NORTH CAROLINA COURT OF APPEALS REPORTS

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184 N.C. APP.

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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
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Assistant Director
Daniel M. Horne, Jr.

Staff Attorneys
John L. Kelly
Shelley Lucas Edwards
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Celeste Howard
Charity Sturdivant
Eugene H. Soar
Yolanda Lawrence
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ADMINISTRATIVE OFFICE OF THE COURTS

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APPELLATE DIVISION REPORTER
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ASSISTANT APPELLATE DIVISION REPORTERS
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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.	Ocracoke
3A	W. Russell Duke, Jr.	Greenville
	Clifton W. Everett, Jr.	Greenville
6A	Alma L. Hinton	Roanoke Rapids
6B	Cy A. Grant, Sr.	Ahoskie
7A	Quentin T. Sumner	Rocky Mount
	Milton F. (Toby) Fitch, Jr.	Wilson
7BC	Walter H. Godwin, Jr.	Tarboro
	Second Division	
3B	Benjamin G. Alford	New Bern
	Kenneth F. Crow	New Bern
	John E. Nobles, Jr.	Morehead City
4A	Russell J. Lanier, Jr.	Beulaville
4B	Charles H. Henry	Jacksonville
5	W. Allen Cobb, Jr.	Wrightsville Beach
	Jay D. Hockenbury	Wilmington
	Phyllis M. Gorham	Wilmington
8A	Paul L. Jones	Kinston
8B	Arnold O. Jones II[1]	Goldsboro
	Third Division	
9	Robert H. Hobgood	Louisburg
	Henry W. Hight, Jr.	Henderson
9A	W. Osmond Smith III	Semora
10	Donald W. Stephens	Raleigh
	Abraham P. Jones	Raleigh
	Howard E. Manning, Jr.	Raleigh
	Michael R. Morgan	Raleigh
	Paul C. Gessner	Wake Forest
	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 R. Fox	Chapel Hill
	R. Allen Baddour	Pittsboro

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
13A	Douglas B. Sasser	Whiteville
13B	Ola M. Lewis	Southport
16A	Richard T. Brown	Laurinburg
16B	Robert F. Floyd, Jr.	Lumberton
	James Gregory Bell[2]	Lumberton
	Fifth Division	
17A	Edwin Graves Wilson, Jr.	Eden
	Richard W. Stone	Eden
17B	A. Moses Massey	Mt. Airy
	Andy Cromer	King
18	Catherine C. Eagles	Greensboro
	Henry E. Frye, Jr.	Pleasant Garden
	Lindsay R. Davis, Jr.	Greensboro
	John O. Craig III	High Point
	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.	Clemmons
	L. Todd Burke	Winston-Salem
	Ronald E. Spivey	Winston-Salem
23	Edgar B. Gregory	Wilkesboro
	Sixth Division	
19A	W. Erwin Spainhour	Concord
19C	John L. Holshouser, Jr.	Salisbury
20A	Tanya T. Wallace[3]	Rockingham
	Kevin M. Bridges[4]	Oakboro
20B	W. David Lee	Monroe
22A	Christopher Collier	Statesville
	Joseph Crosswhite[5]	Statesville
22B	Mark E. Klass	Lexington
	Theodore S. Royster, Jr.[6]	Lexington
	Seventh Division	
25A	Beverly T. Beal	Lenoir
	Robert C. Ervin	Morganton
25B	Timothy S. Kincaid	Newton
	Nathaniel J. Poovey	Newton
26	Robert P. Johnston	Charlotte
	W. Robert Bell	Charlotte
	Richard D. Boner	Charlotte

DISTRICT	JUDGES	ADDRESS
	J. Gentry Caudill	Charlotte
	David S. Cayer	Charlotte
	Yvonne Mims 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	Boone
28	Dennis Jay Winner	Asheville
	Alan Z. Thornburg[7]	Asheville
29A	Laura J. Bridges	Rutherfordton
29B	Mark E. Powell	Hendersonville
30A	James U. Downs	Franklin
30B	Janet Marlene Hyatt	Waynesville

SPECIAL JUDGES

Albert Diaz	Charlotte
Richard L. Doughton[8]	Sparta
Thomas D. Haigwood	Greenville
James E. Hardin, Jr.	Hillsborough
D. Jack Hooks, Jr.	Whiteville
Jack W. Jenkins	Morehead City
John R. Jolly, Jr.	Raleigh
Shannon R. Joseph[9]	Raleigh
Calvin Murphy	Charlotte
William R. Pittman[10]	Raleigh
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
Michael E. Beale[11]	Rockingham
Henry V. Barnette, Jr.	Raleigh
Anthony M. Brannon	Durham
Stafford G. Bullock	Raleigh
Narley L. Cashwell	Wake Forest
C. Preston Cornelius	Mooresville
B. Craig Ellis	Laurinburg
Ernest B. Fullwood	Wilmington

DISTRICT	JUDGES	ADDRESS
	ZORO J. GUICE, JR.	Hendersonville
	MICHAEL E. HELMS	North Wilkesboro
	CLARENCE E. HORTON, JR.	Kannapolis
	DONALD M. JACOBS	Raleigh
	CLIFTON E. JOHNSON	Charlotte
	CHARLES C. LAMM, JR.	Terrell
	JAMES E. LANNING	Charlotte
	JERRY CASH MARTIN	Mt. Airy
	JAMES E. RAGAN III	Oriental
	DONALD L. SMITH	Raleigh
	JOHN M. TYSON[12]	Fayetteville
	GEORGE L. WAINWRIGHT	Morehead City

RETIRED/RECALLED JUDGES

FRANK R. BROWN	Tarboro
JAMES C. DAVIS	Concord
LARRY G. FORD	Salisbury
MARVIN K. GRAY	Charlotte
KNOX V. JENKINS	Four Oaks
JOHN B. LEWIS, JR.	Farmville
ROBERT D. LEWIS	Asheville
JULIUS A. ROUSSEAU, JR.	Wilkesboro
THOMAS W. SEAY	Spencer
RALPH A. WALKER, JR.[13]	Raleigh

1. Elected and sworn in 1 January 2009.
2. Appointed and sworn in 16 January 2009 to replace Gary Locklear who retired 31 December 2008.
3. Elected and sworn in 1 January 2009 to replace Michael Earle Beale who retired 31 December 2008.
4. Elected and sworn in 1 January 2009 to replace Susan C. Taylor who retired 31 December 2008.
5. Elected and sworn in 1 January 2009 to replace Kimberly S. Taylor who retired 31 December 2008.
6. Elected and sworn in 1 January 2009.
7. Appointed and sworn in 8 January to replace Ronald K. Payne who retired 31 December 2008.
8. Appointed and sworn in 25 February 2008.
9. Appointed and sworn in 8 January 2009.
10. Appointed and sworn in 8 January 2009.
11. Appointed and sworn in 2 January 2009.
12. Appointed and sworn in 8 January 2009.
13. Appointed and sworn in 1 January 2009.

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
	Teresa Raquel Robinson[1]	Enfield
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	David B. Brantley (Chief)[2]	Goldsboro
	Lonnie W. Carraway	Goldsboro
	R. Leslie Turner	Kinston

DISTRICT	JUDGES	ADDRESS
	TIMOTHY I. FINAN	Goldsboro
	ELIZABETH A. HEATH	Kinston
	CHARLES P. GAYLOR III[3]	Goldsboro
9	DANIEL FREDERICK FINCH (Chief)[4]	Oxford
	J. HENRY BANKS	Henderson
	JOHN W. DAVIS	Louisburg
	RANDOLPH BASKERVILLE	Warrenton
	S. QUON BRIDGES	Oxford
	CAROLYN J. YANCEY[5]	Henderson
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
	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
	ANNA ELENA WORLEY[6]	Raleigh
11	ALBERT A. CORBETT, JR. (Chief)	Smithfield
	JACQUELYN L. LEE	Sanford
	JIMMY L. LOVE, JR.	Sanford
	O. HENRY WILLIS	Smithfield
	ADDIE M. HARRIS-RAWLS	Clayton
	RESSON O. FAIRCLOTH II	Lillington
	ROBERT W. BRYANT, JR.	Lillington
	R. DALE STUBBS	Lillington
	CHARLES PATRICK BULLOCK	Coats
	PAUL A. HOLCOMBE[7]	Smithfield
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.[8]	Whiteville
	MARION R. WARREN	Exum
	WILLIAM F. FAIRLEY	Southport
	SCOTT USSERY[9]	Whiteville

DISTRICT	JUDGES	ADDRESS
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
	Beverly A. Scarlett	Hillsborough
	Page Vernon[10]	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
	Judith Milsap Daniels[11]	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
	Angela B. Puckett	Elkin
	William F. Southern III[12]	Elkin
18	Joseph E. Turner (Chief)	Greensboro
	Wendy M. Enochs	Greensboro
	Susan Elizabeth Bray	Greensboro
	Patrice A. Hinnant	Greensboro
	H. Thomas Jarrell, Jr.	High Point
	Susan R. Burch	Greensboro
	Theresa H. Vincent	Greensboro
	William K. Hunter	Greensboro
	Sherry Fowler Alloway	Greensboro
	Polly D. Sizemore	Greensboro
	Kimberly Michelle Fletcher	Greensboro
	Betty J. Brown[13]	Greensboro
	Angela C. Foster[14]	Greensboro
	Avery Michelle Crump[15]	Greensboro
19A	William G. Hamby, Jr. (Chief)	Concord
	Donna G. Hedgepeth Johnson	Concord
	Martin B. McGee	Concord
	Michael Knox	Concord
19B	Michael A. Sabiston (Chief)[16]	Troy
	James P. Hill, Jr.	Asheboro
	Jayrene Russell Maness	Carthage
	Lee W. Gavin	Asheboro
	Scott C. Etheridge	Asheboro
	Donald W. Creed, Jr.	Asheboro

DISTRICT	JUDGES	ADDRESS
	Robert M. Wilkins[17]	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	Lisa D. Thacker (Chief)[18]	Wadesboro
	Scott T. Brewer	Monroe
	Amanda L. Wilson[19]	Rockingham
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
22A	L. Dale Graham (Chief)[20]	Taylorsville
	H. Thomas Church	Statesville
	Deborah Brown[21]	Statesville
	Edward L. Hendrick IV[22]	Statesville
	Christine Underwood[23]	Statesville
22B	Wayne L. Michael (Chief)	Lexington
	Jimmy L. Myers	Mocksville
	April C. Wood	Lexington
	Mary F. Covington	Mocksville
	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
	R. Gregory Horne	Newland
	Theodore Wright McEntire[24]	Newland
25	Robert M. Brady (Chief)	Lenoir
	Gregory R. Hayes	Hickory
	L. Suzanne Owsley	Hickory
	C. Thomas Edwards	Morganton
	Buford A. Cherry	Hickory
	Sherrie Wilson Elliott	Newton
	John R. Mull	Morganton
	Amy R. Sigmon	Newton
	J. Gary Dellinger	Newton
26	Lisa C. Bell (Chief)[25]	Charlotte
	H. William Constangy	Charlotte
	Rickye McKoy-Mitchell	Charlotte
	Louis A. Trosch, Jr.	Charlotte

DISTRICT	JUDGES	ADDRESS
	Regan A. Miller	Charlotte
	Hugh B. Lewis	Charlotte
	Becky Thorne Tin	Charlotte
	Thomas Moore, Jr.	Charlotte
	Christy Townley Mann	Charlotte
	Timothy M. Smith	Charlotte
	Ronald C. Chapman	Charlotte
	Donnie Hoover	Charlotte
	Paige B. McThenia	Charlotte
	Jena P. Culler[26]	Charlotte
	William Irwin Belk[27]	Charlotte
	Kimberly Y. Best[28]	Charlotte
	Charlotte Brown-Williams[29]	Charlotte
	John Totten[30]	Charlotte
	Elizabeth Thornton Trosh[31]	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
	Laura Anne Powell	Rutherfordton
	J. Thomas Davis	Rutherfordton
29B	Athena F. Brooks (Chief)[32]	Cedar Mountain
	David Kennedy Fox	Hendersonville
	Thomas M. Brittain, Jr.[33]	Hendersonville
	Peter Knight[34]	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

EMERGENCY DISTRICT COURT JUDGES

Thomas V. Aldridge, Jr.[35]	Whiteville
Philip W. Allen[36]	Reidsville
Kyle D. Austin[37]	Pineola
Sarah P. Bailey	Rocky Mount

DISTRICT	JUDGES	ADDRESS
	Grafton G. Beaman	Elizabeth City
	Ronald E. Bogle	Raleigh
	James Thomas Bowen III	Lincolnton
	Hugh B. Campbell[38]	Charlotte
	Samuel Cathey	Charlotte
	William A. Christian[39]	Sanford
	Shelly H. Desvouges[40]	Raleigh
	M. Patricia DeVine[41]	Hillsborough
	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
	William G. Jones	Charlotte
	Lillian B. Jordan	Asheboro
	David Q. LaBarre	Durham
	William C. Lawton	Raleigh
	James E. Martin	Greenville
	Harold Paul McCoy, Jr.	Halifax
	Lawrence McSwain[42]	Greensboro
	Fritz Y. Mercer, Jr.[43]	Charlotte
	William M. Neely[44]	Asheboro
	Nancy Black Norelli	Charlotte
	Otis M. Oliver	Dobson
	Warren L. Pate	Raeford
	Nancy C. Phillips[45]	Elizabethtown
	Nathaniel P. Proctor	Charlotte
	Dennis J. Redwing	Gastonia
	J. Larry Senter	Goldsboro
	Joseph E. Setzer, Jr.[46]	Goldsboro
	Russell Sherrill III	Raleigh
	Catherine C. Stevens	Chapel Hill
	J. Kent Washburn	Graham
	Charles W. Wilkinson, Jr.[47]	Oxford

RETIRED/RECALLED JUDGES

Claude W. Allen, Jr.	Oxford
Donald L. Boone	High Point
Joyce A. Brown	Otto
Daphene L. Cantrell	Charlotte
Sol G. Cherry[48]	Boone
T. Yates Dobson, Jr.	Smithfield
Spencer B. Ennis	Graham

DISTRICT	JUDGES	ADDRESS
	Harley B. Gaston, Jr.	Gastonia
	Roland H. Hayes	Gastonia
	Walter P. Henderson	Trenton
	Charles A. Horn, Sr.	Shelby
	Robert K. Keiger	Winston-Salem
	Jack E. Klass	Lexington
	C. Jerome Leonard, Jr.	Charlotte
	Edward H. McCormick	Lillington
	J. Bruce Morton	Greensboro
	Stanley Peele	Hillsborough
	Margaret L. Sharpe	Winston-Salem
	Samuel M. Tate	Morganton
	John L. Whitley	Wilson

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1. Elected and sworn in 1 January 2009.
2. Appointed Chief Judge effective 1 January 2009 to replace Joseph E. Setzer, Jr., who retired 31 December 2008.
3. Elected and sworn in 1 January 2009.
4. Appointed Chief Judge effective 1 January 2009 to replace Charles W. Wilkinson, Jr. who retired 31 December 2008.
5. Elected and sworn in 1 January 2009.
6. Elected and sworn in 5 January 2009 to replace Shelly H. Desvouges who retired 31 December 2008.
7. Elected and sworn in 1 January 2009.
8. Retired 31 December 2008.
9. Elected and sworn in 1 January 2009 to replace Nancy C. Phillips who retired 31 December 2008.
10. Elected and sworn in 1 January 2009 to replace M. Patricia DeVine who retired 31 December 2008.
11. Elected and sworn in 1 January 2009.
12. Appointed and sworn in 14 November 2008.
13. Elected and sworn in 1 January 2009 to replace Lawrence McSwain who retired 31 December 2008.
14. Elected and sworn in 1 January 2009.
15. Elected and sworn in 1 January 2009.
16. Appointed Chief Judge effective 1 January 2009 to replace William M. Neely who retired 31 December 2008.
17. Elected and sworn in 1 January 2009.
18. Appointed Chief Judge effective 1 January 2009 to replace Tanya T. Wallace who was elceted to Superior Court.
19. Elected and sworn in 1 January 2009.
20. Appointed Chief Judge effective 1 January 2009.
21. Elected and sworn in 1 January 2009.
22. Elected and sworn in 1 January 2009.
23. Elected and sworn in 1 January 2009.
24. Elected and sworn in 1 January 2009 to replace Kyle D. Austin who retired 31 December 2008.
25. Appointed Chief Judge effective 1 January 2009.
26. Elected and sworn in 1 January 2009.
27. Elected and sworn in 1 January 2009.
28. Elected and sworn in 1 January 2009.
29. Elected and sworn in 1 January 2009.
30. Elected and sworn in 1 January 2009.
31. Elected and sworn in 1 January 2009.
32. Appointed Chief Judge effective 1 January 2009 to replace Robert S. Cilley who retired 31 December 2008.
33. Appointed and sworn in 30 March 2007.
34. Elected and sworn in 1 January 2009.
35. Appointed and sworn in 2 January 2009.
36. Deceased 15 August 2008.
37. Appointed and sworn in 12 January 2009.
38. Appointed and sworn in 26 January 2009.
39. Deceased 10 January 2008.
40. Appointed and sworn in 2 January 2009.
41. Appointed and sworn in 8 January 2009.
42. Appointed and sworn in 1 January 2009.
43. Appointed and sworn in 1 January 2009.
44. Appointed and sworn in 2 January 2009.
45. Appointed and sworn in 2 January 2009.
46. Appointed and sworn in 11 January 2009.
47. Appointed and sworn in 16 January 2009.
48. Deceased 10 December 2008.

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CASES REPORTED WITHOUT PUBLISHED OPINIONS

GENERAL STATUTES CITED

GENERAL STATUTES 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

TERRY'S FLOOR FASHIONS, INC., PLAINTIFF v. CROWN GENERAL CONTRACTORS, INC. AND JERRY SHUMATE ALVIS, DEFENDANTS

No. COA06-738

(Filed 19 June 2007)

1. Liens— subcontractor—subrogation—gross payment deficiency—sufficiency of findings of fact

The trial court did not err by finding that plaintiff subcontractor had a right to file a subrogation lien on the pertinent real property based on gross payment deficiency owed to defendant general contractor by defendant owner, because: (1) the default judgment entered in defendant owners' favor against defendant general contractor is irrelevant to the question of whether the findings of fact contained in the trial court's N.C.G.S. § 1A-1, Rule 52(a) judgment are supported by competent evidence; and (2) the trial court's findings of fact with respect to a 14 January 2003 letter were supported by competent evidence, and the trial court sitting as the trier of fact during the bench trial was entitled to believe plaintiff's evidence and assign it greater weight than the evidence presented by defendant owner.

2. Setoff and Recoupment— calculation—sufficiency to extinguish right to subrogation—liquidated damages

The trial court did not err in a case concerning the enforcement of a subcontractor's subrogation lien on real property by its calculation of the amount to which defendant property owner was entitled as a setoff to the prime contract price for damages he incurred as a result of defendant general contractor's breach,

because: (1) with respect to liquidated damages, plaintiff presented evidence through multiple letters written by defendant contractor, and through the testimony of several witnesses, that defendant property owner caused the construction delay by failing to make timely decisions in selecting materials required to be specially ordered or produced, failing to address in a timely manner a pre-existing moisture problem affecting the building's foundation, and failing to provide accurate hardware specifications such that specially ordered hardware needed to be returned and reordered; (2) where a contract contains a provision for liquidated damages and delays in its completion are occasioned by mutual defaults, the courts will not attempt to apportion the damages, and the obligation for liquidated damages is annulled in the absence of a contract provision for apportionment; (3) plaintiff presented competent evidence from which the trial court could calculate a setoff in the amount of $9,827; and (4) although defendant property owner presented evidence to support a larger setoff, the trial court was charged with determining the credibility of the witnesses and the weight to be given to the evidence.

3. Collateral Estoppel and Res Judicata— entry of default judgment on cross-claim—Rule 52(a) judgment not a relitigation of issues or claims

The trial court did not err in a case concerning the enforcement of a subcontractor's subrogation lien on real property by awarding judgment under N.C.G.S. § 1A-1, Rule 52(a) in favor of plaintiff subcontractor even though it entered default judgment in favor of defendant property owner against defendant general contractor, because: (1) contrary to defendant property owner's assertion, the facts in this case do not create an internal inconsistency and are not governed by *Streeter v. Cotton*, 133 N.C. App. 80 (1999); and (2) although defendant property owner contends res judicata and collateral estoppel show that entry of default judgment on his cross-claim determines the merits of plaintiff's claim, the claims filed by plaintiff and cross-claim filed by defendant property owner were in a single action, and the Rule 52(a) judgment does not represent a relitigation of issues or claims.

4. Costs— attorney fees—unreasonable refusal to fully resolve matter out of court

The trial court did not abuse its discretion in a case concerning the enforcement of a subcontractor's subrogation lien on real property by awarding plaintiff $17,000 in attorney fees under

N.C.G.S. § 44A-35 based upon its finding that defendant property owner unreasonably refused to fully resolve the matter out of court, because: (1) the trial court reasoned that since defendant's own consultant informed him on 2 November 2004 that it would only cost about $7,000 to remedy defendant general contractor's deficient performance under the prime contract, it was unreasonable for defendant property owner to insist that defendant general contractor's deficient performance extinguished his obligations under the prime contract; and (2) the reasonableness of the award is not addressed since defendant property owner did not assign error to or mention in his brief the amount of the award.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendant from order entered 27 October 2003 by Superior Court Judge Narley L. Cashwell and judgment entered 28 September 2005 by District Court Judge Jane P. Gray in District Court, Wake County. Heard in the Court of Appeals 24 January 2007.

Ragsdale Liggett PLLC by Walter L. Tippett, Jr. and Caroline Barbee for plaintiff-appellee.

Young Moore and Henderson, P.A. by David M. Duke and Shannon S. Frankel for defendant-appellant.

STROUD, Judge.

This case concerns enforcement of a subcontractor's subrogation lien on real property. The dispositive questions before this Court are (1) whether the trial court's finding that the property owner owed a gross payment deficiency to the general contractor was supported by competent evidence; (2) whether the trial court's entry of judgment against the property owner in favor of the subcontractor pursuant to N.C. Gen. Stat. § 1A-1, Rule 52(a) (2005) following a bench trial is inconsistent with the trial court's entry of default judgment against the general contractor in favor of the property owner; and (3) whether the trial court abused its discretion by awarding the subcontractor $17,000.00 in attorneys' fees based upon a finding that the property owner "unreasonably refused to fully resolve the matter" out of court. We conclude that the trial court's findings of fact are supported by competent evidence, that the Rule 52(a) and default judgments are not inconsistent with one another, and that the trial court did not abuse its discretion by awarding attorneys

fees. Accordingly, we affirm the trial court's entry of judgment against the property owner.

I. Background

On or about 25 July 2002, defendant property owner Jerry Shumate Alvis [defendant Alvis] contracted with defendant general contractor Crown General Contractors, Inc. [defendant Crown] to complete an "interior [f]it-up" of an office suite owned by defendant Alvis for use as a dental office [hereinafter Prime Contract]. The Prime Contract price was $195,296.00, which was to be paid by defendant Alvis in monthly installments upon certification of defendant Crown's progress by project architect Dick Tilley, who worked for Millennium Architecture, P.A., and who "administer[ed] the construction phase of the [fit-up] as a representative for [defendant] Alvis." The Prime Contract provided that the "[f]it-up" would be substantially completed within one hundred calendar days of commencement of the project, and expressly stated that "[t]ime is of the essence."

On 22 August 2002, defendant Crown contracted with plaintiff subcontractor Terry's Floor Fashions, Inc. to install flooring and baseboard moldings in the dental office [hereinafter Subcontract]. The original Subcontract price for materials and installation was $4,765.00; however, defendant Crown later approved change orders that increased the contract price to $7,921.00.

On 3 September 2002, defendant Crown sent a letter to defendant Alvis describing several structural problems with the office suite, including water ponding under the building slab and lack of drainage grading to move water away from the building. In the letter, defendant Crown proposed ideas to correct the problem and requested "a quick response to our joint problem" from defendant Alvis. On 1 November 2002, defendant Crown sent a second letter to defendant Alvis concerning "[r]e-occuring moisture problems at new Duraleigh office" for the purpose of "document[ing] the situation and mak[ing] all parties aware."

On 5 November 2002, the substantial completion deadline under the Prime Contract, defendant Crown sent a third letter to defendant Alvis stating that it was unable to complete the project on time, "[d]ue to previously documented un-answered issues." The letter further provided that defendant Crown would "be able to produce a schedule for completion after the floor moisture issue is addressed."

On 19 November 2002, defendant Crown sent a letter to Tilley discussing the floor moisture issue and requesting defendant Alvis' decision as to how defendant Crown should proceed. The letter provided:

> Enclosed please find a letter from Terry's Floor Fashions regarding the moisture problem in the slab at this job site. There is no solution within [Terry's] letter and Crown has no solution either. The building moisture problem was a pre-existing condition and the choice of how to deal with this is solely up to . . . Dr. Alvis or his advisors. If the building developer cannot remedy the moisture problem the only remaining choice would be to consider the next best way of dealing with this. The suggestions shown in the attached letter could be considered a last resort. Crown will not warrant the flooring unless . . . [Terry's] is willing to warrant it.

The attached letter from plaintiff to defendant Crown stated that plaintiff would "not warrant any product glued directly to the substrate per manufacturer requirements" due to "off the scale" moisture readings in the concrete pad and would install the flooring only "if warranty is voided and signed by the owner." Thereafter, Tilley contacted the developer of the office suite who installed a concealed drain with inlets into the concrete pad. The developer also re-graded the lot and "waterproofed" the building's exterior. Subsequent moisture testing completed by an independent contractor at defendant Alvis' request resulted in an acceptable moisture reading. Upon receiving notice of the normal moisture reading, plaintiff installed the flooring.[1]

Plaintiff completed the flooring installation on or about 12 December 2002. Shortly thereafter, defendant Crown advised Tilley that it would not be able to complete the project. At that time, defendant Alvis had paid $172,094.00 pursuant to four previous payment applications certified by Tilley. On 30 December 2002, Tilley certified defendant Crown's fifth payment application for $10,752.00, which showed that defendant Crown had substantially completed all work under the Prime Contract except installation of appliances. The payment application also listed the balance of the contract price as

1. There is additional evidence in the record to support an inference that delay on the part of defendant Alvis slowed construction. For example, correspondence between the parties shows that on 16 October 2002 defendant Alvis had not yet selected floor tiling and on 1 November 2002, defendant Alvis had not yet selected materials for casework. Further, on 21 November 2002, it became apparent that Tilley had provided defendant Crown with the wrong finish specifications for hardware, which then needed to be uninstalled and replaced. All of these materials needed to be ordered and some of the materials needed to be specially produced.

$12,450.00, which included a $2,827.00 allowance for appliances and $9,623.00 for retainage.

Defendant Alvis never remitted the fifth payment. Instead, defendant Alvis, through Tilley, sought a sixth and final payment application from defendant Crown, showing a $0.00 balance. Notes made by Tilley following a meeting between himself and Robert O. Mitchell, who was defendant Crown's president, state, "If Apps. are zeroed out as Bal. Due = 0.00, no liens can be filed against client." (Emphasis added.)

Immediately thereafter, defendant Crown sent a letter to Tilley. The letter stated that defendant Crown had been "paid in full for all services rendered" as of the letter date, 14 January 2003. It further stated,

> [w]e will not be able to complete the project unless you are willing to pay the subs and suppliers directly for the remainder of the project. We will stay on record as your General Contractor and provide all necessary supervisory and project management support as required by yourself to complete the job.

The project architect forwarded defendant Crown's letter to defendant Alvis, but included a notation that defendant Crown "has not sent a Final [Payment] Application showing a $0.00 balance as he indicated he would."

Neither defendant Crown nor defendant Alvis has paid plaintiff for the flooring installation; however, defendant Alvis opened a dental practice in the office on 23 December 2002, seven days before Tilley certified defendant Crown's fifth payment application for work completed as of 24 December 2002. On 1 April 2003, plaintiff filed a subcontractor's lien on defendant Alvis' dental office in the amount of $7,921.00 (the Subcontract price) pursuant to Chapter 44A of the North Carolina General Statutes, claiming "a right of subrogation to the lien held by the general contractor [defendant Crown] on the real property."[2]

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2. N.C. Gen. Stat. § 44A-8 provides that a general contractor or other

> person who performs or furnishes labor . . . or furnishes materials . . . pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a right to file a claim of lien on real property on the real property to secure payment of all debts owing for labor done . . . or material furnished.

On 6 June 2003, plaintiff filed a civil action in District Court, Wake County pursuant to N.C. Gen. Stat. § 44A-13 to enforce the lien. In its verified complaint plaintiff also alleged claims against defendant Crown for breach of contract, against defendant Alvis for unfair and deceptive trade practices, and against both defendants for *quantum meruit*. Finally, plaintiff sought recovery of attorneys fees pursuant to N.C. Gen. Stat. § 44A-35, alleging that defendant Alvis "unreasonably refused to fully resolve the matters which constitute the basis of the Lien part of this Complaint."

Defendant Alvis filed an answer, motion, counterclaim, and cross-claim on 8 August 2003. As an initial matter, defendant Alvis alleged that the counterclaims and cross-claims stated in his pleading raised the amount in controversy beyond $10,000.00; thus, defendant Alvis moved that the dispute be transferred to superior court. This motion was subsequently denied by Superior Court Judge Narley L. Cashwell on 27 October 2003. Defendant Alvis then asserted two counterclaims against plaintiff for negligence and breach of contract and also asserted cross-claims against defendant Crown.

Defendant Crown did not answer either plaintiff's complaint or defendant Alvis' cross-claims. On 22 August 2003, plaintiff moved for entry of default against defendant Crown, which the Clerk of Court issued that same day. On or about 17 October 2003, Judge Jane P. Gray entered the default judgment against defendant Crown in the amount of $7,921.00 plus costs, interest, and reasonable attorneys fees.

Plaintiff filed a reply to defendant Alvis' counterclaims on 7 October 2003, denying the allegations contained therein and affirmatively raising six defenses: absence of consideration, breach of contract, unclean hands, estoppel, setoff, and contributory negligence.

On 1 November 2004, defendant Alvis filed a motion for summary judgment as to all of plaintiff's claims. In support of his motion, Defendant Alvis stated that defendant Crown "did not have a lien

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N.C. Gen. Stat. § 44A-23 provides that

> A first tier subcontractor, who gives notice of claim of lien upon funds as provided in this Article, may, to the extent of this claim, enforce the claim of lien on real property of the contractor created by Part 1 of this Article. . . . [U]pon the filing of the claim of lien on real property, with the notice of claim of lien upon funds attached, and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent.

claim on the Project at the time of Plaintiff's filing of alleged Claim of Lien and Notice of Claim of Lien by First Tier Subcontractor, and that no funds were owed by the Owner to the General Contractor, for which Plaintiff, as first tier subcontractor, could subrogate any alleged lien claims." In conjunction with his motion for summary judgment, defendant Alvis submitted the 14 January 2003 letter from defendant Crown to Tilley and the report of John F. Sinnett, an architect retained by defendant Alvis to inspect his dental office and review the construction plans and Prime Contract. In the report dated 2 November 2004, Sinnett concluded that "[t]otal repairs and supervision will run between $6,800.00 and $7,300.00."

On 4 November 2004, plaintiff filed a motion for summary judgment as to all counterclaims asserted by defendant Alvis. In support of its motion, plaintiff stated (1) defendant Alvis' claims are barred by the economic loss rule, (2) defendant Alvis lacked standing to bring the counterclaims at issue, and (3) discovery showed that defendant Alvis could not produce evidence of the essential elements of his counterclaims. That same day, plaintiff also moved for judgment on the pleadings as to defendant Alvis' counterclaims.

On 8 November 2004, defendant Alvis moved for entry of default on his cross-claims against defendant Crown, and the Clerk of Court entered default against Crown on 18 November 2004. On 28 September 2005, Judge Jane P. Gray entered the default judgment against defendant Crown in the amount of $9,827.00 plus costs, interest, and reasonable attorneys fees.

On 22 November 2004, the trial court granted plaintiff's motion for judgment on the pleadings, dismissing defendant Alvis' counterclaims with prejudice. On or about 6 June 2005, the court partially granted defendant Alvis' motion for summary judgment as to plaintiff's claim for *quantum meruit*.

The parties' remaining claims were heard by bench trial in district court on 15 and 16 August 2005, Judge Jane P. Gray presiding, after which the court announced its ruling in favor of plaintiff. Thereafter, plaintiff filed a motion to recover attorneys fees pursuant to N.C. Gen. Stat. § 44A-35. In support of its motion, plaintiff alleged that defendant Alvis had "unreasonably refus[ed] to fully resolve [the] matter which constituted the basis of this suit." In addition to the testimony admitted at trial, plaintiff directed the court's attention to a letter and an e-mail received by plaintiff from defendant Alvis' initial

counsel. The correspondence, dated 26 June 2003 and 4 August 2003 respectively, stated,

> In view of all the circumstances, [defendant Alvis] will make no voluntary payment to any party. If there is not a dismissal, then there will be a litigation of everyone's claims to judgment.

and

> If we must file pleadings, then we will be looking to your client for a settlement payment to [defendant Alvis], and that is the only settlement we will consider. If your client ever makes recovery against [defendant Alvis] it will be after trial court judgment and exhaustion of all appeals.

Plaintiff further argued that unreasonable conduct on the part of defendant Alvis led to unusually high attorneys fees. In particular, plaintiff emphasized that (1) defendant Alvis sought to remove the matter to superior court without cause, (2) defendant Alvis asserted meritless counterclaims, (3) defendant Alvis pursued meritless motions to dismiss and motions for summary judgment of the claims against him, and (4) defendant Alvis employed three different sets of counsel during the course of this litigation. Plaintiff sought attorneys fees in the amount of $26,173.75.

On 28 September 2005, the trial court entered judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 52(a) against defendant Alvis for compensatory damages in the amount of $7,921.00. The court decreed that the award is "a lien on the Subject Property" which "may be enforced by foreclosure of the Property" and further decreed that plaintiff "shall have and recover reasonable attorneys' fees in the amount of $17,000.00," to be taxed as court costs against defendant Alvis.

On 25 October 2005, defendant Alvis entered notice of appeal from the order entered by Superior Court Judge Narley L. Cashwell denying his motion to transfer to superior court and from the N.C. Gen. Stat. § 1A-1, Rule 52(a) judgment entered by District Court Judge Jane P. Gray. Because defendant did not discuss in his brief the order denying his motion to transfer, we deem defendant Alvis' assignment of error to that order abandoned. N.C. R. App. P. 28(a). Defendant Alvis raises four questions concerning the Rule 52(a) judgment on appeal: (1) whether the trial court's finding that the property owner owed a gross payment deficiency to the general contractor was supported by competent evidence; (2) whether the trial court's entry of

default judgment against the general contractor in favor of the property owner is consistent with the trial court's entry of judgment against the property owner in favor of the subcontractor pursuant to N.C. Gen. Stat. § 1A-1, Rule 52(a), following a bench trial; and (3) whether the trial court abused its discretion by awarding the subcontractor $17,000.00 in attorneys' fees based upon a finding that the property owner "unreasonably refused to fully resolve the matter" out of court.

II. Gross Payment Deficiency/Right to Setoff

[1] Defendant Alvis argues that the trial court erred in finding that plaintiff had a right to file a subrogation lien based on a "gross payment deficiency" owed to defendant Crown by defendant Alvis. Specifically, defendant Alvis argues that defendant Crown's 14 January 2003, letter to Tilley and the default judgment entered in defendant Alvis' favor against defendant Crown show that defendant Alvis did not owe any funds to defendant Crown at the time plaintiff filed its lien. Alternatively, defendant Alvis argues that the trial court erred in calculating the amount he was entitled to setoff from the Prime Contract price for damages he incurred as a result of defendant Crown's breach. Defendant Alvis concludes that a properly calculated setoff would extinguish any right to payment possessed by defendant Crown and, correspondingly, plaintiff's right to subrogation. We disagree.

N.C. R. Civ. P., Rule 52(a)(1), provides that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon." When finding facts pursuant to Rule 52(a), the trial judge considers "the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968). "If different inferences may be drawn from the evidence, [the trial judge] determines which inferences shall be drawn and which shall be rejected." *Id.*

On appeal, this Court considers whether the trial court's findings of fact are supported by competent evidence. *Hollerbach v. Hollerbach*, 90 N.C. App. 384, 387, 368 S.E.2d 413, 415 (1988). Findings of fact supported by competent evidence are binding on appeal, notwithstanding the existence of contradictory evidence. *Lagies v. Myers*, 142 N.C. App. 239, 246, 542 S.E.2d 336, 341 (2001).

Here, defendant Alvis assigns error to the following findings of fact entered by the trial court:

12. At the time the Lien was filed, Defendant Alvis had paid Defendant Crown $172,094.00, an amount less than the $195,296.00 stipulated in the Prime Contract, leaving a gross payment deficiency owed by Defendant Alvis to Defendant Crown of $23,202.00. After adjustments set forth in paragraph 13 below, at the time the Lien was filed, Defendant Alvis owed Defendant Crown at least $13,375.00 for its performance under the Prime Contract, an amount in excess of the Contract Sum.

13. The Court heard and considered evidence that Defendant Crown breached the Prime Contract, and that, as a result, Defendant Alvis should be credited with the costs of curing the defaults and liquidated damages arising from delays in completion of work at the Subject Property, as well [as] unused contract allowances. The Court finds that the gross payment deficiency of $23,202.00 should be reduced by $7,000.00 for construction deficiencies and $2,827.00 for an appliances credit, which adjusted payment deficiency is $13,375.00. Crown's purported defaults and liquidated damages did not reduce sums otherwise owed to Defendant Crown under the Prime Contract to the extent that Defendant Alvis' remaining payment obligation was less than the Contract Sum at the time the Lien was filed.

Throughout its order the trial uses the phrase "Contract Sum" to refer to the Subcontract price.

The parties agree that defendant Alvis contracted to pay defendant Crown $195,296.00 for the interior "[f]it-up" of an office suite for use as a dental office, and that defendant Alvis only paid defendant Crown $172,094.00 of the Prime Contract price. The difference between the Prime Contract price and the amount actually paid by defendant Alvis is $23,202.00.

In support of the position that he did not owe any portion of the $23,202.00 balance at the time plaintiff filed its lien, defendant Alvis introduced a letter from defendant Crown to Tilley, dated 14 January 2003. As explained above, Tilley solicited the letter from defendant Crown on behalf of defendant Alvis shortly after defendant Crown submitted (and Tilley certified) its fifth application for payment. The letter provided that defendant Crown had been "paid in full for all services rendered," and explained that defendant Crown would "not be able to complete the project unless [defendant Alvis was] willing to pay the subs and suppliers directly for the remainder of the project." Defendant Alvis argues that this letter, taken together with

the default judgment entered on 8 September 2005 in his favor against defendant Crown, proves that he did not owe a payment deficiency under the Prime Contract at the time plaintiff filed its lien.

Initially, we note that the default judgment entered in defendant Alvis' favor against defendant Crown is irrelevant to the question of whether the findings of fact contained in the trial court's Rule 52(a) judgment are supported by competent evidence. During a bench trial, "[t]he trial judge becomes both judge and juror, and it is his duty to consider and weigh all the competent evidence before him." *Knutton*, 273 N.C. at 359, 160 S.E.2d at 33 (1968). Because a default judgment entered after a trial is not "evidence before the [judge]" at trial, we do not consider the default judgment entered against defendant Crown when evaluating the trial court's findings of fact. We consider the effect of the default judgment entered against defendant Crown on the validity of the Rule 52(a) judgment entered against defendant Alvis in section III of this opinion.

With respect to the 14 January 2003 letter from defendant Crown, we conclude that the trial court's findings of fact are supported by competent evidence. In particular, plaintiff presented Tilley's testimony that (1) defendant Alvis never paid defendant Crown for work certified as complete in payment application five ($10,752.00); (2) defendant Alvis never paid defendant Crown retainage that was to be released upon substantial completion of the "fit-up," ($9,623.00); (3) he never certified a final settlement of account or any other document showing a zero account balance owed by defendant Alvis to defendant Crown under the Prime Contract; (4) defendant Crown never agreed that Defendant Alvis was entitled to a zero balance under the Prime Contract; (5) to his knowledge, the 14 January 2003 letter from defendant Crown did not extinguish any liens against funds owed to defendant Crown; and (6) the 14 January 2003 letter from defendant Crown to the project architect expressly provided that defendant Crown would remain contractor of record and provide supervisory support for the "[f]it-up". Plaintiff also introduced notes made by Tilley that state, "If Apps. are zeroed out as Bal. Due = 0.00, no liens can be filed against client."

The trial court, as the trier of fact during the bench trial, was entitled to believe plaintiff's evidence and assign it greater weight than the evidence presented by defendant Alvis. This evidence is competent to support the trial court's finding that defendant Alvis owed a gross payment deficiency to defendant Crown at the time plaintiff filed its lien. Accordingly, this assignment of error is overruled.

[2] In support of the position that he is entitled to a setoff against the Prime Contract price that is sufficient to extinguish plaintiff's right of subrogation, defendant Alvis argues that the trial court failed to credit him for several defects in defendant Crown's performance and also failed to credit him for liquidated damages owed by defendant Crown. In particular, defendant Alvis emphasizes that Crown never installed window treatments, a sound system, and appliances; and that Crown never completed casework, and corrective work as required by the Prime Contract. Defendant Alvis testified at trial that the Prime Contract provided allowances for these items in the following amounts: $2,500.00 for window treatments, $1,500.00 for a sound system, and $2,827.00 for appliances. Defendant Alvis also testified that he traded a vehicle worth approximately $2,500.00 in exchange for a handyman's services to fix a broken drain in one of the bathrooms, and that he paid approximately $550.00 to have an air conditioning unit repaired the summer after he moved into the office.

With respect to liquidated damages, defendant Alvis testified that he was unable to move into the dental office until 23 December 2002, forty-eight days after the substantial completion deadline of 5 November 2002. Because the Prime Contract provided for liquidated damages in the amount of $300.00 per day for each calendar day beyond the substantial completion deadline on which defendant Alvis was unable to "occupy and use the premises for the practice of dentistry," Defendant Alvis concludes that he is entitled to a $14,400.00 setoff against the contract price.

In support of the trial court's findings, plaintiff points to a supplemental affidavit defendant Alvis submitted in support of his motion for summary judgment. The affidavit stated that defendant Alvis retained John F. Sinnett, an architect employed by The Smith Sinnett Associates, P.A., to inspect his dental office and to review the construction plans and Prime Contract. Following the inspection, Sinnett sent defendant Alvis a report, which defendant Alvis attached to his supplemental affidavit. In the report Sinnett listed deficiencies in defendant Crown's performance of the Prime Contract and concluded,

> As an architect familiar with construction costs, I estimate the cost of the above-noted repairs will be between $5,500.00 and $6,000.00. Additionally, I would estimate[] eight (8) hours of a general contractors [sic] at a rate of $50.00 per hour and a mark up of fifteen (15) percent of overhead and profit to complete the

above list of repairs. Total repairs and supervision will run between $6,800.00 and $7,300.00.

With respect to liquidated damages, plaintiff presented evidence through multiple letters written by defendant Crown, and through the testimony of Tilley, defendant Alvis, and Michael Lee Chamberlain, who was plaintiff's contract sales representative, that defendant Alvis caused the construction delay. Specifically, the evidence tended to show that defendant Alvis failed to make timely decisions in selecting materials required to be specially ordered or produced, including the tile and casework; defendant Alvis failed to address in a timely manner a pre-existing moisture problem affecting the building's foundation; and Tilley failed to provide accurate hardware specifications, such that specially ordered hardware needed to be returned and reordered.

Because "a contractor is not liable under a clause for liquidated damages based on a time limit if his failure to complete the contract within the specified time was wholly due to the act or omission of the other party in delaying the work," *L. A. Reynolds Co. v. State Highway Com.*, 271 N.C. 40, 50, 155 S.E.2d 473, 482 (1967), plaintiff argued that defendant Alvis waived his right to receive liquidated damages. Moreover, "where a contract contains a provision for liquidated damages, and delays in its completion are occasioned by mutual defaults, the courts will not attempt to apportion the damages, and the obligation for liquidated damages is annulled in the absence of a contract provision for apportionment." *Id.* at 51, 155 S.E.2d at 482. No such provision is present in the contract *sub judice*.

In its order, the trial court found that defendant Alvis was entitled to a setoff in the amount of $7,000.00 for construction deficiencies and a credit in the amount $2,827.00 for appliances that were not installed by defendant Crown. The trial court did not find that defendant Alvis was entitled to a setoff for liquidated damages. Thus, the total amount setoff by the trial court against the contract price was $9,827.00, leaving a net payment deficiency of $13,375.00. This deficiency exceeds the amount claimed by plaintiff in its lien.

Based on the evidence discussed above, and our review of the record in total, we conclude that plaintiff presented competent evidence from which the trial court could calculate a setoff in the amount of $9,827.00. Although defendant Alvis presented evidence to support a larger setoff, the trial judge was charged with determining the credibility of the testimony of Tilley, defendant Alvis, and

Chamberlain, and the weight to be given to the evidence, including the report completed by Sinnett. Accordingly, this assignment of error is overruled.

III. Consistency of Judgments

[3] Defendant Alvis argues that the trial court's award of judgment, pursuant to N.C. Gen. Stat. § 1A-1, Rule 52(a), in favor of plaintiff against him is inconsistent with the trial court's entry of default judgment in his favor against defendant Crown. In support of this argument, defendant asserts that he cannot simultaneously (1) be liable to plaintiff in subrogation based on a gross payment deficiency owed to defendant Crown under the Prime Contract, and (2) be entitled to compensatory damages from defendant Crown for breach of the Prime Contract. Defendant Alvis concludes that the Rule 52(a) judgment must be vacated. We disagree.

Defendant Alvis cites one case, *Streeter v. Cotton*, 133 N.C. App. 80, 514 S.E.2d 539 (1999), in support of his conclusion. In *Streeter* this Court considered the effect of a single trial court order that simultaneously granted the plaintiff's motion for judgment notwithstanding the verdict [JNOV] and the plaintiff's motion for a new trial. 133 N.C. App. at 83, 514 S.E.2d at 542. Because it is legally inconsistent to determine that a plaintiff is entitled to judgment as a matter of law by awarding JNOV and then submit that same claim to a jury by awarding a new trial, this Court vacated the trial court order and remanded the matter "for rehearing of plaintiff's motions for JNOV and new trial." *Id.* In a similar case, this Court noted, "the [trial] court's apparent intent was to grant defendant a JNOV and order a new trial if the JNOV was not upheld on appeal." *Southern Furniture Hardware, Inc. v. Branch Banking and Trust Co.*, 136 N.C. App. 695, 703, 526 S.E.2d 197, 202 (2000). In so doing, the Court described the order as "internally inconsistent." *Id.* at 705, 526 S.E.2d at 203.

Here, defendant Alvis challenges the validity of separate judgments, resolving the rights of three different parties with respect to a claim and cross-claim: A judgment following bench trial entered against Defendant Alvis pursuant to N.C. Gen. Stat. § 1A-1, Rule 52 and a default judgment entered against Defendant Crown pursuant to N.C. Gen. Stat. § 1A-1, Rule 55. The facts *sub judice* do not create an internal inconsistency and are not governed by *Streeter*.

Defendant Alvis argues that the default judgment he obtained against defendant Crown shows that defendant Crown's breach of the Prime Contract, and the damages he incurred thereby, extinguished

his financial obligations to defendant Crown; therefore, the trial court erred in entering a judgment against him in favor of a plaintiff who was subrogated to defendant Crown's rights under the Prime Contract. To the extent defendant Alvis argues that entry of default judgment on his cross-claim determines the merits of plaintiff's claim, defendant Alvis' argument rests on the doctrines res judicata and collateral estoppel.

"Res judicata estops a party or its privy from bringing a subsequent action based on the 'same claim' as that litigated in an earlier action." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004). "[C]ollateral estoppel precludes the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim." *Id.* Both are common law doctrines that "advance the twin policy goals of 'protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation.' " *Id.* (quoting *Thomas M. McInnis & Assocs. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986)) (emphasis added). Because the claims filed by plaintiff and cross-claim filed by defendant Alvis were in a single action, the Rule 52(a) judgment does not represent a relitigation of issues or claims.[3] Accordingly, this assignment of error is overruled.[4]

IV. Attorneys Fees

[4] Defendant Alvis argues that the trial court abused its discretion by awarding plaintiff $17,000.00 in attorneys' fees based upon its finding that he "unreasonably refused to fully resolve the matter" out of court. We disagree.

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3. In this opinion, we hold only that the trial court's finding that defendant Alvis owes defendant Crown a gross payment deficiency under the Prime Contract is supported by competent evidence, that the Rule 52(a) judgment entered against Defendant Alvis and the default judgment entered against defendant Crown are not legally inconsistent as explained by *Streeter*, and that entry of default judgment against defendant Crown did not estop plaintiff from seeking a Rule 52(a) judgment against defendant Alvis. We do not consider the validity of the default judgment entered against defendant Crown, which has not been appealed.

4. In the section of his brief addressing inconsistency of judgments, defendant Alvis also argues that the trial court's entry of the Rule 52(a) judgment "effectively grants Terry's a double recovery arising out of a single contract" and states that "by opting to pursue and obtain a judgment against Crown on October 17, 2003, Terry's elected its remedy." Defendant Alvis did not assign error to the Rule 52(a) judgment on the basis of "double recovery" and does not support this argument with citation to any legal authority. Accordingly, this argument is not properly before the Court and we do not consider it. N.C. R. App. P. 10(a) and 28.

N.C. Gen. Stat. § 44A-35 provides:

> In any suit brought or defended under the provisions of Article 2 or Article 3 of this Chapter, the presiding judge may allow a reasonable attorneys' fee to the attorney representing the prevailing party. This attorneys' fee is to be taxed as part of the court costs and be payable by the losing party upon a finding that there was an unreasonable refusal by the losing party to fully resolve the matter which constituted the basis of the suit or the basis of the defense.

This Court reviews a trial court's award of attorney's fees pursuant to section 44A-35 for abuse of discretion. *Martin Architectural Prods. Inc. v. Meridian Constr. Co.*, 155 N.C. App. 176, 182, 574 S.E.2d 189, 193 (2002). "To demonstrate an abuse of discretion, the appellant must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 601, 617 S.E.2d 40, 45 (2005), *aff'd per curiam*, 360 N.C. 356, 625 S.E.2d 779 (2006) (internal citation omitted).

In support of his position, defendant contends that the trial court "punished" him for "asserting valid defenses [based upon the 14 January 2003 letter from Defendant Crown to Tilley] even following reasonable offers to settle." In his reply to plaintiff's motion for attorneys fees, defendant Alvis states that he made a settlement offer of $1,500.00 to plaintiff on 16 May 2004 and an second offer of $2,000.00 on 16 November 2004.

In response, plaintiff argues that $2,000.00 was not a reasonable settlement offer and emphasizes two letters from defendant Alvis, dated 26 June 2003 and 4 August 2003 respectively. The letters state:

> In view of all the circumstances, [defendant Alvis] will make no voluntary payment to any party. If there is not a dismissal, then there will be a litigation of everyone's claims to judgment.

and

> If we must file pleadings, then we will be looking to your client for a settlement payment to [defendant Alvis], and that is the only settlement we will consider. If your client ever makes a recovery against [defendant Alvis] it will be after trial court judgment and exhaustion of all appeals.

Additionally, plaintiff argues that defendant Alvis (1) pursued a meritless motion to remove the matter to superior court that was denied on 27 October 2003; (2) pursued meritless counterclaims against plaintiff that were dismissed by judgment on the pleadings entered 22 November 2004; and (3) pursued groundless motions to dismiss and motions for summary judgment of plaintiff's claims, which were denied (with the exception of plaintiff's claim for *quantum meruit*) on 7 June 2005.

After considering this and other evidence presented by the parties, including the report completed by Sinnett discussed in section II of this opinion, the trial court found the following:

> 15. Plaintiff has attempted to obtain payment funds secured by the Notice of Lien and the Lien from Defendants Crown and Alvis. Defendant Alvis unreasonably refused to fully resolve the matter after receiving the report from his consulting architect [Sinnett] on November 2, 2004. The consulting architect reported his conclusion that only about $7,000.00 in recommended remedial work was needed under the Prime Contract and of that amount, only $200.00 could be attributed to Plaintiff's performance under the Contract. Defendant Alvis presented no evidence that the recommended remedial work was ever contracted and paid for by him.
>
> . . . .
>
> 18. As a result of Defendant Alvis' unreasonable refusal to fully resolve the matter that is the basis of this dispute, Plaintiff has incurred reasonable attorney's fees in the amount of $17,000.00. This amount represents fees incurred after November 2, 2004 and includes what the Court finds as a reasonable fee for preparing the Motion for Attorney Fees.

These findings of fact indicate, on their face, that the trial court's award of attorneys fees was the product of a reasoned decision: the trial court reasoned that because defendant's own consultant informed him on 2 November 2004 that it would only cost about $7,000.00 to remedy defendant Crown's deficient performance under the Prime Contract, it was unreasonable for defendant Alvis to insist that defendant Crown's deficient performance extinguished his obligations under the Prime Contract. Moreover, it is apparent from the remainder of the trial court's order that the court believed plaintiff's evidence tending to show that defendant's conduct caused or con-

tributed to the construction delay; thus, the trial court concluded that defendant Alvis was not entitled to a set off for liquidated damages.

We recognize that the dissenting opinion would vacate the award of attorneys' fees and remand this case to the trial court for additional findings regarding the reasonableness of the amount of fees awarded. We do not address the amount of the award because defendant Alvis did not assign error to the amount or mention this argument in his brief. For the reasons stated above, we conclude that the trial court did not abuse its discretion in awarding plaintiff attorneys fees based on defendant Alvis' unreasonable refusal to resolve the dispute out of court. Accordingly, this assignment of error is overruled.

V. Conclusion

For the reasons stated above we hold that (1) the trial court's finding that defendant Alvis owed a gross payment deficiency to defendant Crown was supported by competent evidence; (2) the trial court's entry of judgment against defendant Alvis in favor of plaintiff pursuant to N.C. Gen. Stat. § 1A-1, Rule 52(a) following a bench trial is not inconsistent with the court's entry of default judgment against defendant Crown in favor of defendant Alvis; and (3) the trial court did not abuse its discretion by awarding plaintiff $17,000.00 in attorneys' fees based upon a finding that defendant Alvis "unreasonably refused to fully resolve the matter" out of court. Accordingly, we affirm the judgment entered on 28 September 2005 by Judge Jane P. Gray in District Court, Wake County.

AFFIRMED.

Judge STEPHENS concurs.

Judge TYSON concurring in part and dissenting in part in a separate opinion.

TYSON, Judge, concurring in part, dissenting in part.

I concur in the result reached by the majority in sections I through III of their opinion. The award to plaintiff for $17,000.00 in attorneys' fees pursuant to N.C. Gen. Stat. § 44A-35 is error. No competent or substantial evidence supports any finding that defendant Alvis unreasonably refused to settle and without this finding, the trial court's unsupported conclusion to award attorneys' fees is an error of

law. The trial court also failed to make required findings of fact regarding the reasonableness of the attorneys' fees it awarded. I vote to reverse in part and respectfully dissent.

I. Background

Following a bench trial, the trial court awarded plaintiff $7,921.00 in compensatory damages from defendant Alvis. The trial also awarded plaintiff $17,000.00 in attorneys' fees pursuant to N.C. Gen. Stat. § 44A-35.

The statute states, in relevant part:

> In any suit brought or defended under the provisions of Article 2 or Article 3 of this Chapter, the presiding judge *may* allow a reasonable attorneys' fee to the attorney representing the prevailing party. This attorneys' fee is to be taxed as part of the court costs and be payable by the losing party *upon a finding that there was an unreasonable refusal by the losing party to fully resolve the matter which constituted the basis of the suit or the basis of the defense.*

N.C. Gen. Stat. § 44A-35 (emphasis supplied).

To support its award of attorneys' fees, the trial court found as fact:

> 15. Plaintiff has attempted to obtain payment funds secured by the Notice of Lien and the Lien from Defendants Crown and Alvis. Defendant Alvis unreasonably refused to fully resolve the matter after receiving the report from his consulting architect on November 2, 2004. The consulting architect reported his conclusion that only about $7,000.00 in recommended remedial work was needed under the Prime Contract and of that amount, only $200.00 could be attributed to Plaintiff's performance under the contract. Defendant Alvis presented no evidence that the recommended remedial work was ever contracted and paid for by him.
>
> 16. Defendant Alvis did not tender an Offer of Judgment in this lawsuit.
>
> 17. Plaintiff is the prevailing party.
>
> 18. As a result of Defendant Alvis' unreasonable refusal to fully resolve the matter that is the basis of this dispute, Plaintiff has incurred reasonable attorney fees in the amount of $17,000.00. This amount represents fees incurred after November 2, 2004 and

includes what the Court finds as a reasonable fee for preparing the Motion for Attorney Fees.

The trial court concluded as a matter of law:

12. In the Court's discretion, Plaintiff's reasonable attorneys' fees in the amount of $ 17,000.00 should be taxed against Defendant Alvis as court costs pursuant to N.C.G.S. § 44A-35.

II. Standard of Review

Upon an appeal from a judgment entered in a non-jury trial, our Supreme Court imposed "three requirements on the court sitting as finder of fact: it must (1) find the facts on all issues joined in the pleadings; (2) declare the conclusions of law arising from the facts found; and (3) enter judgment accordingly." *Stachlowski v. Stach*, 328 N.C. 276, 285, 401 S.E.2d 638, 644 (1991). Our standard of review is whether competent evidence exists to support the trial court's findings of fact and whether the findings support the conclusions of law. *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163, *disc. rev. denied*, 354 N.C. 365, 556 S.E.2d 577 (2001). The trial court's conclusions of law drawn from the findings of fact are reviewable *de novo*. *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980).

In addition, when awarding attorneys' fees, the trial court must make specific findings of fact concerning the attorney's skill, the attorney's hourly rate, and the nature and scope of the legal services rendered. *In re Baby Boy Scearce*, 81 N.C. App. 662, 663-64, 345 S.E.2d 411, 413, *disc. rev. denied*, 318 N.C. 415, 349 S.E.2d 590 (1986). Whether these requirements are met is a question of law, reviewable on appeal. *Taylor v. Taylor*, 343 N.C. 50, 54, 468 S.E.2d 33, 35 (1996).

The decision to award attorneys' fees pursuant to N.C. Gen. Stat. § 44A-35 is within the trial court's discretion. N.C. Gen. Stat. § 44A-35 "does not mandate that the trial court award attorneys' fees, but instead places the award within the trial court's discretion." *Barrett Kays & Assocs., P.A. v. Colonial Bldg. Co.*, 129 N.C. App. 525, 530, 500 S.E.2d 108, 112 (1998).

III. Unreasonably Refused to Settle

Defendant Alvis argues the evidence does not support the trial court's finding that he unreasonably refused to settle. Defendant Alvis contends he attempted to resolve the matter in good faith by offering

plaintiff successive settlements of $1,500.00 and $2,000.00 and he asserted valid defenses against plaintiff's claims. I agree.

N.C. Gen. Stat. § 44A-35 provides the trial court "may" award a prevailing party a reasonable attorneys' fee upon a finding there was an "unreasonable refusal . . . to fully resolve the matter which constituted the basis of the suit or the basis of the defense." An award of attorneys' fees under this statute is not mandatory and the trial court may only award attorneys' fees in cases after findings of fact based upon substantial evidence of the losing party's unreasonable refusal to settle or the failure to assert valid defenses. N.C. Gen. Stat. § 44A-35; *see Barrett Kays & Assocs., P.A.*, 129 N.C. App. at 530, 500 S.E.2d at 112 (The statute "does not mandate that the trial court award attorneys' fees, but instead places the award within the trial court's discretion.")

Plaintiff's allegations against defendant Alvis showed he was only secondarily liable to plaintiff after defendant Crown, the general contractor. Defendant Alvis never dealt directly with plaintiff prior to hearing from plaintiff's attorney about a possible lawsuit. When confronted with a lawsuit from plaintiff, defendant Alvis was reasonable to rely on the general contractor, in which defendant Crown stated it had "been paid in full for all services rendered" as of 14 January 2003 for work on defendant Alvis's job. Defendant Alvis's defenses for offsets and credits were allowed by the trial court to reduce any gross deficiency due plaintiff.

The majority's opinion relies in part on two letters dated 26 June 2003 and 4 August 2003 from defendant Alvis's counsel to plaintiff's counsel after suit was filed. In these letters, defendant Alvis's counsel states he "will make no voluntary payment to any party" and that the only settlement he will consider is a payment from plaintiff to defendant Alvis. At that time, defendant Alvis had asserted claims against defendant Crown and defendant Alvis's architect had supported offsets against both plaintiff and defendant Crown for deficiencies. These letters fail to show defendant Alvis unreasonably refused to resolve the matter. Both letters were dated *prior to* the two settlement offers made by defendant Alvis to plaintiff. These letters became irrelevant after substantial settlement offers were made to and rejected by plaintiff and cannot support a finding that defendant Alvis unreasonably refused to settle.

On 16 May 2004, defendant Alvis made a settlement offer of $1,500.00 to plaintiff. Plaintiff rejected this offer. Defendant Alvis

made a second settlement offer to plaintiff on 16 November 2004 for $2,000.00 prior to the initial trial date in this matter. Plaintiff rejected this offer and counter offered $7,921.00, no compromise from the original amount of its claim in the complaint. In its findings of fact concerning the award of attorneys' fees to plaintiff, the trial court failed to consider or make findings of fact regarding the two settlement offers defendant Alvis made to plaintiff after the letters, but prior to trial.

Without adequate findings of fact, the trial court's conclusion to award plaintiff attorneys' fees pursuant to N.C. Gen. Stat. § 44A-35 is error. Defendant Alvis made two separate substantial settlement offers to plaintiff and asserted reasonable defenses against plaintiff's claims. The trial court's conclusion to award plaintiff attorneys' fees pursuant to N.C. Gen. Stat. § 44A-35 is not supported by its findings of fact. I respectfully dissent.

IV. Reasonableness of the Attorneys' Fees Awarded

The trial court also failed to make required findings of fact as to the reasonableness of the attorneys' fees awarded.

The majority's opinion asserts defendant Alvis failed to assign error or argue the amount of attorneys' fees awarded. Defendant Alvis assigned error to:

> 20. Paragraph 3 of the Trial Court's Final Decree in the Rule 52(A) Judgment, on the grounds that the evidence was insufficient to support a finding that Plaintiff-Appellee should recover attorneys' fees from Defendant-Appellant, and an award of the same is contrary to law.

Defendant Alvis argues in his brief, "[T]he trial court abused its discretion in awarding [plaintiff's] more than 2 times the amount of the contract in attorney fees. The decision of the trial court awarding Terry's $17,000.00 in attorneys fees constitutes an abuse of discretion and should be reversed." Defendant Alvis also "request[ed] that this Court reverse and vacate the trial court's Rule 52(A) Judgment awarding . . . attorney's fees." Defendant Alvis assigned error to, and argued, the amount of the attorneys' fee awarded was unreasonable.

This Court has stated:

> A trial court, in making an award of attorneys' fees, *must explain why the particular award is appropriate and how the court arrived at the particular amount*. Specifically, an award of attor-

> ney's fees usually requires that the trial court enter findings of fact as to the time and labor expended, skill required, customary fee for like work, and experience or ability of the attorney based on competent evidence.

Dunn v. Canoy, 180 N.C. App. 30, 49, 636 S.E.2d 243, 255 (2006) (emphasis supplied) (internal quotation and citations omitted), *disc. rev. denied*, 361 N.C. 351, —— S.E.2d —— (2007); *see Thorpe v. Perry-Riddick*, 144 N.C. App. 567, 572, 551 S.E.2d 852, 856 (2001) ("If the trial court elects to award attorney fees, it must also enter findings of fact as to the time and labor expended, skill required, customary fee for like work, and experience or ability of the attorney based on competent evidence."); *see also Brookwood Unit Ownership Assn. v. Delon*, 124 N.C. App. 446, 449-50, 477 S.E.2d 225, 227 (1996) ("To determine if an award of counsel fees is reasonable, 'the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney' based on competent evidence." (quoting *West v. Tilley*, 120 N.C. App. 145, 151, 461 S.E.2d 1, 4 (1995); *United Laboratories, Inc. v. Kuykendall*, 102 N.C. App. 484, 494, 403 S.E.2d 104, 111 (1991), *aff'd*, 335 N.C. 183, 437 S.E.2d 374 (1993)).

The trial court failed to make these required findings of fact and erred by awarding to plaintiff $17,000.00 in attorneys' fees pursuant to N.C. Gen. Stat. § 44A-35. The statute states, "the presiding judge may allow a *reasonable attorneys' fee* to the attorney representing the prevailing party." N.C. Gen. Stat. § 44A-35 (emphasis supplied).

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

The trial court's findings of fact concerning the imposition of attorneys' fees are set out above. The trial court failed to make any finding of fact "as to the time and labor expended, skill required, customary fee for like work, and experience or ability of the attorney based on competent evidence." *Dunn*, 180 N.C. App. at 49, 636 S.E.2d at 255. Without these findings, this Court cannot "determine whether [the] judgment, and the legal conclusions that underlie it, represent a correct application of the law." *Spicer*, 168 N.C. App. at 287, 607 S.E.2d at 682. Here, the trial court's award of $17,000.00 in attorneys'

fees to plaintiff must be vacated and remanded for further findings and conclusions regarding the reasonableness of the award. *Dunn*, 180 N.C. App. at 50, 636 S.E.2d at 256.

V. Conclusion

Defendant Alvis did not unreasonably refuse to settle this matter with plaintiff. Defendant Alvis never dealt directly prior to plaintiff's demands, made two separate and substantial settlement offers to plaintiff, asserted reasonable defenses against plaintiff's claims, and was awarded offsets and credits set forth in his answer by the trial court. No evidence shows defendant Alvis "unreasonably refused" to settle with plaintiff. I vote to reverse the trial court's order on this issue.

Alternatively, the trial court failed to make any finding of fact "as to the time and labor expended, skill required, customary fee for like work, and experience or ability of the attorney based on competent evidence." *Dunn*, 180 N.C. App. at 49, 636 S.E.2d at 255. Without these findings, this Court cannot review and determine whether the trial court's award of attorneys' fees was "reasonable." N.C. Gen. Stat. § 44A-35. The trial court's award of $17,000.00 in attorneys' fees to plaintiff should be vacated and remanded for further findings regarding the reasonableness of the award using the factors in the numerous cases cited above. I respectfully dissent.

STATE OF NORTH CAROLINA v. KENNETH BARNARD

No. COA06-209

(Filed 19 June 2007)

1. Search and Seizure— traffic stop—thirty-second delay at stop light—reasonable articulable suspicion

The trial court did not err by ruling that an officer had an objectively reasonable articulable suspicion that defendant might be impaired and properly stopped defendant's vehicle after defendant hesitated for thirty seconds after a stop light turned green. Thirty seconds goes well beyond the delay caused by routine distractions.

2. Evidence— testimony stricken and curative instruction given—any error in allowing testimony cured

Granting defendant's motion to strike and giving a prompt curative instruction cured any error in denying defendant's motion to suppress his response to an officer's question about how long he had had a habit.

3. Confessions and Incriminating Statements— voluntary statements—Miranda not applicable

Defendant's motion to suppress statements he had made to an officer was properly denied where he had volunteered those statements. Miranda does not apply to voluntary statements made without questioning.

4. Appeal and Error— preservation of issues—contention not raised below—not briefed—not considered

Defendant's argument concerning a search of his person was not considered where he did not raise it to the trial court and did not specifically argue it in his brief on appeal.

Judge CALABRIA dissenting.

Appeal by defendant from judgment entered 6 April 2005 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 30 October 2006.

Roy Cooper, Attorney General, by Daniel S. Johnson, Special Deputy Attorney General, for the State.

Anne Bleyman for defendant-appellant.

MARTIN, Chief Judge.

Defendant was charged in bills of indictment with two counts of possession of cocaine and two counts of having achieved the status of an habitual felon. Prior to trial, defendant moved to suppress evidence seized as a result of searches of his vehicle and his person, as well as statements which he made to the police. After a hearing, the motion to suppress was denied. Defendant was convicted by a jury of two counts of possession of cocaine and subsequently entered a plea of guilty to one count of having achieved the status of an habitual felon. The remaining habitual felon charge was dismissed. He appeals from a judgment sentencing him to a minimum term of 168 months and a maximum term of 211 months imprisonment. We find no error.

The evidence presented at the suppression hearing and at trial tended to show that at around 12:15 a.m. on 2 December 2004, Officer Brett Maltby was on patrol in a high crime area of downtown Asheville where a number of bars are located. Officer Maltby was driving a marked patrol car and was behind defendant's vehicle, a 1993 Ford Taurus, which was stopped at a red traffic light. When the light turned green, defendant remained stopped for approximately thirty seconds before making a left turn. Based upon his training and experience, Officer Maltby considered that the delayed reaction to the green light was an indicator that the driver of the vehicle may be impaired. Officer Maltby initiated a stop of the vehicle to determine whether, in fact, the driver was impaired.

Officer Maltby approached defendant and asked for his license and registration. Defendant's breathing was rapid and he was shaking. Officer Maltby smelled a slight odor of alcohol on defendant's breath. Defendant said that he did not have his license and gave Officer Maltby a name and birth date. Officer Maltby returned to his patrol car to conduct a check of the name and birth date to determine if defendant had a driver's license and to check for outstanding warrants. He determined that the information which the defendant had given him was not correct. Officer Maltby then returned to defendant's vehicle and asked him to step out of his vehicle. Officer Maltby observed an open container of alcohol partially concealed in a paper bag. Officer Maltby placed defendant in investigatory detention, handcuffed him due to his nervousness and inability to explain his identity, and walked him back to the patrol car. Defendant then disclosed his real name, and Officer Maltby was able to determine that his driver's license had been suspended. Officer Maltby began to write a citation for possession of an open container of alcohol and driving while license revoked.

Officer Dwight Arrowood arrived at the scene to assist Officer Maltby. At Officer Maltby's direction, Officer Arrowood searched the interior of the Taurus and recovered a crack pipe and a Brillo pad, which is sometimes used as a filter for a crack pipe. Officer Maltby then began to write a citation for possession of drug paraphernalia when defendant said he would do anything to get out of the situation and offered to purchase narcotics. He told Officer Maltby that he had purchased crack cocaine earlier that day from a person known as "One-Arm Willy." Maltby was familiar with "One-Arm Willy" and agreed to void the citations he was writing if defendant would make a controlled buy from his drug dealer.

Officer Maltby stored defendant's vehicle, took him to the police station, and secured the assistance of an undercover narcotics officer, Officer Lauffer. Defendant agreed to go to the residence of One-Arm Willy and purchase a $20 rock of crack cocaine. The officers explained that defendant would be searched prior to leaving the police station, that he would accompany Officer Lauffer to the residence, purchase the crack cocaine and return immediately to the officer's car. He would then be returned to the police station where he would be debriefed and searched a second time.

Defendant successfully purchased a crack rock from the dealer and turned it over to Officer Lauffer, who gave it to Officer Maltby when they returned to the police station. Officer Maltby then began to debrief defendant, inquiring as to what he had seen in the house for the purpose of obtaining and executing a search warrant. Officer Maltby searched defendant and found a small rock of crack cocaine concealed in defendant's pocket. Defendant told Officer Maltby that he had gotten a "front" from One-Arm Willy for the second rock of cocaine. He then "asked [Officer Maltby] if he could just have the rock of crack cocaine back." Officer Maltby refused and concluded that the defendant was not sufficiently reliable to be used as a confidential informant to support a search warrant of the dealer's home. Officer Maltby took defendant home and subsequently charged him with possession of crack cocaine.

On appeal, defendant contends the trial court erred in denying his motion to suppress the evidence seized by the officers as a result of the vehicle stop and subsequent search of his vehicle, as well as statements which he made to Officer Maltby. We have carefully considered his arguments and conclude the evidence was properly admitted.

On a motion to suppress, we review a trial court's findings of fact to determine if there is competent evidence to support them. *State v. Brewington*, 170 N.C. App. 264, 271, 612 S.E.2d 648, 653 (2005) (citation omitted). The trial court's findings upon conflicting evidence are accorded "great deference upon appellate review as it has the duty to hear testimony and weigh the evidence." *Id.* If the findings are supported by competent evidence, they are conclusive on appeal. *State v. Campbell*, 359 N.C. 644, 661, 617 S.E.2d 1, 12 (2005). The conclusions of law which the court draws from those findings are fully reviewable. *Id.* at 662, 617 S.E.2d at 13.

[1] Defendant first challenges the trial court's denial of his motion to suppress the evidence related to Officer Maltby's traffic stop of the defendant's vehicle. He argues that Officer Maltby had neither probable cause nor a reasonable, articulable suspicion to stop defendant and therefore it was error to admit evidence resulting from the stop. We disagree.

A police officer may effect a brief investigatory seizure of an individual where the officer has reasonable, articulable suspicion that a crime may be underway. *Terry v. Ohio*, 392 U.S. 1, 21, 20 L. Ed. 2d 889, 906 (1968). "Reasonable suspicion" requires that "[t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). All the State is required to show is a "minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.' " *Id.* at 442, 446 S.E.2d at 70 (quoting *U.S. v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)). A court must consider the totality of the circumstances in determining whether the officer possessed a reasonable and articulable suspicion to make an investigatory stop. *Id.* at 441, 446 S.E.2d at 70.

The trial court found that on 2 December 2004, defendant stopped at an intersection and "remained stopped for some 30 seconds without any reasonable appearance of explanation for doing so." This finding is amply supported by competent evidence and thus binding on appeal. *See State v. Parker*, 137 N.C. App. 590, 598, 530 S.E.2d 297, 302 (2000). Based on this finding, the trial court concluded the following:

> [T]he Court concludes that from the totality of the circumstances that [sic] a reasonable articulable suspicion of wrongdoing on the part of the Defendant existed to warrant Officer Maltby's stop of the Defendant's vehicle in view of its prolonged existence at this intersection without any reason for doing so.

When considering the totality of the circumstances, the trial court's findings provide the requisite objective justification from which a conclusion can be drawn that a reasonable suspicion existed to warrant Officer Maltby's stop. From defendant's thirty second delay, Officer Maltby made a rational inference that defendant might be impaired. This inference was based on Officer Maltby's training and experience, as reflected by his testimony.

Q: Based upon your training and experience, do you have an opinion as to whether or not that sort of delayed reaction could usually involve an impaired substance or driving while impaired?

A: Absolutely. Yes, sir.

Q: Can you articulate that?

A: People's reaction is slowed down. A red light turning green and hesitating for 30 seconds definitely would be an indicator of impairment.

Defendant, however, cites *State v. Roberson*, 163 N.C. App. 129, 135, 592 S.E.2d 733, 737 (2004), in which this Court held that a driver's eight to ten second delayed reaction at a traffic light did not give the officer a reasonable and articulable suspicion of criminal activity. This Court predicated its holding on the multitude of reasons a motorist's attention may be diverted for such a quick span of time. *Id.* at 134, 592 S.E.2d at 737. The instant case is distinguishable in that the length of defendant's delay at the traffic light, at thirty seconds, was three times longer than the delay in *Roberson*. A thirty second delay goes well beyond the delay caused by a motorist's routine distractions, such as changing a radio station, glancing at a map or looking in the rear view mirror. *See People v. Kelly*, 802 N.E.2d 850, 853 (Ill. Ct. App. 2003) (finding a twenty second delay at a traffic light to be an unreasonable period of time to react to the stop light change and to ascertain it to be safe to proceed). As a result, Officer Maltby was confronted with a far greater likelihood that the driver might be impaired.

The trial court did not err in ruling that Officer Maltby had an objectively reasonable articulable suspicion that defendant may be impaired and properly performed a *Terry* stop of defendant's vehicle. Therefore, the evidence seized as a result of the stop was properly admitted.

[2] Defendant next argues that the trial court erred in denying his motion to suppress any statements he made after he was handcuffed and placed in the patrol car because Officer Maltby failed to properly advise him of his *Miranda* rights. *See Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). " 'It is well established that *Miranda* warnings are required only when a [criminal] defendant is subjected to custodial interrogation.' " *State v. Smith*, 160 N.C. App. 107, 114, 584 S.E.2d 830, 835 (2003) (quoting *State v. Patterson*, 146 N.C. App. 113, 121, 552 S.E.2d 246, 253 (2001)). The United States

Supreme Court has defined "interrogation" as "[a] practice that the police should know is reasonably likely to evoke an incriminating response from a suspect[.]" *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980). "Volunteered statements of any kind are not barred by the Fifth Amendment[.]" *Miranda*, 384 U.S. at 478, 16 L. Ed. 2d at 726.

During the trial, the prosecutor asked Officer Maltby about events which occurred after he had placed defendant in his patrol car:

> Q: Did you then proceed to write the Defendant a citation for Possession of Drug Paraphernalia?
>
> A: Yes, I did.
>
> Q: Okay. And did the Defendant say anything to you in response to your writing those citations?
>
> Defense Counsel: Objection, Your Honor, prior motion.
>
> The Court: Overruled.
>
> A: I asked the Defendant how long he had had a habit. At that point the defendant stated for a number of years. He said he just recently started back with his habit because of recent legal problems and troubles.
>
> Defense Counsel: Objection, move to strike, Your Honor.
>
> The Court: The motion is allowed. Members of the jury, do not consider that last response of the witness.

Our Supreme Court has held "where the trial court immediately sustains the defendant's objection to a prosecutor's comment and instructs the jury to disregard the offending remark, the impropriety is cured." *State v. Garner*, 340 N.C. 573, 593, 459 S.E.2d 718, 728 (1995) (citing *State v. Maynor*, 331 N.C. 695, 417 S.E.2d 453 (1992); *State v. Small*, 328 N.C. 175, 400 S.E.2d 413 (1991)). Assuming, *arguendo*, that it was error for the trial court to deny defendant's motion to suppress defendant's response to this particular question, any error was cured by the trial court's grant of defendant's motion to strike and prompt instruction to the jury not to consider the statement.

[3] As for defendant's statements regarding his willingness to participate in the controlled buy, the trial court found that those statements were made "without any questions being asked." Officer Maltby's direct examination continued:

Q: Officer Maltby, did the Defendant at some time initiate a conversation with you, not in response to any question that you might have asked—

Defense Counsel: Objection, leading, Your Honor.

The Court: Overruled.

Q: —not in response to any question you may have asked him, regarding the charges that you were writing?

A: Yes. He advised there's no way that he could hold another charge, to be charged with something of this magnitude, and advised that he would do anything and everything to try to help himself out in this matter.

Defense Counsel: Objection. Move to strike.

The Court: The motion is denied. The objection is overruled.

Q: What did he say with regards to what he could do to help?

A: He said he knew several different locations where he could go back and purchase narcotics. He advised one location through a gentleman in West Asheville on 70 Howard Street by the name of—nickname of One-Arm Willy.

Q: And did he say that he had been to One-Arm Willy's recently?

A: He did. He said he had recently purchased crack at One-Arm Willy's house as recently as that day.

Q: I'm going to ask you to try to raise your voice just a little bit.

A: I'm sorry. Repeat. He did advise that he had been to One-Arm Willy's house and had been there as recently as that day to purchase crack.

Q: Did he indicate whether or not he had smoked that crack?

A: Yes, he did.

Q: And what else did he say about One-Arm Willy in connection with his pleading with you to help out with the charges?

A: He advised again that he would do absolutely anything to help himself out to—to get rid of these charges that I had on him during this vehicle stop.

Officer Maltby testified that defendant volunteered the statements spontaneously without prompting or questioning. The trial court concluded that these statements were "voluntarily made, not as a result of any questions being asked of [defendant]." The trial court's conclusion is supported by the findings of fact. The holding in *Miranda* does not apply to voluntary statements and, therefore, the motion to suppress the statements was properly denied. *See Miranda*, 384 U.S. at 478, 16 L. Ed. 2d at 726.

[4] Finally, though defendant has assigned error to the admission of evidence regarding Officer Maltby's search of his person after defendant returned from the controlled buy, he has not specifically argued it in his brief and the assignment of error could be taken as abandoned. N.C. R. App. P. 28(b)(6) (2006). In any event, the defendant did not raise the issue of the search of his person in his argument to the trial court and we will not consider it on appeal. N.C. R. App. P. 10(b)(1); *see State v. Valentine*, 357 N.C. 512, 525, 591 S.E.2d 846, 857 (2003).

No error.

Judge TYSON concurs.

Judge CALABRIA dissents with a separate opinion.

CALABRIA, Judge, dissenting.

I respectfully dissent from the majority opinion that there was no error in the court's denial of defendant's motion to suppress evidence. A 30-second delay at a green light fails to provide the particularized suspicion required for an investigative stop, and I would therefore hold that the trial court erred in denying defendant's motion to suppress the crack discovered during the stop and the statements made following the stop. However, I would remand the case to the trial court for further proceedings to determine whether the crack rock seized from defendant following his participation in a controlled buy is fruit of the poisonous tree and should therefore be suppressed.

In the instant case, defendant contends that Officer Maltby, an officer with the Asheville Police Department, had no reasonable, articulable suspicion to stop him and it was therefore error for the court to deny defendant's motion to suppress evidence resulting from the stop. "On a motion to suppress evidence, the trial court's findings of fact are conclusive on appeal if supported by competent evidence."

State v. Campbell, 359 N.C. 644, 661, 617 S.E.2d 1, 12 (2005), *pet. denied*, *Campbell v. N.C.*, 126 S. Ct. 1773, 164 L. Ed. 2d 523 (2006). However, the conclusions of law supported by those findings are reviewed *de novo*. *Id.* at 662, 617 S.E.2d at 13.

As the majority correctly notes, a police officer may affect a brief investigatory seizure of an individual where the officer has reasonable, articulable suspicion that a crime may be underway. *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968). To justify what is known as a *Terry* stop, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. This rule also applies to investigatory traffic stops where the officer does not have probable cause to stop the vehicle. "[A]n investigatory-type traffic stop is justified if the totality of [the] circumstances affords an officer reasonable grounds to believe that criminal activity may be afoot." *State v. Wilson*, 155 N.C. App. 89, 95, 574 S.E.2d 93, 98 (2002). Something more than an "unparticularized suspicion or 'hunch' " is required. *U.S. v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 1, 10 (1989).

In the case *sub judice*, Officer Maltby testified that he stopped defendant because defendant hesitated for approximately 30 seconds before proceeding through the intersection after the red light had turned green. Officer Maltby stated that he considered the defendant's delay in proceeding through the light to be indicative of a slowed reaction time, which he believed indicated impairment. Defendant presents plausible alternative reasons why a driver might hesitate before proceeding through an intersection after a red light has turned green. Defendant argues that a 30-second delay, by itself, provides insufficient grounds to justify a *Terry* stop. I agree.

As the majority notes, this Court has previously considered the question of whether a slight delay in proceeding through a green light provides a sufficient basis to conduct a stop of a defendant's vehicle. In *State v. Roberson*, we determined it was not error for a trial court to grant a motion to suppress where the only reason a police officer stopped a driver was based on an 8 to 10 second delay before responding to a traffic light changing from red to green. 163 N.C. App. 129, 592 S.E.2d 733 (2004).

The *Roberson* case was a case of first impression in North Carolina. In *Roberson*, this Court noted that a driver's actions must be evaluated against the "backdrop of everyday driving experience" and stated that "[i]t is self-evident that motorists often pause at a

stop sign or traffic light when their attention is distracted or preoccupied by outside influences." *Id.* at 134, 592 S.E.2d at 736 (quoting *State v. Emory*, 809 P.2d 522, 525 (Idaho Sup. Ct. 1991)). The Court further stated:

> A motorist waiting at a traffic light can have her attention diverted for any number of reasons. . . . *When defendant did cross the intersection, there was nothing suspicious about her driving and thus no indication that she may have been under the influence of alcohol. Consequently, defendant's driving, including the delayed reaction at the traffic light, did not give rise to a reasonable, articulable suspicion that she was driving while under the influence.*

Roberson, 163 N.C. App. at 134-35, 592 S.E.2d at 737 (emphasis supplied).

The rule stated in *Roberson* is applicable here since the defendant's delay in the face of a changing traffic light formed the sole basis of Officer Maltby's suspicion that defendant was engaged in or was about to be engaged in criminal activity.

The case *sub judice* involves a delay of approximately 30 seconds, 20 seconds longer than the stop in *Roberson*. However, the instant case is similar to *Roberson* in that the delay could be attributable to impairment but it could also be attributable to numerous other causes and there was nothing else suspicious about defendant's driving.

While testifying on direct examination, Officer Maltby stated that he believed defendant's attention was diverted by the presence of a police cruiser pulling in behind him. The relevant exchange in the record is as follows:

> Officer Maltby: The traffic light turned green for northbound direction of travel. I observed the Defendant's car stopped at this red light for approximately 30 seconds before it finally made a left-hand turn onto Hilliard Avenue.
>
> Prosecutor: Did you find that to be unusual?
>
> Officer Maltby: Yes sir, I did.
>
> Prosecutor: Why is that unusual?
>
> Officer Maltby: Typically it would mean, I believe, that the Defendant was paying particular attention to the rear view mirror and noticing me and not the actual traffic light.

As Officer Maltby himself recognized, it is typical for a driver to watch the rear view mirror when a patrol car pulls in behind him, and this fact explains why a driver's attention was diverted from the traffic light changing from red to green. Officer Maltby testified that he did not look at his watch to determine the exact amount of time defendant delayed making his turn, but merely estimated that approximately 30 seconds elapsed while the light changed from red to green. Officer Maltby also stated that the light remained green as defendant made his lawful left-hand turn and noticed nothing suspicious in defendant's driving.

Officer Maltby's testimony indicates that he did not believe he had ample reason to stop defendant based on the delay alone, but decided to further observe defendant's driving for signs of impairment. On cross-examination, Officer Maltby was asked why he did not honk or beep his horn to get the defendant's attention. The officer responded: "I wanted to further my investigation and watch him in his driving demeanor at that point." When Officer Maltby was asked about defendant's driving demeanor, he responded that the left turn defendant made was a legal left turn. Officer Maltby further stated that he previously observed defendant's driving for approximately two minutes prior to stopping him at the red light. Just as there was nothing suspicious about defendant's driving after the light turned green and he turned left, there was also nothing suspicious about defendant's driving during the two minutes prior to his stop at the red light. Thus, Officer Maltby's suspicion was a vague, unparticularized suspicion, which under *Terry* and its progeny, does not justify a stop. Further, neither the location of the stop nor the time bolster the officer's unparticularized suspicion.

> The fact that Officer Eaton's observation of defendant gave rise to no more than an " 'unparticularized suspicion or hunch,' " *Steen*, 352 N.C. at 239, 536 S.E.2d at 8 (citation omitted), cannot be rehabilitated by adding to the mix of considerations the general statistics advocated by the State on time, location, and special events from which a law enforcement officer would draw his inferences based on his training and experience, see, e.g., *Emory*, 119 Idaho at 664, 809 P.2d at 525 ("[statistical] inferences must still be evaluated against the backdrop of everyday driving experience . . . [and the time of day of the stop] does not enhance the suspicious nature of the observation [of the delay]").

Roberson, 163 N.C. App. at 134-35, 592 S.E.2d at 737 (citations omitted).

Although the majority notes that Officer Maltby initiated the stop in a "high-crime area," it does not include this factor in weighing the totality of the circumstances which must be considered in evaluating the legality of the stop. Officer Maltby testified that the area in question has a specific reputation for drug activity, prostitution, breaking and entering, and possession of stolen vehicles, not that the area is notorious for impaired driving.

A neighborhood's general reputation for drug activity is not enough to support a specific suspicion that a defendant is driving while intoxicated. Otherwise, police would be justified in stopping any motorist driving through a bad neighborhood where the motorist hesitates at a stop light or other traffic control device, and this justification would come largely from external factors nonspecific to the driver of the automobile.

We have previously determined that an officer's decision to stop a vehicle based on reasonable suspicion is justified only if the totality of circumstances affords an officer reasonable grounds to believe that criminal activity may be afoot. *State v. Peck*, 305 N.C. 734, 741, 291 S.E.2d 637, 641 (1982). For instance, an officer had reasonable suspicion to stop a vehicle when he observed a driver who the officer believed was driving with a revoked license. *State v. Kincaid*, 147 N.C. App. 94, 555 S.E.2d 294 (2001). Similarly, we have held that an officer may conduct an investigatory stop of a vehicle where he reasonably suspects the vehicle's windows may be tinted more darkly than allowed by North Carolina law. *State v. Schiffer*, 132 N.C. App. 22, 510 S.E.2d 165 (1999).

However, in this case, Officer Maltby observed nothing suspicious about defendant's driving except for a pause in the face of a traffic light turning green. As we noted in *Roberson*, such a delay could be caused by any number of factors common in everyday driving. A motorist hesitating at a light could be distracted by things such as changing a radio station or glancing at a map, as the majority recognizes, or even glancing in the rear view mirror at a patrol car, as Officer Maltby himself recognized. But despite the majority's assertion to the contrary, such factors may cause a motorist to hesitate longer than 10 seconds after a light has changed. As such, the justifications cited in *Roberson* are not erased by the passage of an additional 20 seconds.

The majority cites *People v. Kelly*, 802 N.E.2d 850 (Ill. Ct. App. 2003), for the proposition that a 20-second delay at a traffic light is an unreasonable period of time to react to the stop light change and to ascertain it to be safe to proceed. In *Kelly*, the Illinois Court of Appeals affirmed a trial judge who also denied defendant's motion to suppress evidence. The trial court's denial was based on the officer's reasonable grounds to stop a defendant who paused for 20 seconds after a red light changed to green. However, the Illinois trial court based its decision on defendant's violation of Illinois statutes requiring drivers to obey traffic control devices. That is, the defendant's delay at the light changing from red to green provided grounds for the officer to stop him *based on his violation of specific statutes* that prohibited stopping, standing, or parking in specific places. The court *did not* determine that the 20-second delay provided reasonable grounds to believe that defendant was impaired. Here, since no such statute is implicated, *Kelly* is wholly inapplicable to this case.

In fact, Illinois has another case which is instructive to the case *sub judice*. In *People v. Dionesotes*, 603 N.E.2d 118 (Ill. Ct. App. 1992), the Illinois Court of Appeals held that there was no reasonable, articulable suspicion for an officer to stop a driver who at 2:30 a.m. was observed driving 10 miles per hour in a 25 mile per hour zone and who subsequently stopped his car for approximately one-and-a-half minutes before resuming his driving. The *Kelly* court stated that under the facts in *Dionesotes*, it would have been objectively reasonable for an officer to suspect impairment. *Id.* at 856. However, this is a misreading of the *Dionesotes* decision. In *Dionesotes*, the court stated:

> In the present case, defendant drove slowly and stopped his car in the middle of the street for a short period of time. These facts do not support a reasonable inference that defendant is committing, is about to commit, or has committed an offense.

Dionesotes, 603 N.E.2d at 120.

In *Dionesotes*, the arresting officer testified that he did not subjectively suspect impairment, but suspected that something "unusual" was underway. Although the *Kelly* court in *dicta* criticized *Dionesotes* and sought to distinguish it on the grounds that the officer in *Dionesotes* had no subjective belief that defendant was specifically impaired, it is clear from the language of *Dionesotes* that the court did not consider driving that is merely "unsusual" enough to

provide the particularization necessary to initiate a *Terry* stop, regardless of the officer's lack of a subjective, particularized belief that a specific crime was being committed.

It should be further noted that courts are split on the issue of whether an officer's subjective belief is relevant in determining whether reasonable, articulable suspicion exists. Some courts have determined that an officer must have a subjective suspicion that is objectively reasonable in order to conduct a *Terry* stop, *see United States v. Lott*, 870 F.2d 778, 783-84(1st Cir. 1989), while others have determined that *Terry* is a purely objective test rendering an officer's subjective suspicions irrelevant. *United States v. Brown*, 188 F.3d 860, 866 (7th Cir. 1999); *United States v. Cummins*, 920 F.2d 498, 502 (8th Cir. 1990). North Carolina has followed the line of cases holding that the officer's subjective suspicion is irrelevant and that the test is a purely objective one. *Peck*, 305 N.C. at 741, 291 S.E.2d at 641-42 ("The officer's subjective opinion is not material. Nor are the courts bound by an officer's mistaken legal conclusion as to the existence or non-existence of probable cause or reasonable grounds for his actions. The search or seizure is valid when the objective facts known to the officer meet the standard required.").

Regardless of the officer's subjective suspicions or lack thereof in *Dionesotes*, it is apparent from the opinion that the court did not believe the totality of the circumstances, viewed objectively, gave rise to a reasonable suspicion of wrongdoing sufficient to justify a *Terry* stop. As cited above, the court determined that the facts "do not support a reasonable inference that defendant is committing, is about to commit, or has committed an offense." *Dionesotes*, 603 N.E.2d at 120. This language implicitly recognizes that even if the officer had subjectively suspected impairment, the facts known to him at the time would not have supported an investigative stop.

The *Dionesotes* court further stated, "[U]nusual behavior alone does not necessarily support a reasonable suspicion that a crime has occurred, is occurring or is about to occur. Without more, a proper basis to make a *Terry* stop has not been established." *Id.* at 120-21. Despite *Kelly's* criticisms of *Dionesotes*, *Dionesotes* has never been overruled and remains good law in Illinois.

Although it is not binding precedent on this Court, *Dionesotes* demonstrates that other courts have required much more to justify an investigative stop of a vehicle than the majority does in the instant case. While I agree with the majority that a 30-second delay in the

face of a changing traffic light is unusual, I disagree that it provides sufficient particularized suspicion that a driver is impaired.

Accordingly, I believe the officer did not have reasonable, articulable suspicion to stop the defendant given that he had nothing more than an unparticularized hunch that defendant was committing a crime. Any other factor, such as unsteady driving, might tip the scales to favor a *Terry* stop. But the delay alone is not enough.

The majority's opinion determines that at some point in the 20 seconds between a 10-second delay and a 30-second delay, an unparticularized hunch ripens into a reasonable, particularized suspicion, leaving trial courts in the unfortunate position of having to guess at the exact location of that point. This will inevitably lead to uneven enforcement and require trial courts to engage in an *ad hoc* guessing game. Further, the majority's decision so weakens the reasons supporting the *Roberson* decision that today's decision effectively overrules *Roberson*.

Since I believe that there was no basis for Officer Maltby to stop defendant, I further believe the crack pipe seized from defendant's car and statements made as a result of the stop were fruit of the poisonous tree and should have been excluded at trial. *Wong Sun v. United States*, 371 U.S. 471, 9 L. Ed. 2d 441 (1963).

The more difficult question in this case is whether the second crack rock seized from defendant after he completed the controlled buy should have been suppressed as fruit of the poisonous tree. The second crack rock would not have been discovered but for the police officers' violation of defendant's constitutional rights. However, the United States Supreme Court has made it clear that application of the fruit of the poisonous tree doctrine does not rest on a but-for test.

> We need not hold that all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

Id. at 487-88 (quotation marks and citation omitted). Here, the evidence seized was discovered as part of defendant's participation in a controlled buy. By promising to dispose of the original charges stem-

ming from the illegal stop in exchange for defendant's cooperation, the police secured defendant's participation in the controlled buy, thus exploiting the original violation of defendant's rights. However, the evidence subsequently seized related to a crime committed by defendant *during* the course of the controlled buy, an intervening act unrelated to the original arrest. As such, the evidence can be said to have been gained by "means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488, 9 L. Ed. at 455. The United States Supreme Court has previously held that evidence sufficiently attenuated from the primary taint may not be subject to suppression as fruit of the poisonous tree. *Nardone v. United States*, 308 U.S. 338, 84 L. Ed. 307 (1939).

"The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217, 4 L. Ed. 2d 1669, 1677 (1960). Thus, the purpose underlying the fruit of the poisonous tree doctrine, deterring police misconduct, would not be furthered by suppression of the evidence.

Accordingly, I would determine that the second crack rock was not fruit of the poisonous tree, but evidence of a subsequent crime, and that the defendant's commission of a separate and intervening crime while participating in the controlled buy sufficiently purged the taint of the original illegality. Nevertheless, the second crack rock would never have been discovered by police if not for defendant's participation in the controlled buy. Since I believe there was no justification for police to stop, detain, and search defendant, I conclude the search that produced the crack rock can only be justified as a consent search. So the question becomes whether defendant consented to a search of his person following the controlled buy, and if so, whether that consent was given voluntarily or coerced by police.

> [T]he question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent. As with police questioning, two competing concerns must be accommodated in determining the meaning of a "voluntary" consent—the legitimate need for such searches

and the equally important requirement of assuring the absence of coercion.

Schneckloth v. Bustamonte, 412 U.S. 218, 227, 36 L. Ed. 2d 854, 862-63 (1973). "Merely because a defendant is under arrest when consent is given does not render the consent involuntary. . . . It is, however, a factor which must be considered, and places a greater burden upon the State to show voluntariness." *State v. Cobb*, 295 N.C. 1, 17-18, 243 S.E.2d 759, 769 (1978) (citations omitted).

The issues of defendant's consent and the voluntariness of that consent are issues of fact to be determined by the trial court. Since the trial court made no findings of fact with respect to these issues, this Court is unable to conduct a proper review. Thus, I would vacate the judgment and hold that the evidence deriving from the illegal stop should be suppressed. I would remand to the trial court for further proceedings consistent with this opinion to determine whether defendant voluntarily consented to the search of his person that turned up the crack rock from the controlled buy.

IN THE MATTER OF: S.J.M.

No. COA06-822

(Filed 19 June 2007)

1. Appeal and Error— amendment of record on appeal— summons

The trial court did not err in a permanency planning/review hearing by concluding it had subject matter jurisdiction over the matter even though respondent mother contends a summons was never issued as to either respondent, because: (1) while the original record on appeal contained no summons in this matter, on 8 September 2006 DSS filed a motion to amend the record on appeal to include a copy of the summons along with an affidavit from the clerk of court asserting to the fact that the deputy clerk of Lee County had issued the summons on 21 June 2005, thus satisfying N.C. R. App. P. 9(b)(3); (2) the Court of Appeals granted DSS's motion to amend the record on appeal, thus reflecting that a summons was in fact issued; and (3) by participating in substantive matters in this case, respondent parents waived any objection to lack of service of process.

2. Child Abuse and Neglect— order ceasing reunification— mental evaluation of sibling—consideration of doctor's opinions

The trial court in a permanency planning hearing properly considered a doctor's opinions stated in a mental health evaluation of a sibling of the minor child when determining whether to cease reunification efforts with respondent mother where no objection was made to the trial court's consideration of the doctor's report or to the social worker's report which referenced the doctor's report, and the trial court had received the doctor's report into evidence without objection at the disposition hearing.

3. Child Abuse and Neglect— order ceasing reunification— failure to comply with Case Plan—supporting evidence

Competent evidence supported the trial court's finding in a permanency planning order that respondent mother had not complied with the Family Service Case Plan where the evidence showed that, although respondent mother did complete her parenting classes as required, it also showed that she did not make progress toward reunification because she struggled with appropriately recognizing the minor child's basic needs.

4. Child Abuse and Neglect— order ceasing reunification— mother's inability to safely parent the child—supporting evidence

Competent evidence supported the trial court's findings in a permanency planning order that the mother had not demonstrated an ability to safely parent the child and that the child is exposed to a substantial risk of physical injury or abuse because the mother is unable to provide adequate supervision or protection where the evidence showed that the mother had difficulty making a budget or schedule; the mother had difficulty interacting with the child; the mother would usually feed the child as a response to any complaint by the child; and the mother would not listen to the foster mother's suggestions to pick up the child, talk to the child, or try to amuse him with toys when faced with such complaints from the child.

5. Child Abuse and Neglect— order ceasing reunification— absence of family member assistance—supporting evidence

Competent evidence supported the trial court's finding in a permanency planning order that there were no family members

identified by the parents who could give more than cursory assistance in parenting their child where the maternal grandparents did not feel they could provide for another child, the paternal grandmother was unsure if she would be able to take care of the child, and DSS was unable to identify any other relatives as possible resources for the parents.

6. Child Abuse and Neglect— permanency planning hearing— possibility of child returning home within six months— extension of time not required

In determining in a permanency planning hearing whether it would be possible for the minor child to be returned home within the next six months, the trial court was not required to extend the time to eight months after the hearing in order to allow the completion of a contract with an in-home reunification service which had been working with the parents.

7. Child Abuse and Neglect— order ceasing reunification— gradual reduction of visitation

In order to facilitate permanency and proceed to adoption in accordance with the trial court's decision changing the plan from reunification to adoption, the trial court may gradually reduce visitation so that there is no abrupt stop.

8. Child Abuse and Neglect— permanency planning order— incorporation of DSS and guardian ad litem reports—harmless error

The trial court's improper incorporation of a DSS court report and the guardian ad litem's report as additional findings of fact in a permanency planning order was harmless error in light of the trial court's other findings of fact that were sufficient to support the court's conclusion of law.

9. Child Abuse and Neglect— further reunification efforts futile—possibility of returning home within reasonable time

The trial court did not err by concluding in a permanency planning order that further reunification efforts were futile because DSS presented evidence showing that it was not possible for the minor child to be returned home within a reasonable period of time.

10. Child Abuse and Neglect— permanency planning order— failure to comply with Family Service Case Plan—supporting evidence

Competent evidence supported the trial court's findings in a permanency planning order that respondent father failed to comply with the Family Service Case Plan, even though the Plan was not introduced into evidence, where the DSS court report outlined requirements from the Family Service Case Plan, and there was evidence that respondent father failed to meet the two major requirements of attending parenting classes and attending mental health appointments.

11. Child Abuse and Neglect— order ceasing reunification— father's inability to parent child—risk of injury or abuse—supporting evidence

Competent evidence supported the trial court's findings in a permanency planning order that respondent father has not demonstrated an ability to safely parent the child and that the child is exposed to a substantial risk of physical injury or abuse because the father is unable to provide adequate supervision or protection where there was evidence that the parents were unable to care for the child without assistance, that the parents had difficulty in making a budget and schedule, and that the father did not complete his parenting classes or keep his mental health appointments as required by a Family Service Case Plan for reunification.

12. Child Abuse and Neglect— permanency planning order— DSS court report—guardian ad litem report

The trial court could properly consider the DSS court report and guardian ad litem report in determining whether to change the permanent plan from reunification to adoption because the court may properly consider all written reports and materials submitted in connection with the proceeding.

13. Child Abuse and Neglect— order ceasing reunification— possibility of child returning home within six months—child's best interest—supporting evidence

Competent evidence supported the trial court's findings in a permanency planning order changing the plan from reunification to adoption that it was not possible for the child to be returned home immediately or within the next six months and that it was not in the child's best interest to return home because of the cog-

nitive limitations of the parents where there was evidence that respondent father had made only limited progress, that the father had failed to complete his parenting classes and had failed to keep his mental health appointments, and that a contractor for an in-home reunification service who was working with the parents could not definitely state that the child might be able to be returned to the home within the next six months.

Judge WYNN dissenting.

Appeal by respondent-mother and respondent-father from an order entered 10 January 2006 *nunc pro tunc* 22 November 2005 by Judge George R. Murphy in Lee County District Court. Heard in the Court of Appeals 9 January 2007.

Beverly D. Basden for petitioner-appellee Lee County Department of Social Services.

Elizabeth Myrick Boone for appellee Guardian ad Litem.

Katharine Chester for respondent-appellant mother.

Susan J. Hall for respondent-appellant father.

HUNTER, Judge.

This appeal arises out of the trial court's order ceasing reunification with respondents, mother and father, and their minor child, S.J.M. Because the record shows that there was competent evidence to support the trial court's order, we affirm.

The underlying facts show that on 20 June 2005, Lee County Department of Social Services ("DSS") filed a juvenile petition alleging that respondent-mother and respondent-father (together, "respondents") neglected their child and the child was dependent. The trial court placed the child in the protective custody of DSS, adjudicated the child dependent, and ordered respondents to work with DSS, Naven's Nest (an intensive in-home reunification service), and the foster parent. On 22 November 2005, at the Permanency Planning/Review hearing, the trial court ordered the cessation of reunification efforts and changed the plan from reunification to adoption.[1] Respondents appeal.

1. The minor child's two siblings were previously removed from the home, one due to physical abuse and the other due to mother's incarceration. Both children are in adoptive placements.

Both respondents argue that the trial court erred in changing the permanent plan from reunification to adoption because there were insufficient findings of fact to support its conclusions of law that reunification efforts should cease and for a permanent plan of adoption. Respondent-mother further argues that the trial court lacked subject matter jurisdiction over this matter.

"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." *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004). This Court is "bound by the trial court['s] findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984); N.C. Gen. Stat. § 1A-1, Rule 52 (2005). The trial court is required to make written findings on all of the relevant criteria detailed by N.C. Gen. Stat. § 7B-907(b) (2005):

> (b) . . . At the conclusion of the 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 reason-

able efforts to implement the permanent plan for the juvenile;

(6) Any other criteria the court deems necessary.

Id.

"In a nonjury trial, it is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000).

I.A.

[1] Respondent-mother first argues that a summons was never issued as to either respondent, and as such, the trial court did not have subject matter jurisdiction over this matter. While it is true that the original record on appeal contains no summons in this matter, on 8 September 2006 DSS filed a motion to amend the record on appeal to include a copy of the summons along with an affidavit from Denise Whitaker, Deputy Clerk of Superior Court of Lee County, attesting to the fact that she had issued the summons on 21 June 2005, the date on the face of the summons. The summons is addressed to each of the parents at their address in Sanford, North Carolina, lists the names and phone numbers of the lawyers temporarily assigned to represent them, and advises them of a hearing on 24 June 2005 at 10:00 a.m. at the Lee County Courthouse. We hereby grant DSS's motion to amend the record on appeal and, thus, the record shows that a summons was in fact issued on 21 June 2005. We therefore dismiss this assignment of error.

The dissent correctly notes that in our opinion in *In re Mitchell*, 126 N.C. App. 432, 485 S.E.2d 623 (1997), on very similar facts, we held that because no summons had been issued we did not have jurisdiction—personal or subject matter—over the persons involved. *Id.* at 433, 485 S.E.2d at 624. However, because we grant the motion to amend the record to include the summons, the record now reflects that a summons *was* in fact issued, and thus *Mitchell* is not controlling on this point.

The summons does not show that it was served on either parent. However, service of process may be waived by appearance and participation in the legal proceeding without raising an objection to the lack of service. N.C. Gen. Stat. § 1A-1, Rule 12(h) (2005); *see also In re D.R.S.*, 181 N.C. App. 136, 139, 638 S.E.2d 626, 628 (2007);

In re Howell, 161 N.C. App. 650, 655, 589 S.E.2d 157, 160 (2003). The record in this case shows that a hearing was held on 24 June 2005, at which the parents were not present. The matter was before the trial court on 29 June 2005 with the parents, their respective counsel, and their guardians *ad litem* present. This matter was continued on 19 July 2005 and again on 9 August 2005. On 23 August 2005, a disposition hearing was held before Judge Murphy, again with both parents, their respective counsel, and their guardians *ad litem* present. Finally, on 22 November 2005, a permanency planning hearing was held before Judge Murphy, with both parents' respective counsel and their guardians *ad litem* present. The record is devoid of any assertion of lack of service. By thus participating in substantive matters in this case, the parents waived any objection to lack of service of process.

The dissent is again correct that this argument applies only to personal jurisdiction, that subject matter jurisdiction must also be obtained before this Court can properly hear an appeal, and that subject matter jurisdiction cannot be obtained simply by the appearance of parties before us. However, because we grant the motion to amend, the record now includes not only the summons but an affidavit from the clerk of court stating the date on which the summons was issued. The dissent is correct that Rule 9(b)(3) of our Rules of Appellate Procedure requires that "[e]very . . . paper included in the record on appeal shall show the date on which it was filed[.]" N.C.R. App. P. 9(b)(3). The Rule does not specifically require a date stamp on each paper. Our granting of the motion means that the record now contains a copy of a validly issued summons and an affidavit from an officer of the court as to the date it was issued, which, in this case, we believe constitutes proof to satisfy Rule 9's requirements. As such, subject matter jurisdiction has been validly obtained.

I.B.

Respondent-mother further argues that there was insufficient evidence to support the trial court's findings of fact nos. 3, 5, 6, 8, 10, 14, 15, 16, 17, 18, 22, 24, 25, and 29. We disagree.

Respondent-mother states that findings of fact nos. 3, 5, 6, and 18 taken together explain the trial court's justification in ceasing reunification efforts:

> 3. A [child mental health evaluation (CMHE)] was prepared on the older sibling, J.W. by Dr. [Robert] Aiello and he tested both

parents as to their IQ's. As a result of these tests, both parents were assigned [guardians *ad litem*] in this action.

. . .

5. The Department of Social Services was precluded, because of the findings in the prior cases from making reasonable efforts to prevent and/or eliminate the need for the juvenile's placement.

6. Because of the abuse to J.W., termination in A.M.'s case and the results of the CMHE, S.M. would be in an environment injurious to his health if returned to the parents. The parents' limited ability to parent precludes returning the juvenile to the home safely.

. . .

18. Both parents, in Dr. Aiello's opinion, would require significant support in order to have the juvenile live with them. There was no one in the family willing to provide the level of support required. Naven's Nest is limited in the time period they can work with the family. They are only available to the parents 3½ to 5 hours per week. They have seen some improvement but the parents still have no phone. In addition she has talked with them about court and does not know why they are not present in court today.

Respondent-mother takes issue with the reliance on Dr. Aiello's evaluation and his opinion in these findings. Specifically, respondent-mother argues that the CMHE referred to in finding of fact no. 3 was not received into evidence, nor did Dr. Aiello testify at the hearing. She also argues that the CMHE was inapplicable to this hearing both because it was conducted on behalf of her other child, already removed from her custody, and because it was done prior to Naven's Nest working with the family.

[2] However, the record reveals no objection to the trial court's consideration of Dr. Aiello's report or the social worker's report which referenced Dr. Aiello's report. Furthermore, the trial court received Dr. Aiello's report[2] into evidence, without objection, at the disposition hearing on 23 August 2005. Thus, the trial court properly considered Dr. Aiello's opinions when determining whether to cease reunification efforts with respondent-mother. *See In re Ivey*, 156

2. We note that Dr. Aiello's report was not included in the record on appeal.

N.C. App. 398, 402, 576 S.E.2d 386, 390 (2003) (providing that " '[i]n juvenile proceedings, trial courts may properly consider all written reports and materials submitted in connection with said proceedings' " (quoting *In re Shue*, 63 N.C. App. 76, 79, 303 S.E.2d 636, 638 (1983)).

[3] With regards to finding of fact no. 10, respondent-mother argues there is no evidence to support the trial court's finding that both respondents "have not complied with the Family Services Case Plan" and that respondent-mother "does not request additional visitation with the juvenile."[3] We disagree.

The record shows that the Family Services Case Plan required respondent-mother to work with Naven's Nest and the foster parent to create a household budget and a system of consistently meeting financial obligations in a timely manner; to get transportation to various appointments; to secure a home telephone; and to devise a method to aid respondents in scheduling and keeping regular appointments as required. Moreover, it is apparent from the DSS court report that respondent-mother was to complete a parenting class.

Although a DSS report reveals that respondent-mother did complete her parenting classes as required, it also shows that she did not make progress towards the goal of reunification because she struggled with appropriately recognizing the minor child's basic needs. Specifically, the evidence showed that respondent-mother (1) had difficulty interacting with the child; (2) would usually feed the child as a response to any complaint on his part, even when informed that the child had already eaten; and (3) would not listen to the foster mother's suggestions to pick up the child, talk to the child, or try to amuse him with toys in response to such complaints. While respondent-mother is correct that evidence contrary to this finding exists in the record, this Court as stated above is bound by the trial court's findings of fact where evidence exists to support them. The record contains such evidence for finding of fact no. 10, and as such we find that the trial court did not err as to it.

[4] As to findings of fact nos. 14 and 17, which state that "[t]he parents have not demonstrated an ability to safely parent this child" and

3. A careful review of the record reveals that the Family Service Plan itself was apparently not admitted into evidence and was not included in the record on appeal. However, the record also reveals that respondent-mother made no objection to the trial court considering any reference to the Family Service Plan. Moreover, respondent-mother failed to make any such argument on appeal, and as such we decline to address this issue.

that the child "is exposed to a substantial risk of physical injury or abuse because the parent is unable to provide adequate supervision or protection[,]" respondent-mother argues that the evidence supports a contrary finding. We disagree.

The evidence showed: (1) The Naven's Nest worker witnessed respondent-mother acting appropriately with the child, but could not state that respondents would be able to care for the baby without help;[4] (2) respondents had difficulties in making a budget and schedule and, once the minor child is in the home, these difficulties would be amplified; (3) respondents were not ready to take the minor child home immediately; (4) respondent-mother had difficulty interacting with the child; (5) respondent-mother would usually feed the child as a response to any complaint on his part; and (6) respondent-mother would not listen or take the foster mother's suggestions to pick up the child, talk to the child, or try to amuse him with toys when faced with such complaints from the child.

Cumulatively, this evidence shows a pattern of respondents being unable to consistently care for the child's needs in the future when unsupervised. In particular, respondent-mother's inability or simple unconcern as to what the child actually needed when it complained—food, attention, etc.—might well have concerned the trial court. Based on this evidence, we find that the trial court had competent evidence to support these findings and therefore overrule respondent-mother's assignments of error as to them.

[5] With regards to finding of fact no. 15, which provides "[t]here were no family members identified by the parents who could give more than cursory assistance in their trying to parent their child[,]" respondent-mother argues that evidence showed that she had support from relatives and her church family, and therefore she had more than "cursory assistance." We disagree.

Respondent-mother contends that the evidence showed that she had the support of members of their church and families in addition to the workers from Naven's Nest. However, aside from the bare assertion of this fact from a Naven's Nest report, the record reflects no evidence—presented by respondent-mother or otherwise—as to what type of support (how often, in what capacity, etc.) was being provided.

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4. This statement comes from finding of fact no. 11, to which respondent-mother failed to assign error; it is therefore binding on this Court. *See Montgomery*, 311 N.C. at 110-11, 316 S.E.2d at 252-53.

The record does reflect evidence by DSS that it approached respondents' family members about taking care of the minor child. The maternal grandparents "did not feel they could provide for another child" and although the paternal grandmother expressed interest in taking care of the child, she was unsure if she would be able to do so. DSS was unable to identify any other relatives as possible resources for this family. The record thus reflects competent evidence on which this finding of fact was based, and as such, this assignment of error is overruled.

[6] As to finding of fact no. 29, which provides "[i]t is not possible for the juvenile to be returned home immediately or within the next six (6) months and it is not in the juvenile's best interest to return home because of the cognitive limitations of the parents[,]" respondent-mother argues that reunification was possible if Naven's Nest was allowed to complete their contract with the family. This argument is without merit.

At the hearing on 22 November 2005, Renee Hannah, a contractor for Naven's Nest, testified that Naven's Nest's involvement with the family began in July 2005 and was scheduled to continue through July 2006, eight months after the hearing. The record shows reports regarding respondents from Ms. Hannah dated 15 August, 15 October, and 15 November 2005; Ms. Hannah testified that during that time progress had been made, and that she would like more time to work with respondents.

Per statute, if a child is not able to return home immediately, the trial court must consider certain issues, including "[w]hether 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[.]" N.C. Gen. Stat. § 7B-907(b)(1) (emphasis added).

Here, the trial court was required to consider whether S.J.M. could be returned to respondents within the *next six months*. Respondent-mother urges this Court to consider the potential improvement that might be shown at the end of the Naven's Nest contract, which would not be complete for eight months. However, the trial court was not required to consider whether the minor child could be returned beyond the statutory time period of six months. Respondent-mother's contention that the trial court should have allowed completion of the Naven's Nest contract is implicitly based

on an assumption that S.J.M. could with certainty be returned to her at that point, but even Ms. Hannah was not able to testify that respondents would be able to take custody of S.J.M. following the end of her involvement. Based on the record and testimony from the hearing, the trial court had competent evidence on which to base this finding of fact.

[7] As to finding of fact no. 22, respondent-mother argues that there is nothing in the record to indicate that the reduction in visitation was in the best interest of the minor child. We disagree.

Here, respondent-mother failed to assign error to finding of fact no. 21, which provides that "[t]his child needs permanency. It is recommended that reunification efforts cease and the plan be changed from reunification to adoption by the [current foster family] with a concurrent plan of adoption by another approved family." Because respondent-mother failed to challenge this assignment of error, it is binding on this Court. *See Montgomery*, 311 N.C. at 110-11, 316 S.E.2d at 252-53. In order to facilitate permanency and proceed to adoption, which is stated to be in the child's interest per finding of fact no. 21, the trial court may decide to gradually reduce visitation so that there is no abrupt stop. The trial court properly reduced the visitation based on the best interest of the minor child.

[8] Finally, as to finding of fact no. 24, respondent-mother argues that the trial court incorporated the DSS court report and guardian *ad litem's* report as additional findings of fact in an improperly broad fashion. This argument is without merit. Although the trial court is not permitted to broadly incorporate outside sources as a substitute for making its own findings of fact, the trial court is allowed to consider these documents when making its decision. *See Ivey*, 156 N.C. App. at 402, 576 S.E.2d at 390; *In re J.S.*, 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004) (providing that the trial court should not "broadly incorporate" guardian *ad litem* and social worker's reports, but may consider the reports when making its findings). Notwithstanding the trial court's improper incorporation of the reports as additional findings of fact, it made other findings of fact that were sufficient to support its conclusion of law. Thus, the trial court's incorporation of the DSS court report and guardian *ad litem's* report was harmless error.

[9] Respondent-mother last argues the trial court erred in concluding further reunification efforts were futile. We disagree.

The purpose of a permanency planning hearing is "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). "In a permanency planning hearing held pursuant to Chapter 7B, the trial court can only order the cessation of reunification efforts when it finds facts based upon credible evidence presented at the hearing that support its conclusion of law to cease reunification efforts." *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003).

Here, we have held that there was competent evidence presented at the hearing to support the trial court's findings of fact. DSS presented evidence showing that it was not possible for the minor child to be returned home within a reasonable period of time. Thus, based on those findings, the trial court properly concluded that:

> 1. It is in the child's best interest for the permanent plan to be adoption.
>
> . . .
>
> 3. It is in the juvenile's best interest that the juvenile's placement and care be the responsibility of the Department of Social Services and the agency shall arrange for the foster care or other placement of the juvenile. Placement with the [current foster family] is approved but not required. It is in the child's best interest that the Department of Social Services have the authority to obtain medical treatment, educational, psychological, or psychiatric treatment and services as deemed appropriate by the Department of Social Services and/or as required by this court order.
>
> 5.[5] Reasonable efforts to eliminate the need for placement are not required or shall cease because such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time.
>
> 6. The filing of a termination petition or motion in the cause is in the child's best interest because adoption is the plan for the juvenile.
>
> 7. The best plan of care to achieve a safe, permanent home for the juvenile within a reasonable period of time is adoption.

5. There is no conclusion of law no. 4.

8. The permanent plan for the juvenile is adoption.

9. Visitation with the parents one time per month is in the child's best interest.

In regards to the remaining assignments of error not addressed, they are deemed abandoned because respondent-mother failed to set forth an argument within her brief to support those assignments of error. N.C.R. App. P. 28(b)(6) (providing that "[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned").

II.

In his appeal, respondent-father argues that the trial court's findings of fact did not support its conclusions of law that reunification efforts should cease and for the permanent plan of adoption. Specifically, respondent-father argues that there is insufficient evidence to support findings of fact nos. 3, 5, 6, 9, 10, 14, 17, 18, 22, 24, 25, and 29. We disagree.

Respondent-father first argues that there is nothing in the record to support findings of fact nos. 3, 5, 6, 17, and 18[6] (set out above) because Dr. Aiello's report is absent. We disagree.

As mentioned above, the trial court at the disposition hearing on 23 August 2005 admitted into evidence Dr. Aiello's report, without objection. Furthermore, respondent-father did not object to the admission of the DSS court report, which referenced Dr. Aiello's opinions. Hence, the trial court properly considered the reports and had competent evidence in order to support these findings. *See Ivey*, 156 N.C. App. at 402, 576 S.E.2d at 390.

[10] As to findings of fact nos. 9 and 10, respondent-father argues that without a copy of the Family Service Plan, the trial court was unable to determine whether respondent-father actually complied with the plan. We disagree.

As mentioned above, a careful review of the record reveals that the Family Service Plan itself was apparently not admitted into evidence and was not included in the record on appeal. However, also as above, the record does not show that respondent-father made an objection to the trial court considering any reference to the Family

6. Respondent-father included finding of fact no. 4 in his argument, but as he did not assign error to this finding, we do not address it.

Service Plan because it was not admitted into evidence. Therefore, respondent-father failed to preserve this issue for appeal. N.C.R. App. P. 10(b)(1) (providing that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context").

Assuming *arguendo* that this assignment was preserved for appeal, the DSS court report dated 22 November 2005 outlined requirements from the Family Service Plan relating to respondent-father. According to the report, respondent-father was required to attend all mental health appointments, take his medicine regularly and as prescribed, meet with a support person weekly around anger management issues, complete parenting classes, demonstrate and discuss non-physical discipline techniques with social worker, call support persons for help as needed, and access county transportation or other means of transportation for appointments and visitations.

Here, DSS showed that respondent-father failed to complete his parenting classes, failed to make his mental health appointments, and started to report soft hallucinations. Although the record may not contain evidence as to each of the requirements above, respondent-father's failure to meet the two major requirements of attending parenting classes and attending mental health appointments certainly constitutes competent evidence for the trial court's finding.

[11] Findings of fact nos. 14 and 17, as mentioned above, state that "[t]he parents have not demonstrated an ability to safely parent this child" and that the child "is exposed to a substantial risk of physical injury or abuse because the parent is unable to provide adequate supervision or protection." Respondent-father argues that there is simply no evidence in the record to support these findings. We disagree.

Here, the facts show that: (1) respondents were unable to care for juvenile without assistance; (2) respondents had difficulties in making a budget and schedule and with a child in the home, these difficulties would be amplified; (3) respondents were not ready to take the minor child home immediately; and (4) respondent-father did not complete his parenting classes or keep his mental health appointments. Undoubtedly, the trial court felt that respondent-father's refusal to accept treatment for his mental health problem created a substantial likelihood that respondent-father would be unable to ade-

quately supervise S.J.M. were the child returned to his care. The record reveals competent evidence on which these findings of fact were based, and respondent-father's assignment of error is therefore overruled.

As to finding of fact no. 22, respondent-father argues as respondent-mother did that there is nothing in the record to indicate that the reduction in visitation was in the best interest of the minor child. This argument is without merit.

As with respondent-mother, respondent-father failed to assign error to finding of fact no. 21, which means it is binding on this Court. *See Montgomery*, 311 N.C. at 110-11, 316 S.E.2d at 252-53. The same conclusion as to gradually ceasing visitation holds true here as well, and we find that the trial court properly reduced the visitation based on the best interest of juvenile.

[12] As to finding of fact no. 24, respondent-father argues that the DSS court report and guardian *ad litem* report received into evidence and incorporated by reference are filled with unreliable information and hearsay. However, respondent-father made no objection to the social worker and guardian *ad litem's* reports being admitted into evidence at the hearing. Per Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure, an appellant cannot raise an argument at the appellate level for the first time on appeal. N.C.R. App. P. 10(b)(1) (providing that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context"). Thus, respondent-father failed to properly preserve this argument for appeal.

Assuming *arguendo* this argument was properly preserved for appeal, however, it is without merit because the trial court may properly consider all written reports and materials submitted in connection with the proceedings. *See Ivey*, 156 N.C. App. at 402, 576 S.E.2d at 390. Therefore, this argument is without merit.

[13] Finally, as to finding of fact no. 29, respondent-father contends that the trial court rushed to judgment, because he was making progress when it found that "[i]t is not possible for the juvenile to be returned home immediately or within the next six (6) months and it is not in the juvenile's best interest to return home because of the cognitive limitations of the parents." We disagree.

Here, DSS presented evidence to show that respondent-father (1) had made limited progress, (2) had failed to complete his parenting class; and (3) had failed to keep his mental health appointments. Additionally, Ms. Hannah was unable to definitely state that within the next six months the minor child might be able to be returned to the home. Based on the evidence in the record, the trial court did not err in this finding of fact, and we overrule this assignment of error.

Respondent-father next argues that the trial court erred in its conclusions of law nos. 1, 3, 5, 6, 7, 8, and 9 (laid out above). We disagree.

As mentioned above, in a permanency planning, the trial court must find facts, based on credible evidence from the hearing, to support a conclusion of law to cease reunification efforts before it can order such a cessation. *Weiler*, 158 N.C. App. at 477, 581 S.E.2d at 137.

As stated above, we hold that competent evidence was presented at the hearing to support the trial court's findings of fact. The deficiencies in parenting abilities found by the trial court support the conclusion that adoption is in the child's best interests, and thus reunification efforts should cease.

In regards to the remaining assignments of error not addressed, they are deemed abandoned because respondent-father failed to set forth an argument within his brief to support those assignments of error. N.C.R. App. P. 28(b)(6) (providing that "[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned").

Affirmed as to both respondents.

Judge STEELMAN concurs.

Judge WYNN dissents in a separate opinion.

WYNN, Judge, dissenting.

"[A] trial court's general jurisdiction over the type of proceeding or over the parties does not confer jurisdiction over the specific action." *In re A.B.D.*, 173 N.C. App. 77, 86, 617 S.E.2d 707, 714 (2005) (quotation and citation omitted). Indeed, "before a court may act there must be some appropriate application invoking the judicial

power of the court with respect to the matter in question." *Id.* (quotation and citations omitted). Because I find that DSS has failed to show that an "appropriate application invoking the judicial power of the court," namely a summons, was issued in this matter, I conclude that the trial court lacked the subject matter jurisdiction to hear this case. I would therefore vacate the trial court's order.

North Carolina General Statute § 7B-401 states that "[t]he pleading in an abuse, neglect, or dependency action is the petition. The process in an abuse, neglect, or dependency action is the summons." N.C. Gen. Stat. § 7B-401 (2005). This Court has held that when no summons is issued, the trial court does not acquire subject matter jurisdiction, and the underlying order must be vacated. *See In re Mitchell*, 126 N.C. App. 432, 433, 485 S.E.2d 623, 624 (1997) (vacating the trial court's order and holding that "[w]here no summons is issued the court acquires jurisdiction over neither the persons nor the subject matter of the jurisdiction."). Nevertheless, "any act which constitutes a general appearance obviates the necessity of *service of summons* and waives the right to challenge the court's exercise of *personal jurisdiction* over the party making the general appearance." *A.B.D.*, 173 N.C. App. at 83, 617 S.E.2d at 712 (quotation and citation omitted) (emphasis added). Significantly, however, "[a] court cannot undertake to adjudicate a controversy on its own motion; rather, it can adjudicate a controversy *only when a party presents the controversy to it*[.]" *Id.* at 87, 617 S.E.2d at 714 (quotation and citation omitted) (emphasis added).

In the *A.B.D.* case, this Court held that a "termination of parental rights action should have been treated as if it had never been filed" because a summons had lost its vitality. *Id.* at 86-87, 617 S.E.2d at 713-14 (quotation and citation omitted). The petitioner in that case had issued a summons but failed to serve the summons on the respondent within the required thirty days, and further failed to obtain an endorsement, extension, or alias/pluries summons that would have kept the summons from becoming dormant. *Id.* at 84-86, 617 S.E.2d at 712-13. We therefore concluded that the failure to extend the original summons meant that "the termination of parental action should have been treated as if it had never been filed[,]" and, relevant to the instant case, "where an action has not been filed, a trial court necessarily lacks subject matter jurisdiction." *Id.* at 86, 617 S.E.2d at 713.

I find the *A.B.D.* case to be controlling here. Where, in *A.B.D.*, a summons had merely lost its vitality, here the court file and record

show no summons was ever issued at all.[7] Indeed, during the 24 June 2005 review hearing, and in its Order on Need for Continued Nonsecure Custody, the trial court noted that no summons had been issued to Respondents. Despite this notice of a lack of summons, DSS moved forward with its case, and the record fails to indicate when, or whether, a summons was ever issued. Without a summons, the trial court had no subject matter jurisdiction over this specific matter, even if it has general jurisdiction to hear juvenile cases.

Moreover, although the majority correctly notes that Respondents appeared at several of the hearings at the trial court level, and had representation through both counsel and guardians *ad litem*, those appearances waived personal jurisdiction only, not the subject matter jurisdiction of the court. North Carolina General Statute § 1-75.7 states that "[a] court of this State *having jurisdiction of the subject matter* may, without serving a summons upon him, exercise jurisdiction in an action over a person: (1) Who makes a general appearance in an action[.]". N.C. Gen. Stat. § 1-75.7 (2005) (emphasis added). Thus, a trial court must first acquire subject matter jurisdiction over a specific matter before it can determine that it has personal jurisdiction by virtue of a waiver through general appearance.

Our cases have largely dealt with the issue of personal jurisdiction in such matters, not subject matter jurisdiction, and have occasionally conflated the two. *See*, *e.g.*, *In re A.J.M.*, 177 N.C. App. 745, 751-52, 630 S.E.2d 33, 37 (2006) (finding that respondent had waived the right to challenge insufficiency of service of process and lack of personal jurisdiction by making a general appearance); *In re Howell*, 161 N.C. App. 650, 655-56, 589 S.E.2d 157, 160 (2003) (finding that trial court gained jurisdiction over the respondent through her waiver and

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7. I would also deny the DSS Amended Motion to Amend the Record on Appeal, which the majority grants. Under our Rules of Appellate Procedure, the record on appeal of a termination order must include "a copy of the summons with return, or of other papers showing jurisdiction of the trial court over person or property, or a statement showing same[.]" N.C. R. App. P. 9(a)(1)(c). Moreover, "[e]very pleading, motion, affidavit, or other paper included in the record on appeal *shall show the date on which it was filed* and, if verified, the date of verification and the person who verified." N.C. R. App. P. 9(b)(3) (emphasis added).

Here, although DSS has offered an affidavit from the Clerk stating that she issued a summons in this case, and has attached a copy of that summons to their Motion to Amend the Record on Appeal, the copy provided has no time or date stamp showing that it was actually issued or filed in a timely manner. This copy therefore does not meet the requirements of our appellate rules and, as such, cannot be included in the record on appeal.

general appearances); *Mitchell*, 126 N.C. App. at 434, 485 S.E.2d at 624 (vacating order adjudicating juvenile neglected because no summons was issued so trial court did not have subject matter jurisdiction nor personal jurisdiction because respondent objected to insufficiency of service of process at initial hearing); *In re J.L.P.*, 181 N.C. App. 606, 640 S.E.2d 446 (2007) (finding that juvenile had waived defense of insufficiency of process by making general appearance and not objecting at hearing, but making no statement as to subject matter jurisdiction even though no summons issued); *In re A.W.M.*, 176 N.C. App. 766, 627 S.E.2d 351 (unpublished, No. COA05-886, 21 Mar. 2006) (finding that respondent had waived issue of insufficiency of process by "fully participating in all proceedings of the trial court without raising the issue" but making no specific statement as to subject matter jurisdiction even though no summons was issued), *disc. review denied*, 361 N.C. 219, 642 S.E.2d 241 (2007).

Nevertheless, given the uncertain history of the copy of the summons in this case, I conclude that the court file and record lack evidence that the summons was issued in a timely manner. I would therefore vacate the order of the trial court for lack of subject matter jurisdiction in this matter. The purpose of a summons to confer subject matter jurisdiction on a trial court, and the requisite distinction between the ability to waive personal jurisdiction but not subject matter jurisdiction, are questions fundamental to our judicial system. Accordingly, I respectfully dissent from the majority opinion.

DAY'LE LATHON, EMPLOYEE, PLAINTIFF v. CUMBERLAND COUNTY, EMPLOYER, SELF-INSURED (KEY RISK MANAGEMENT SERVICES, SERVICING AGENT), DEFENDANTS

No. COA06-912

(Filed 19 June 2007)

1. Workers' Compensation— opinion filed after term of commissioner expired—validity—holdover—de facto officers

The Industrial Commission's opinion and award in a workers' compensation case was not void even though it was filed after the terms of two of the commissioners on the panel deciding plaintiff's case had expired, because: (1) under N.C. Const. art. VI, § 10, N.C.G.S. § 128-7, and *State ex rel. Martin v. Preston*, 325 N.C. 438 (1989), the two commissioners were still prop-

erly serving since they continue to hold their positions upon expiration of their term until other appointments are made; (2) nothing in the record indicated that defendants raised the issue of the validity of the commissioners' ongoing tenures in office before the full Commission as required by N.C. R. App. P. 10(b)(1); and (3) even if under *Estes v. N.C. State Univ.*, 117 N.C. App. 126 (1994), the Commissioners were unable to continue serving after their terms expired, the fact that they continued to publicly discharge their duties as Commissioners rendered them de facto officers.

2. Workers' Compensation— findings of fact—ninety-five percent of job is keyboarding or handwriting affidavits

The Industrial Commission did not err in a workers' compensation case by finding that ninety-five percent of plaintiff employee's job is keyboarding or handwriting affidavits, because: (1) defendants concede that this finding is supported by plaintiff's own testimony; and (2) the finding cannot be disturbed on appeal regardless of whether there is also evidence to the contrary.

3. Workers' Compensation— findings of fact—credibility of doctor's testimony

The Industrial Commission did not err in a workers' compensation case by finding that a doctor's testimony was credible rather than agreeing with the deputy commissioner that the testimony should not be accepted as credible, because: (1) the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony; and (2) the Court of Appeals cannot review the Commission's credibility determination.

4. Workers' Compensation— findings of fact—occupational disease—carpal tunnel syndrome

The Industrial Commission did not err in a workers' compensation case by finding that plaintiff employee contracted an occupational disease from her work duties, because: (1) although carpal tunnel syndrome is not specifically listed as an occupational disease in N.C.G.S. § 97-53, it falls within the catchall provision of N.C.G.S. § 97-53(13); (2) the Commission's findings are supported by a doctor's testimony even though defendants have pointed to contrary testimony; and (3) the findings of fact support the Commission's conclusion.

Judge TYSON dissenting.

Appeal by defendants from opinion and award entered 7 April 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 February 2007.

MacRae, Perry & MacRae, L.L.P., by Daniel T. Perry, III, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Dayle A. Flammia and Bradley G. Inman, for defendants-appellants.

GEER, Judge.

Defendants Cumberland County and Key Risk Management Services appeal from an opinion and award of the North Carolina Industrial Commission concluding that plaintiff Day'le Lathon is entitled to workers' compensation benefits as a result of carpal tunnel syndrome plaintiff developed while working for defendant Cumberland County. On appeal, defendants argue that the Commission's opinion and award is void because it was filed after the terms of two of the commissioners on the panel deciding plaintiff's case had expired. Because, however, defendants did not raise this issue before the Full Commission, it has not been properly preserved for appellate review. Further, defendants' remaining arguments regarding the merits of plaintiff's claim address only questions of credibility and weight to be given evidence and, therefore, under our standard of review, do not present a basis for reversal. Consequently, we affirm the opinion and award of the Commission.

Facts

Plaintiff, who was 40 years old at the time of the hearing before the deputy commissioner, had been the Assistant Director of Pretrial Services for the County since 1999. In this position, plaintiff prepared reports, supervised other employees, and entered data. Plaintiff, who is right-handed, began to notice tingling, numbness, and swelling in her left hand in December 2001.

Defendants referred plaintiff to Occupational Health Services on 8 February 2002, where nerve conduction studies were "normal." Plaintiff was later referred to orthopedist Dr. Louis Clark at the Cape Fear Orthopaedic Clinic, who examined plaintiff for complaints related to pain and spasms in both hands and twitching in her fingers. Dr. Clark did not believe he could help plaintiff surgically and referred her to a rheumatologist, Dr. Maria Watson.

Dr. Watson concluded that plaintiff did not have rheumatoid or inflammatory arthritis, but rather diagnosed plaintiff as suffering from tendinitis. Dr. Watson explained in her deposition:

> She actually had tendinitis secondary to overuse and hand pain, again, using the keyboard at work. She does not do a lot of home work that would cause this. My belief is that her job is the primary cause of her problem. I have suggested that she will need to have things changed at work if her tendinitis is to get better.

After plaintiff's counsel asked her to assume that plaintiff was "doing keyboarding for 75 to 95 percent of her time," Dr. Watson testified that plaintiff would be "more prone to [tendinitis] than someone that did not do keyboarding for that amount of time[.]"

In response to questioning by defendants' counsel, Dr. Watson testified that she was not aware of any recognizable link between tendinitis and plaintiff's job as Assistant Director of Pretrial Services. She then testified as follows:

> Q. Do you have an opinion satisfactory to yourself and to a reasonable degree of medical certainty whether tendinitis is characteristic of and peculiar to the position of assistant director of pre-trial services?
>
> . . . .
>
> A. I don't have anything. I guess no.

Dr. Watson agreed that tendinitis is "an ordinary disease of life."

On 4 May 2004, plaintiff was examined by Dr. James E. Lowe, Jr., who is board certified in plastic surgery. He explained that his "boards state that [he is] qualified and certified to perform hand surgery" and that he performs approximately 300 hand surgeries a year, including carpal tunnel surgeries. Dr. Lowe found that plaintiff had clinical evidence of carpal tunnel syndrome and ordered another nerve conduction study. The nerve conduction study, read by a board certified neurologist, showed "a polyneuropathy of the upper extremities involving both the median and the ulnar nerves," which, according to Dr. Lowe, confirmed his carpal tunnel diagnosis. At first, Dr. Lowe continued plaintiff on medication and instructed her to wear splints at night. When, on 26 July 2004, Dr. Lowe last treated plaintiff for continued numbness in both hands, he recommended carpal tunnel surgery on both of plaintiff's hands.

With respect to the cause of plaintiff's carpal tunnel syndrome, Dr. Lowe testified:

> I do have an opinion to a reasonable degree of medical certainty that is supported by essentially all of the literature on carpal tunnel surgery, that it is causal—casually [sic] related to repetitionous [sic] work, and I feel that in her case that her carpal tunnel surgery is related to her repetitionous [sic] work, which causes synovitis.

According to Dr. Lowe, synovitis is the most common cause of carpal tunnel syndrome. He concluded that repetitious activity was "the most significant contributing factor" to plaintiff's carpal tunnel syndrome. Dr. Lowe explained that his diagnosis was consistent with Dr. Watson's diagnosis because tendinitis is the same as synovitis. Dr. Lowe further testified that the general public at large, who does not do repetitive keyboarding to the degree of plaintiff, would not be at equal risk of developing carpal tunnel syndrome as someone who does perform the repetitive activity.

Defendants denied plaintiff's claim and, following a hearing, Deputy Commissioner Theresa Stephenson filed an opinion and award on 21 December 2004 denying plaintiff's claim. The deputy commissioner did not find Dr. Lowe's testimony credible, and, therefore, concluded plaintiff had failed to establish that she suffered from an occupational disease. Plaintiff appealed to the Full Commission.

On 7 April 2006, in an opinion and award authored by Commissioner Laura Kranifeld Mavretic and joined by Commissioner Thomas J. Bolch, the Full Commission reversed the decision of the deputy commissioner. The Commission found "that plaintiff's repetitious work caused synovitis, which led her to develop bilateral carpal tunnel syndrome"; that "plaintiff contracted an occupational disease to both of her hands as a result of her job"; that "[p]laintiff's condition is the result of a disease that is characteristic of and peculiar to her particular trade, occupation or employment"; and that "[p]laintiff's disease is not an ordinary disease of life to which the public is equally exposed outside the employment." Based on these findings, the Commission concluded that plaintiff had contracted a compensable occupational disease. Commissioner Dianne C. Sellers dissented on the grounds that the majority erred by finding Dr. Lowe's testimony credible. Defendants timely appealed to this Court.

I

[1] We turn first to defendants' argument that the Commission's opinion and award is void because it was filed after the terms of Commissioners Bolch and Mavretic had expired. Defendants rely upon *Estes v. N.C. State Univ.*, 117 N.C. App. 126, 128, 449 S.E.2d 762, 764 (1994), in which this Court vacated an opinion and award of the Industrial Commission when it was filed after the term of one of the two commissioners joining in the majority opinion had expired.

Here, the terms for Commissioners Bolch and Mavretic—the two members of the majority—expired on 30 June 2004 and 30 April 2005 respectively. *See* N.C. Gen. Stat. § 97-77(a) (2005) ("[T]he Governor shall appoint [commissioners] for a term of six years, and thereafter the term of office of each commissioner shall be six years."). Defendants assert that we are, therefore, required under *Estes* to vacate and remand the Commission's decision filed on 7 April 2006.

Plaintiff responds that *Estes* is at odds with a state constitutional provision that "[i]n the absence of any contrary provision, all officers in this State, whether appointed or elected, *shall hold their positions until other appointments are made* or, if the offices are elective, until their successors are chosen and qualified." N.C. Const. art. VI, § 10 (emphasis added). Our Supreme Court considered a similarly worded provision applying to judges, N.C. Const. art. IV, § 16, and held: "Where, as here, the incumbents' terms end without successors having been elected and qualified, and new terms of office have not begun, the Constitution's 'hold over' provision operates and allows the incumbents to continue serving in the interim. The constitutional provision . . . allows the judges to remain in office." *State ex rel. Martin v. Preston*, 325 N.C. 438, 455, 385 S.E.2d 473, 482 (1989) (internal citation omitted). This principle has also been codified by our General Assembly in N.C. Gen. Stat. § 128-7 (2005) ("All officers shall continue in their respective offices until their successors are elected or appointed, and duly qualified."). Under the state constitution, N.C. Gen. Stat. § 128-7, and *Preston*, it would appear that Commissioners Mavretic and Bolch were still properly serving.

Neither *Estes* nor defendants address N.C. Const. art. VI, § 10. We need not, however, resolve the apparent conflict between *Estes* and N.C. Const. art. VI, § 10—and the analysis of our Supreme Court in *Preston*—since defendants have failed to preserve this issue for appellate review.

Rule 10(b)(1) of the Rules of Appellate Procedure provides: "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." As our Supreme Court has observed with respect to N.C.R. App. P. 10(b)(1), its purpose " 'is to require a party to call the [trial] court's attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal.' " *Reep v. Beck*, 360 N.C. 34, 37, 619 S.E.2d 497, 499 (2005) (quoting *State v. Canady*, 330 N.C. 398, 401, 410 S.E.2d 875, 878 (1991)).

In the present case, nothing in the record indicates that defendants raised the issue of the validity of Commissioners Bolch's and Mavretic's ongoing tenures in office before the Full Commission. The record includes a calendar for the 8 June 2005 docket before the Full Commission, identifying Commissioners Sellers, Mavretic, and Bolch as the panel before which this case would be heard. The record, however, contains no indication that defendants at any time prior to appeal objected to the presence of Commissioners Bolch and Mavretic even though, under *Estes*, it would be impossible to have an opinion joined by two Commissioners with unexpired terms.

This failure is particularly significant given that the Commission—had it agreed with defendants' argument under *Estes*—could have remedied the situation by convening another panel comprised of individuals whose terms had not yet similarly expired. *See* N.C. Gen. Stat. § 97-85 (2005) ("Provided further, the chairman of the Industrial Commission shall have the authority to designate a deputy commissioner to take the place of a commissioner on the review of any case, in which event the deputy commissioner so designated shall have the same authority and duty as does the commissioner whose place he occupies on such review."). We decline to construe *Estes* so as to permit defendants to circumvent this well-established rule of appellate practice and obtain a ruling on the issue from this Court without first calling it to the attention of the Commission.

Estes presented a materially different set of circumstances. In *Estes*, Commissioner Davis' term expired eight months *after* oral argument before the panel, but before entry of the opinion and award. 117 N.C. App. at 128, 449 S.E.2d at 764. Thus, the parties did not have a meaningful opportunity to object. It is also apparent that the question of the propriety of Commissioner Davis' joining in the opinion was considered by the panel since Commissioner Davis attached an

affidavit to the opinion and award stating that he had joined the opinion prior to his term's expiration. *Id.* The issue had, therefore, been preserved for appellate review.

This case does not involve a question of jurisdiction that can be raised at any time. Even under *Estes*, Commissioners Mavretic and Bolch could be considered *de facto* officers. As this Court has explained: "*De facto* status arises where a person assumes office 'under *color* of authority' or where one 'exercises the duties of the office so long or under such circumstances as to raise a presumption of his right; in which cases his necessary official acts are valid as to the public and third persons; but he may be ousted by a direct proceeding.' " *Kings Mountain Bd. of Educ. v. N.C. State Bd. of Educ.*, 159 N.C. App. 568, 575, 583 S.E.2d 629, 635 (quoting *Norfleet v. Staton*, 73 N.C. 546, 550 (1875)), *disc. review denied*, 588 S.E.2d 476 (2003). *See also* N.C. Gen. Stat. § 128-6 (2005) ("Any person who shall, by the proper authority, be admitted and sworn into any office, shall be held, deemed, and taken, by force of such admission, to be rightfully in such office until, by judicial sentence, upon a proper proceeding, he shall be ousted therefrom, or his admission thereto be, in due course of law, declared void.").

Here, there is no dispute that Commissioners Mavretic and Bolch were properly appointed as Commissioners of the Industrial Commission. As a result, even if, under *Estes*, they were unable to continue serving after their terms expired, the fact that they continued to publicly discharge their duties as Commissioners rendered them *de facto* officers. *See State ex rel. Duncan v. Beach*, 294 N.C. 713, 720, 242 S.E.2d 796, 800 (1978) (holding that "[a] judge *de facto* is defined as one who occupies a judicial office under some color of right, and for the time being performs its duties with public acquiescence, though having no right in fact" (internal quotation marks omitted)). Further, "[t]he acts of a *de facto* officer are valid in law in respect to the public whom he represents and to third persons with whom he deals officially." *State v. Porter*, 272 N.C. 463, 465-66, 158 S.E.2d 626, 628 (1968).[1]

Thus, as at least *de facto* officers, the public acts of Commissioners Mavretic and Bolch are deemed valid and their presence on the panel cannot give rise to a jurisdictional challenge that eliminates the

1. We note that this Court has also held that "[t]he validity of the title *or an act* of a *de facto* officer may be challenged only through an action of *quo warranto*." *Kings Mountain*, 159 N.C. App. at 575, 583 S.E.2d at 635 (emphasis added).

need to comply with N.C.R. App. P. 10.[2] Because defendants do not contend that they raised this issue below, we may not consider this assignment of error. A contrary conclusion would allow a party to wait and see whether a panel would rule favorably, secure in the knowledge that any unfavorable ruling could be voided on appeal. This Court has previously rejected such an approach in the analogous area of judicial recusal. *See In re Key*, 182 N.C. App. 714, 719, 643 S.E.2d 452, 456 (2007) (holding that when party to civil proceeding failed to move at trial level to recuse judge for bias and prejudice, Rule 10(b)(1) precluded appellate review); *State v. Love*, 177 N.C. App. 614, 628, 630 S.E.2d 234, 243 ("There was no request, objection or motion made by defendant at trial [to recuse the trial judge] and therefore the question was not properly preserved for appeal."), *disc. review denied*, 360 N.C. 580, 636 S.E.2d 192-93 (2006). We see no basis for applying a different rule when a party fails to object to a "holding over" commissioner.

II

We turn now to defendants' arguments challenging the Commission's findings of fact and conclusions of law. "[A]ppellate review of an award from the Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 705, 599 S.E.2d 508, 512 (2004). Findings of fact by the Commission are conclusive on appeal " 'when supported by competent evidence, even when there is evidence to support a finding to the contrary.' " *Gutierrez v. GDX Auto.*, 169 N.C. App. 173, 176, 609 S.E.2d 445, 448 (quoting *Plummer v. Henderson Storage Co.*, 118 N.C. App. 727, 730, 456 S.E.2d 886, 888, *disc. review denied*, 340 N.C. 569, 460 S.E.2d 321 (1995)), *disc. review denied*, 359 N.C. 851, 619 S.E.2d 408 (2005).

[2] Defendants first assert that the Commission erred by finding that "[n]inety-five percent of plaintiff's job is keyboarding or handwriting affidavits." Defendants concede that this finding is supported by plaintiff's own testimony. Defendants' assertion "that plaintiff's claim

2. Defendants also cite *Coppley v. PPG Indus., Inc.*, 142 N.C. App. 196, 197-99, 541 S.E.2d 743, 744-45 (2001) (voiding majority opinion and award entered on remand because concurring commissioner had retired prior to filing). In *Coppley*, however, one of the commissioners in the majority had actually left the Commission prior to the filing of the opinion and, therefore, the panel was composed of only two commissioners. Further, the appellant in *Coppley* would have had no opportunity to raise the issue prior to appeal.

in this regard is not credible given her title, admitted duties, and total lack of corroborating evidence" was an argument for the Commission. Since this finding is supported by plaintiff's testimony, it cannot be disturbed on appeal regardless whether there is also evidence to the contrary. *See Alexander v. Wal-Mart Stores, Inc.*, 166 N.C. App. 563, 573, 603 S.E.2d 552, 558 (2004) (Hudson, J., dissenting) (noting that if "there is any evidence at all, taken in the light most favorable to the plaintiff, the finding of fact stands, even if there is substantial evidence to the contrary"), *adopted per curiam*, 359 N.C. 403, 610 S.E.2d 374 (2005).

[3] Defendants next contend that the Commission "erred in finding that Dr. Lowe's testimony was credible" rather than agreeing with the deputy commissioner that the testimony should not be accepted as credible. It is well-established that " '[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). Consequently, this Court may not review the Commission's credibility determination. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116-17, 530 S.E.2d 549, 553 (2000).

[4] Finally, defendants argue that the Commission erred in concluding that plaintiff contracted an occupational disease from her work duties. Because carpal tunnel syndrome is not specifically listed as an occupational disease in N.C. Gen. Stat. § 97-53 (2005), it falls instead within the catchall provision of N.C. Gen. Stat. § 97-53(13). Under § 97-53(13), an occupational disease includes "[a]ny disease . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment."

As the Supreme Court has explained, in order to be considered an occupational disease under N.C. Gen. Stat. § 97-53(13), a condition must be:

> (1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be "a causal connection between the disease and the [claimant's] employment."

Rutledge v. Tultex Corp., 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (quoting *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 105-06 (1981)). The first two elements "are satisfied if, as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally." *Id.* at 93-94, 301 S.E.2d at 365.

Defendants assert that "plaintiff failed to elicit credible expert medical testimony in support of her position, and therefore [has] failed to prove the existence of an occupational disease . . . ." Defendants suggest that the testimony of Dr. Watson is more credible and supports their position that plaintiff did not have a compensable occupational disease. Defendants do not dispute that Dr. Lowe's testimony—found credible by the Commission—supports the Commission's findings (1) "that plaintiff contracted an occupational disease to both of her hands as a result of her job with defendant," (2) that "[p]laintiff's condition is the result of a disease that is characteristic of and peculiar to her particular trade, occupation or employment," and (3) "[p]laintiff's disease is not an ordinary disease of life to which the public is equally exposed outside the employment."

Because the Commission's findings are supported by Dr. Lowe's testimony, they are binding even though defendants have pointed to contrary testimony. Further, those findings of fact support the Commission's conclusion that plaintiff has contracted a compensable occupational disease. *See*, *e.g.*, *Terasaka v. AT&T*, 174 N.C. App. 735, 743-44, 622 S.E.2d 145, 151 (2005) (plaintiff carried burden of showing carpal tunnel syndrome was an occupational disease when doctors testified that extensive typing like plaintiff testified she routinely performed placed plaintiff at increased risk), *aff'd per curiam and disc. review improvidently allowed*, 360 N.C. 584, 634 S.E.2d 888 (2006). We, therefore, affirm the opinion and award of the Commission.

Affirmed.

Judge ELMORE concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge dissenting.

The majority's opinion ignores binding precedent from this Court that the Commission's opinion and award is void when entered after

the expiration of two of the Commissioner's terms. *Coppley v. PPG Industries, Inc.*, 142 N.C. App. 196, 541 S.E.2d 743 (2001); *Estes v. N.C. State Univ.*, 117 N.C. App. 126, 449 S.E.2d 762 (1994). Neither of these precedents have been overturned by our Supreme Court. "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." *State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 133-34 (2004); *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). I respectfully dissent.

This case was heard before a panel of the Full Commission consisting of Commissioners Bolch, Mavretic, and Sellers on 8 June 2005. The opinion and award was signed by the Commissioners on 3 August 2005 and filed on 7 April 2006. Commissioner Mavretic authored the opinion and award and Commissioner Bolch concurred. Commissioner Sellers dissented. Defendant asserts the terms of Commissioners Bolch and Mavretic expired on 30 June 2004 and 30 April 2005 respectively.

I. Appellate Rule 10(a)

This issue is properly before this Court. Rule 10(a) of the North Carolina Rules of Appellate Procedure provides:

> [U]pon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly making them the basis of assignments of error, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, *whether the court had jurisdiction of the subject matter*, and whether a criminal charge is sufficient in law.

N.C.R. App. P. 10(a) (2007) (emphasis supplied). "Jurisdiction is '[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it.' " *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 789-90 (2006) (quoting Black's Law Dictionary 856 (7th ed. 1999)). "[A] court must also have subject matter jurisdiction, or jurisdiction over the nature of the case and the type of relief sought, in order to decide a case." *Id.* at 590, 636 S.E.2d at 790 (quotation omitted). Subject matter jurisdiction is "the power to pass on the merits of the case." *Boyles v. Boyles*, 308 N.C. 488, 491, 302 S.E.2d 790, 793 (1983).

Defendant argues Commissioners Bolch and Mavretic had no jurisdiction, subject matter or otherwise, to rule upon this case after

their terms had expired prior to the case being heard and that the Commission's opinion and award is void. Defendant's assignment of error numbered 7 states, "The Commission erred as a matter of law in filing its Opinion and Award without a sufficient number of Commissioners concurring." Defendant has properly raised and argued this issue through an assignment of error. This issue is properly before this Court. N.C.R. App. P. 10(a).

II. *Estes* and *Coppley*

The proper holding in this case is controlled by this Court's prior precedents. In *Estes*, the Full Commission panel consisted of three commissioners at the time of the original hearing. 117 N.C. App. at 128, 449 S.E.2d at 764. Chairman Booker authored the opinion and award and Commissioner Davis concurred. *Id.* Commissioner Ward dissented. *Id.* However, when the opinion and award was signed and filed, Commissioner Davis's term had expired. *Id.* This Court unanimously held the Full Commission's decision was void as a matter of law. *Id.*

This Court also considered this issue in *Coppley*, 142 N.C. App. 196, 541 S.E.2d 743. Commissioner Bolch authored the opinion and award and Commissioner Bunn concurred. *Id.* Commissioner Riggsbee dissented. *Id.* at 197, 541 S.E.2d at 743. Chairman Bunn signed the opinion and award on 22 June 1999 and left the Commission on 21 September 1999. *Id.* The opinion and award was filed on 19 October 1999. *Id.* This Court stated, " 'Where a commissioner's vote was taken before the expiration of his term of office, but the decision was not issued until after the term expired, the decision of the Commission is void as a matter of law.' " *Id.* at 198, 541 S.E.2d at 744 (quoting Leonard T. Jernigan, Jr., *North Carolina Workers' Compensation Law and Practice* § 25-9 (3d ed. 1999)). The opinion and award was held to be void because no majority of the Commission existed when it was filed. *Id.*

The facts of this case are more egregious than either of the facts in *Estes* or *Coppley*. Defendant argues that unlike the facts in *Estes and Coppley*, Commissioners Bolch and Mavretic comprised the total majority and both their terms had expired before the panel convened, the case was heard, and the opinion and award was entered. On 8 September 2006, this Court allowed defendant's Motion for Addition to Record on Appeal filed on 24 August 2006 as exhibits to the record on appeal. Attached to the motion as Exhibit A were copies of two letters, both signed by former Governor James B. Hunt, Jr. One letter,

dated 10 June 1999, is addressed to Mr. Thomas J. Bolch. The first paragraph of the letter states in full, "It gives me great pleasure to reappoint you as a member of the North Carolina Industrial Commission. Pursuant to General Statute 97-77, your appointment is effective immediately. Your term *will expire on June 30, 2004*." (Emphasis supplied).

The second letter, dated 21 July 2000, is also signed by former Governor Hunt and is addressed to Ms. Laura K. Mavretic. The first paragraph of this letter states in full, "It gives me great pleasure to appoint you to serve as a member of the North Carolina Industrial Commission. Pursuant to General Statute 97-77, your appointment is effective August 1, 2000 and *will expire on April 30, 2005*." (Emphasis supplied).

Nothing in the record shows either Commissioners Bolch or Mavretic were reappointed to the Commission after their terms of office expired on "June 30, 2004," and "April 30, 2005," respectively. According to the Commission's website, Commissioner Bolch was replaced by Mr. Danny Lee McDonald, who was sworn into office on 9 February 2007. Commissioner Mavretic was administered the oath of office on 8 February 2007. *See* News Release dated 2 February 2007, http://www.comp.state.nc.us/ncic/pages/020207nr.htm.

Defendant argues Commissioners Bolch and Mavretic purported to convene the Commission to hear this case, and signed and entered the opinion and award after their terms had expired and without a current commission issued by the Governor to renew their terms. N.C. Gen. Stat. § 97-77 (2005) mandates "the Governor *shall* appoint a successor for a term of six years, and thereafter the term of office of each commissioner *shall* be six years." (Emphasis supplied).

This Court is bound by both *Estes* and *Coppley*. *Jones*, 358 N.C. at 487, 598 S.E.2d at 133-34; *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. "As a commission it acts by a majority of its *qualified members* at the time decision is made." *Gant v. Crouch*, 243 N.C. 604, 607, 91 S.E.2d 705, 707 (1956) (emphasis supplied).

III. Conclusion

Defendant's appeal challenges the jurisdictional members of the Commission to hear this appeal. N.C.R. App. P. 10(a). Following *Gant*, *Estes*, and *Coppley*, no majority of the Commission possessed "the power to pass on the merits of the case" or concur in the opinion and

award entered. *Boyles*, 305 N.C. at 491, 302 S.E.2d at 793. The opinion and award is void and must be vacated. *Gant*, 243 N.C. at 607, 91 S.E.2d at 707; *Coppley*, 142 N.C. App. at 198, 541 S.E.2d at 744; *Estes*, 117 N.C. App. at 128, 449 S.E.2d at 764. I respectfully dissent.

IN THE MATTER OF: Dj.L., D.L., AND S.L., MINOR CHILDREN

No. COA07-31

(Filed 19 June 2007)

1. Child Abuse and Neglect— verification of petition—drawn, verified, filed—separate requirements

The phrases beginning with "drawn," "verified," and "filed" in N.C.G.S. § 7B-403(a) (concerning verification of juvenile petitions) are separate requirements.

2. Child Abuse and Neglect— petition—signed by social services employee—standing to initiate action

A juvenile petition contained sufficient information from which the trial court could determine that the person who signed the petition had standing to initiate an action under N.C.G.S. § 7B-403(a), construing the juvenile petition as to do substantial justice. It was not argued that the person signing the petition was not an authorized representative of the director of the county department of social services or that she exceeded the scope of her authority.

3. Child Abuse and Neglect— petition—signed by identifiable social services employee

Where an identifiable employee of the Youth and Family Services Division of the Mecklenburg County Department of Social Services actually signed and verified a juvenile petition, the case was not controlled by *In re T.R.P.*, 173 N.C. App. 541, (which held that there was no subject matter jurisdiction for a juvenile petition where the petition was neither signed nor verified).

4. Child Abuse and Neglect— delay between filing and hearing—less than six months—not prejudice per se

A delay between the filing of a juvenile petition and the hearing did not present an extraordinary delay resulting in prejudice per se (and thus reversible error) because the delay was less than

six months, which would have been within the trial court's statutory authority for granting a continuance.

5. Termination of Parental Rights— waiver of pretrial hearing—not ineffective assistance of counsel

General averments about waiving a pretrial hearing were not sufficient to establish prejudice and ineffective assistance of counsel in a termination of parental rights hearing.

6. Termination of Parental Rights— waiver of defective service of process—not ineffective assistance of counsel

The waiver of the defense of defective service of process did not constitute ineffective assistance of counsel in a termination of parental rights case. Litigants often choose to waive this defense when they had actual notice of the action and when the immediate and inevitable response of the opposing party would be to reserve the process.

7. Constitutional Law— effective assistance of counsel—vigorous representation—overwhelming evidence

Respondent was not deprived of effective assistance of counsel at a termination of parental rights hearing where counsel was familiar with the substantive issues in the case, as well as respondent's uncooperative personality, and counsel's representation was vigorous and zealous, if imperfect. DSS presented overwhelming evidence to support at least one ground for termination of respondent's parental rights, and it is difficult to see a defense on which respondent could have prevailed.

Appeal by respondent mother from judgment entered 6 November 2006 by Judge Regan Miller in District Court, Mecklenburg County. Heard in the Court of Appeals 14 May 2007.

Kathleen Widelski, Edward Yeager, and Tyrone C. Wade, for petitioner-appellee Mecklenburg County Department of Social Services.

McDaniel & Anderson, LLP by John M. Kirby for Guardian Ad Litem.

Jeffrey L. Miller for respondent-appellant.

STROUD, Judge.

Respondent Marie L. appeals the trial court order terminating her parental rights to three children, Dj.L., D.L., and S.L. This order was

entered in District Court, Mecklenburg County by Judge Regan Miller on 6 November 2006, following a termination hearing at which respondent was represented by appointed counsel. The trial court terminated respondent's parental rights on three grounds: (1) respondent neglected the children, (2) respondent willfully left the children in foster care for more than twelve months without making reasonable progress under the circumstances toward correcting the conditions that led to the children's removal from the home, and (3) respondent willfully failed to pay a reasonable portion of the cost of the children's care for a continuous period of more than six months next preceding filing of the petition for termination by the Mecklenburg County Department of Social Services [DSS]. The trial court's termination of respondent's parental rights was supported, in part, by findings that respondent failed to attend to the medical needs of her children, including the needs of Dj.L. who has juvenile diabetes; respondent failed to attend medical appointments for the children; respondent failed to educate herself on the proper care of Dj.L.'s condition, which is treated with an insulin pump; respondent failed to obtain and maintain stable housing; respondent's failures were, at times, attributable to marijuana use; respondent failed to complete substance abuse treatment and follow after-care recommendations; and respondent paid zero dollars toward the cost of care for her children in foster care.

Respondent raises three questions on appeal: (1) whether DSS lacked standing to file a termination petition because it was never awarded custody of the children by a court of competent jurisdiction, (2) whether the trial court erred by holding a termination hearing approximately six months after DSS filed its petition for termination, and (3) whether the trial court erred by terminating respondent's parental rights because respondent did not receive effective assistance of counsel during the termination hearing. We affirm the trial court order.

I. Standing

[1] Respondent argues that DSS lacked standing to file a petition for termination of her parental rights to Dj.L., D.L., and S.L. In support of her argument, respondent emphasizes that N.C. Gen. Stat. § 7B-1103(3) (2005) provides that a county department of social services may file a petition to terminate parental rights only when it has been given custody of a juvenile by a court of competent jurisdiction. Respondent argues that the trial court in this case did not have jurisdiction to grant custody of Dj.L., D.L., and S.L. to DSS because DSS's

juvenile petition alleging that the children are dependent and neglected was not properly verified.

Respondent cites *In re T.R.P.*, 360 N.C. 588, 636 S.E.2d 787 (2006), for the proposition that a juvenile petition that is not properly verified does not confer subject matter jurisdiction on the trial court. The defect in verification identified by respondent is that the underlying petition fails to state that the affiant, Betty Hooper, is either the director of DSS or an authorized agent of the director. Based on this alleged defect, respondent concludes that the adjudication order resolving DSS's juvenile petition is void and that DSS was never granted custody of Dj.L., D.L., and S.L. by a court of competent jurisdiction; therefore, respondent reasons that DSS did not have standing to file a petition for termination of her parental rights under section 7B-1103(3). This argument is without merit.

N.C. Gen. Stat. § 7B-403(a) (2005) provides that a juvenile petition alleging dependency, abuse, or neglect "shall be drawn by the director, verified before an official authorized to administer oaths, and filed by the clerk, recording the date of filing." We read the phrases beginning with "drawn," "verified," and "filed" to be separate requirements.

[2] First, N.C. Gen. Stat. § 7B-403(a) requires a juvenile petition alleging abuse, neglect, or dependency to be "drawn by the director." N.C. Gen. Stat. § 7B-101(10) (2005) defines "director" as "[t]he director of the county department of social services in the county in which the juvenile resides or is found, or the director's representative as authorized in G.S. § 108A-14." N.C. Gen. Stat. § 108A-14(b) (2005) permits the director of a county department of social services to "delegate to one or more members of his staff the authority to act as his representative." Such delegation may extend to the director's duty "[t]o assess reports of child abuse and neglect and to take appropriate action to protect such children" pursuant to Chapter 7B. N.C. Gen. Stat. § 108A-14(a)(11), (b).

Here, the petition alleging Dj.L., D.L., and S.L. to be dependent and neglected juveniles states, in part, that "Betty Hooper, Petitioner, ha[s] sufficient knowledge or information to believe that a case has arisen which invokes the juvenile jurisdiction of the Court." Betty Hooper signed the document as the "petitioner" and listed her address as "Youth and Family Services," which is a division of the Mecklenburg County Department of Social Services. From the language above, the trial court knew that Betty Hooper was an employee

of Youth and Family Services, who had actual knowledge of the factual basis for the allegations in the juvenile petition.

Although the best practice is to include a distinct statement that the petitioner is the director of the county department of social services or is an authorized representative of the director, we hold that the juvenile petition in the case *sub judice* contained sufficient information from which the trial court could determine that Betty Hooper had standing to initiate an action under section 7B-403(a). In so holding, we construe the juvenile petition "as to do substantial justice." N.C. Gen. Stat. § 1A-1, Rule 8 (2005) ("All pleadings shall be so construed as to do substantial justice."). We emphasize that respondent has never argued, and does not now argue, that Betty Hooper is not an authorized representative of the Director of the Mecklenburg County Department of Social Services or that she exceeded the scope of her authority by filing the juvenile petition.

[3] Second, N.C. Gen. Stat. § 7B-403(a) requires a petition alleging abuse, neglect, or dependency to be "verified before an official authorized to administer oaths." N.C. Gen. Stat. § 1A-1, Rule 11(b) sets forth the substance of such verification, stating,

> [i]n any case in which verification of a pleading shall be required by these rules or by statute, it shall state in substance that the contents of the pleading verified are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters he believes them to be true.

Correspondingly, N.C. Gen. Stat. § 10B-40(d) (2005)[1] sets forth a form of verification sufficient for acceptance by North Carolina courts, stating,

> (d) A notarial certificate for an oath or affirmation taken by a notary is sufficient and shall be accepted in this State . . . if it includes all of the following:
>
> (1) Identifies the state and county in which the oath or affirmation occurred;
>
> (2) Names the principal who appeared in person before the notary unless the name of the principal otherwise is clear from the record itself.

1. N.C. Gen. Stat. §§ 10B-40(d)(1) and (3) were repealed by North Carolina Session Laws 2006-59, s. 18, which became effective 1 October 2006, approximately six months after DSS filed its petition for termination in this case.

(3) States that the notary has either (i) personal knowledge of the identity of the principal or (ii) satisfactory evidence of the principal's identity, indicating the nature of that satisfactory evidence;

(4) Indicates that the principal who appeared in person before the notary signed the record in question and certified to the notary under oath or by affirmation as to the truth of the matters stated in the record.

(5) States the date of the oath or affirmation.

(6) Contains the signature and seal or stamp of the notary who took the oath or affirmation.

(7) States the notary's commission expiration date.

Here, the verification page of the petition filed by DSS shows the following:

VERIFICATION

The undersigned Petitioner, being duly sworn, says that the Petition hereon is true to his own knowledge, except as to those matters alleged on information and belief, and as to those matters, he believes it to be true.

Betty Hooper
Petitioner-Affiant

Sworn to and subscribed before me
this the 4th day of June, 2004.

Roma J. Hester
Notary Public

My Commission expires: 05-09-2005

The notary also stamped the document with her seal, which read "Roma J. Hester, Notary Public, Mecklenburg County, N.C." This verification complies with N.C. Gen. Stat. § 1A-1, Rule 11 and N.C. Gen. Stat. § 10B-40(d) in both form and substance. *Cf. In re A.J.H.R. & K.M.H.R.*, 184 N.C. App. ——, —— S.E.2d —— (2007) (concluding that a purported verification did not satisfy N.C. Gen. Stat. § 7B-403 when the principal did not appear before the notary, sign the record in question, or certify the truth of the matters stated therein by oath or affirmation).

We emphasize that the facts *sub judice* are distinct from the facts of *In re T.R.P.*, a case in which the North Carolina Supreme Court recently vacated a custody review order after concluding that the trial court lacked subject matter jurisdiction to resolve the underlying juvenile petition. 360 N.C. 588, 636 S.E.2d 787. In *In re T.R.P.*, the North Carolina Supreme Court stated "the General Assembly's requirement of a verified petition is a reasonable method of assuring that our courts exercise their power only when an identifiable government actor 'vouches' for the validity of the allegations in such a freighted action." *Id.* at 592, 636 S.E.2d at 791. Because the juvenile petition alleging neglect in *In re T.R.P.* was "neither signed nor verified," the Court held that the trial court did not have subject matter jurisdiction to enter an adjudication and disposition order resolving that petition, or to enter a subsequent custody review order pursuant to N.C. Gen. Stat. § 7B-906. *Id.* at 589, 636 S.E.2d at 789. In *In re T.R.P.*, the Court used the phrase "neither signed nor verified" to explain that no one signed as "petitioner-affiant" on the verification page of the juvenile petition: there was no indication "that the principal who appeared in person before the notary signed the record in question and certified to the notary under oath or by affirmation as to the truth of the matters stated in the record." N.C. Gen. Stat. § 10B-40(d)(4); *see In re T.R.P.*, 173 N.C. App. 541, 546-47, 619 S.E.2d 525, 529 (2005), *aff'd*, 360 N.C. 588, 636 S.E.2d 787 (2006). We determine that *In re T.R.P.* does not control the case *sub judice* because, here, an identifiable government actor, and specifically an identifiable employee of the Youth and Family Services Division of the Mecklenburg County Department of Social Services, actually signed and verified the petition.

Applying N.C. Gen. Stat. §§ 108A-14(a)(11), (b), 7B-101(9), 7B-403(a), 1A-1, Rule 11(b), and 10B-40(d), we hold that the juvenile petition drawn and verified by Betty Hooper was sufficient to invoke the subject matter jurisdiction of the trial court. Accordingly, the adjudication order entered 30 August 2004, awarding custody of Dj.L., D.L., and S.L. to DSS, is not void. In that document, the trial court expressly ordered

> 3. The children shall remain in the legal custody of YFS [Youth and Family Services] . . . in foster care.
>
> 4. The child[ren]'s placement and care are the responsibility of YFS and YFS is to provide or arrange for the foster care or other placement of the child. DSS/YSF is granted the authority to obtain medical, educational, psychological, or psychiatric

> treatment and provide other services as deemed appropriate by the agency.

Because DSS is a "county department of social services . . . to whom custody of the juvenile has been given by a court of competent jurisdiction," DSS had standing to file a petition for termination of respondent's parental rights under section 7B-1103(3).

This assignment of error is overruled.

II. N.C. Gen. Stat. § 7B-1109 Time Limit

[4] Respondent argues that the trial court erred by failing to hold a termination hearing within ninety days of the date on which DSS filed its petition for termination. Because respondent has not shown that she was prejudiced by the identified delay, we overrule this assignment of error.

N.C. Gen. Stat. § 7B-1109(a) (2005) provides

> [t]he 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.

Section 7B-1109(d) permits the trial court to continue a termination hearing for up to ninety days for "good cause shown," or beyond ninety days "in extraordinary circumstances when necessary for the proper administration of justice." When the trial court continues a termination hearing beyond ninety days, it "shall issue a written order stating the grounds for granting the continuance"; however, there is no requirement in N.C. Gen. Stat. § 7B-1109 that the trial court make written findings to support an initial ninety day continuance for "good cause."

Here, DSS filed its petition for termination of respondent's parental rights on 28 March 2006 and the trial court held the termination hearing on 26 September 2006. Although approximately six months passed between the date of filing and the date of hearing, there is no continuance order in the record and no indication that any party requested a continuance in this matter; therefore, for purposes of this appeal, we conclude that the trial court erred by calendaring the termination hearing outside the ninety day time limit set in N.C. Gen. Stat. § 7B-1109(a).

However, "time limitations in the Juvenile Code are not jurisdictional." *In re C.L.C.*, 171 N.C. App. 438, 443, 615 S.E.2d 704, 707 (2005), *aff'd per curiam*, 360 N.C. 475, 628 S.E.2d 760 (2006). Failure to comply with a time limitation in the Juvenile Code is not reversible error unless the appellant shows "prejudice resulting from the time delay." *Id.* Thus, to prevail on this assignment of error, an appellant "must appropriately articulate the prejudice arising from the delay." *Cf. In re S.N.H.*, 177 N.C. App. 82, 86, 627 S.E.2d 510, 513 (2006) (applying N.C. Gen. Stat. § 7B-1109(e) and explaining that the passage of more than thirty days between a termination hearing and the trial court's entry of a written termination order is not prejudicial *per se*). "The passage of time alone is not enough to show prejudice." *Id.*

Respondent argues that the delay in this case was an "extraordinary delay" that resulted in prejudice *per se*. We are not persuaded. The time between DSS's filing of the petition for termination and the termination hearing was less than six months, which is a delay that would have been authorized by N.C. Gen. Stat. § 1109(a) and (d) if the trial court had entered a continuance for "good cause shown." N.C. Gen. Stat. § 1109(a), (d) (setting a three month time limit for calendaring and permitting an additional three month continuance for "good cause shown"). In light of the statutory scheme, which affords a degree of flexibility to the trial court in calendaring, we conclude that a delay of less than six months between the filing of a termination petition and a termination hearing is not so "extraordinary" that it results in prejudice *per se*. Because respondent has not shown actual prejudice arising from the identified delay, this assignment of error is overruled.

III. Ineffective Assistance of Counsel

Respondent argues that the trial court erred by entering an order terminating her parental rights because she was denied effective assistance of counsel at the termination hearing. We disagree.

Parents have a statutory " 'right to counsel in all proceedings dedicated to the termination of parental rights.' " *In re L.C.*, *I.C.*, *L.C.*, 181 N.C. App. 278, 282, 638 S.E.2d 638, 641 (2007) (quoting *In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 396 (1996)), *disc. rev. denied*, 361 N.C. 354, —— S.E.2d —— (2007). *See also* N.C. Gen. Stat. §§ 7B-1101.1(a), 1109(b) (2005). This statutory right includes the right to effective assistance of counsel. *In re L.C.*, *I.C.*, *L.C.*, 181 N.C. App. at 282, 638 S.E.2d at 641; *In re Oghenekevebe*, 123 N.C. App. at 436, 473 S.E.2d at 396. Counsel's assistance, as guaranteed by N.C. Gen. Stat. §§ 7B-1101.1(a) and 1109(b), is ineffective

when (1) counsel's performance was deficient and (2) the "deficiency was so serious as to deprive the represented party of a fair hearing." *In re Oghenekevebe*, 123 N.C. App. at 436, 473 S.E.2d at 396. (considering an appellant's ineffective assistance of counsel claim pursuant to former N.C. Gen. Stat. § 7A-289.23 (1995), which has been repealed and recodified); *In re J.A.A.*, 175 N.C. App. 66, 74, 623 S.E.2d 45, 50 (2005).

[5] First, respondent argues that counsel's performance was deficient because counsel waived her right to a pre-trial hearing under N.C. Gen. Stat. § 7B-1108(b) (2005) by failing to file an answer to DSS's petition for termination. The purpose of a pre-trial hearing as defined by N.C. Gen. Stat. § 7B-1108(b) is "to determine the issues raised by the petition." This Court has previously determined that a respondent was not prejudiced by counsel's failure to request a pre-trial hearing in an action for termination of parental rights when the respondent was "on notice as to the issues" to be resolved. *Id.* Respondent does not argue that she was unaware of the issues raised in DSS's petition for termination; rather, respondent states generally that at a pre-trial hearing "witnesses and evidence would have been disclosed, motions made, and trial preparation enhanced." Such general averments are insufficient to establish prejudice resulting in an unfair hearing. *See In re B.P.*, 169 N.C. App. 728, 733, 612 S.E.2d 328, 332 (2005) (denying an ineffective assistance claim when the respondent "failed to specify what motions should have been made and what evidence could have been, but was not, presented before the trial court"). Therefore, assuming *arguendo* that counsel's performance was deficient in this respect, respondent has not shown that the alleged deficiency resulted in an unfair hearing.

[6] Second, respondent argues that counsel's performance was deficient because counsel waived the defense of lack of personal jurisdiction. In particular, respondent argues that the address at which process was hand-delivered was not her "usual place of abode" as required by N.C. Gen. Stat. § 1A-1, Rule 4(j)(a) (2005). The record reflects that process was delivered to respondent's grandmother's home.

We hold that counsel's waiver of the defense of defective service of process did not constitute deficient performance in this case. In so doing, we recognize that litigants often choose to waive the defense of defective service when they had actual notice of the action and when the inevitable and immediate response of the opposing party will be to re-serve the process. Again, respondent does not argue that

she lacked notice of the action or the issues to be resolved thereby. In fact, it is undisputed that at the time of the hearing respondent was living with her grandmother and that she had been living there for approximately one month. Moreover, respondent attended a permanency planning review hearing in this same matter on 9 August 2006, after DSS filed its petition for termination but before the termination hearing.

[7] Third, respondent argues that counsel's performance was deficient because counsel failed to make proper objections to testimony on the ground that it was hearsay, irrelevant, non-responsive, unfairly prejudicial or other evidentiary grounds; counsel failed to develop defenses to the grounds alleged for termination; and counsel did not subpoena witnesses, including witnesses to authenticate the results of respondent's drug screening and respondent's treatment workers. Assuming *arguendo* that counsel's performance was deficient in these respects, these deficiencies did not deprive respondent of a fair hearing.

This Court has previously determined that alleged deficiencies did not deprive the respondent of a fair hearing when the respondent's counsel "vigorously and zealously represented" her, was familiar "with her ability to aid in her own defense, as well as the idiosyncrasies of her personality," and "the record contain[ed] overwhelming evidence supporting termination," *In re J.A.A.*, 175 N.C. App. 66, 74, 623 S.E.2d 45, 50 (2005). After reviewing the record in its entirety, we are convinced that these criteria are met in the case *sub judice*.

Counsel's representation, while not perfect, was vigorous and zealous. Counsel represented respondent at every stage of this consolidated case, beginning with mediation proceedings held on 21 July 2004. As such, counsel was familiar with the substantive issues involved in the case as well as respondent's personality, which appears to have been uncooperative at times.

Most importantly, DSS presented overwhelming evidence to support at least one ground for termination of respondent's parental rights: respondent's failure to pay a reasonable portion of the cost of care for Dj.L., D.L., and S.L. for a continuous period of six months preceding DSS's filing of the petition, although respondent was physically and financially able to do so. N.C. Gen. Stat. § 7B-1111(3) (2005); *In re Shermer*, 156 N.C. App. 281, 285, 576 S.E.2d 403, 406 (2003) (explaining that the existence of a single statutory ground for termination is sufficient to support a termination order). The trial

court entered a child support order requiring respondent to pay $50.00 per month beginning on 29 August 2005; however, as of the termination hearing on 26 September 2006, respondent had not paid any amount toward the cost of care for her children. Respondent testified at the termination hearing that during the six to seven months preceding DSS's filing of its petition for termination, she worked full-time at Hardee's and she also worked at Wrennett's Helping Hands second-hand shop.[2] Based on this and other testimony, the trial court concluded that respondent "could have paid some amount greater than zero towards the cost of her children's care."

In light of the child support order, respondent's failure to pay any amount toward the cost of her children's care, and respondent's admission that she had been employed full-time, we conclude that counsel's alleged deficiencies did not result in an unfair termination hearing. It is difficult to see a defense on which respondent could have prevailed, and respondent cites no such theory on appeal.

For the reasons stated above, we conclude that trial counsel's waiver of the defense of lack of personal jurisdiction based on defective service of process did not constitute deficient performance. We further conclude that the remaining deficiencies alleged by respondent did not deprive her of a fair hearing. This assignment of error is overruled.

IV. Conclusion

For the reasons stated above, we hold that DSS had standing to file a petition for termination of respondent's parental rights under section 7B-1103(3), respondent has failed to show actual prejudice resulting from an approximately six month delay between the date on which DSS filed its petition for termination and the termination hearing, and respondent did not receive ineffective assistance of counsel during the termination hearing. Accordingly, the order terminating respondent's parental rights to Dj.L., D.L., and S.L. entered in District Court, Mecklenburg County on 6 November 2006 by Judge Regan Miller is affirmed.

AFFIRMED.

Judges JACKSON and STEPHENS concur.

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2. Respondent also testified that she held other full time jobs at Ross, Subway, Tally's, IHOP, and several temporary placement agencies during the period in which the children were removed from her home.

JAMES E. PEVERALL, JR., AND OTHERS SIMILARLY SITUATED, PLAINTIFF v. THE COUNTY OF ALAMANCE, DEFENDANT

No. COA06-1106

(Filed 19 June 2007)

1. Appeal and Error— appellate rules violations—sanctions—pay printing costs

Plaintiff's counsel is ordered to pay the printing costs of this appeal under N.C. R. App. P. 34(b) based on appellate rules violations, because: (1) plaintiff failed to provide the applicable standards of review in his brief for any of the questions presented, nor did he supply citations of authorities supporting such standards as required by N.C. R. App. P. 28(b)(6); and (2) plaintiff's assignments of error in both the record and brief incorrectly reference the record in violation of N.C. R. App. P. 28(b)(6) and N.C. R. App. P. 10(c)(1).

2. Appeal and Error— preservation of issues—failure to argue—failure to assign error to additional findings

Plaintiff's second assignment of error that he failed to address in his brief is deemed abandoned under N.C. R. App. P. 28(b)(6), and plaintiff's third assignment of error is limited to a review of findings of fact numbers 10 through 16 because plaintiff did not assign error to the trial court's additional findings of fact.

3. Class Actions— denial of certification—unknown identity and number—disparate law—failure to show adequate representative of class—varying damages

The trial court did not abuse its discretion in an action alleging due process violations, breach of contract, and intentional and negligent infliction of emotional distress by denying plaintiff's motion for class certification of 376 Alamance County employees who, at the time the action was brought, had more than five but less than twenty years of employment with the county who might retire due to a nonwork-related disability and thus be denied county insurance benefits under a new ordinance, because: (1) the identity and number of individuals who might retire under such conditions was unknown and could not be known; (2) the record revealed that the potential class numbered only seven individuals who had been denied benefits, and plain-

tiff failed to establish that the potential class would be so numerous as to make it impracticable to bring each member before the court; (3) plaintiff failed to establish that common issues of law and fact predominated over individual issues such that certifying the class would accomplish the goal of preventing a multiplicity of suits or inconsistent results; (4) plaintiff's claim and the other six employees' claims are disparate in law and fact when plaintiff retired prior to the change and the six individuals retired after the plan was changed; (5) plaintiff cannot serve as an adequate representative of the class when different insurance plans were in effect when plaintiff and the other potential class members were denied benefits; and (6) the damages of the potential class members could be expected to vary greatly.

Judge TYSON dissenting.

Appeal by plaintiff from order entered 28 April 2006 by Judge James C. Spencer, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 11 April 2007.

Randolph M. James, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Elizabeth A. Martineau and Joseph S. Murray, IV, for defendant-appellee.

JACKSON, Judge.

James E. Peverall, Jr. ("plaintiff") appeals from the trial court's order denying class certification. For the following reasons, we affirm the trial court's order.

Plaintiff brought suit against the County of Alamance ("defendant") alleging due process violations, breach of contract, and intentional and negligent infliction of emotional distress. Plaintiff amended the complaint on 7 March 2001, and sought class action status on behalf of himself, his daughter, and others similarly situated. Defendant filed a motion to dismiss plaintiff's amended complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The trial court denied defendant's motion to dismiss, and upon defendant's appeal, this Court affirmed the trial court's decision. *Peverall v. County of Alamance*, 154 N.C. App. 426, 573 S.E.2d 517 (2002), *disc. rev. denied*, 356 N.C. 676, 577 S.E.2d 632 (2003). Plaintiff then appealed, *inter alia*, the trial court's 21 October 2003 order denying his motion for class certification. This Court, in an

unpublished decision, remanded to the trial court for further findings of fact on the class certification issue. *Peverall v. County of Alamance*, No. COA04-416, 2005 N.C. App. LEXIS 47 (N.C. Ct. App. Jan. 4, 2005). Plaintiff now appeals from the trial court's 28 April 2006 order denying class certification.

The facts of this case, stated in greater detail in the earlier opinions, show that plaintiff began working for Alamance County on or about 13 June 1992 as an emergency medical technician. At the time of plaintiff's hire, defendant had an insurance plan administered by Travelers Insurance Company. After plaintiff's hire in 1992, but prior to his retirement in July 1999, defendant became self-insured and provided its own insurance plan.

As a result of two vehicular accidents, plaintiff was diagnosed with post-traumatic stress disorder, and thus was unable to perform his EMS duties. In July 1999, plaintiff submitted an application to the Department of State Treasurer Retirement Systems Division for retirement based on disability. His application was approved by the Medical Board of the Retirement Systems Division on 11 August 1999, with a retroactive effective date of 1 August 1999.

On 15 August 1999 the Alamance County Board of Commissioners unanimously voted and adopted a new retroactive policy that required county employees to have completed twenty years of continuous employment (instead of five years as required pursuant to the previous policy) to receive insurance benefits after retirement due to disability. The change was to take effect retroactively on 1 July 1999. The new policy also stated that employees must not work in any capacity to be eligible. Defendant denied plaintiff insurance benefits based upon the new ordinance. Although he qualified under the old policy with more than five years of employment, he did not have the requisite twenty years of service to qualify under the new plan.

On appeal, plaintiff contends that: (1) the trial court abused its discretion in denying plaintiff's motion for class certification; (2) the denial of class certification was inconsistent with the applicable law as discussed by this Court's prior opinion remanding the issue of class certification; and (3) the trial court's findings of fact are not supported by competent evidence and do not support the trial court's conclusions of law.

[1] As a preliminary matter, we note that plaintiff's brief fails to comply fully with the North Carolina Rules of Appellate Procedure. Rule 28(b)(6) provides that "[t]he argument shall contain a concise

statement of the applicable standard(s) of review for each question presented, which shall appear either at the beginning of the discussion of each question presented or under a separate heading placed before the beginning of the discussion of all the questions presented." N.C. R. App. P. 28(b)(6) (2006). Rule 28(b)(6) further requires that "the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies." *Id.* In the case *sub judice*, plaintiff has not provided this Court with the applicable standards of review for any of the questions presented, much less citations of authorities supporting such standards.

Rule 28(b)(6) also requires the brief to contain references to the assignments of error in the record corresponding to each question presented. "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." *Id.* Moreover, Rule 10(c)(1) states that an assignment of error in the record "is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references." N.C. R. App. P. 10(c)(1) (2006). Plaintiff's assignments of error in both the record and brief incorrectly reference the record. Plaintiff's first and second assignments of error reference portions of plaintiff's and defendant's proposed orders to the trial court. Plaintiff's third assignment of error references defendant's proposed order.

"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)). As our Supreme Court noted in *Hart*, however, dismissal of an appeal or an assignment of error is not always required, and "some other sanction may be appropriate, pursuant to Rule 25(b) or Rule 34 of the Rules of Appellate Procedure." *Id.* at 311, 644 S.E.2d at 202. Accordingly, we elect to order plaintiff's counsel to pay the printing costs of this appeal pursuant to Rule 34(b), as plaintiff's violations are not so egregious as to warrant dismissal. *See McKinley Bldg. Corp. v. Alvis*, 183 N.C. App. 500, 502-03, 645 S.E.2d 219, 221 (2007); *Caldwell v. Branch*, 181 N.C. App. 107, 110, 638 S.E.2d 552, 555 (2007). We instruct the Clerk of this Court to enter an order accordingly.

The standard of review for class certification is whether the trial court's decision constitutes an abuse of discretion. *Nobles v. First Carolina Commc'ns, Inc.*, 108 N.C. App. 127, 132, 423 S.E.2d 312, 315

(1992), *disc. rev. denied*, 333 N.C. 463, 427 S.E.2d 623 (1993). Further, this Court "is bound by the [trial] court's findings of fact if they are supported by competent evidence." *Id.*

[2] Plaintiff's first assignment of error is that the trial court abused its discretion in denying class certification. Plaintiff's second assignment of error is not addressed in the brief and is deemed abandoned pursuant to Rule 28(b)(6). N.C. R. App. P. 28(b)(6) (2006). Plaintiff's third assignment of error cites seven findings of fact which plaintiff argues are unsupported by competent evidence. As plaintiff did not assign error to the trial court's additional findings of fact, these findings are presumed to be supported by competent evidence and are binding on appeal. *See Dreyer v. Smith*, 163 N.C. App. 155, 156-57, 592 S.E.2d 594, 595 (2004). Accordingly, this Court's review is limited to findings of fact numbers 10 through 16.

[3] Rule 23 of the North Carolina Rules of Civil Procedure governs class certification. *See* N.C. Gen. Stat. § 1A-1, Rule 23 (2005). A class action suit may be brought "[i]f persons constituting a class are so numerous as to make it impracticable to bring them all before the court." N.C. Gen. Stat. § 1A-1, Rule 23(a) (2005). One or more of the potential class members, "as will fairly insure the adequate representation of all," may sue or be sued, on behalf of all. *Id.* The overarching objectives of the rule are "the efficient resolution of the claims or liabilities of many individuals in a single action and the elimination of repetitious litigation and possible inconsistent adjudications involving common questions, related events, or requests for similar relief." *English v. Holden Beach Realty Corp.*, 41 N.C. App. 1, 9, 254 S.E.2d 223, 230-31 (internal quotation marks and citation omitted), *disc. rev. denied*, 297 N.C. 609, 257 S.E.2d 217 (1979), *overruled on other grounds*, *Crow v. Citicorp Acceptance Co., Inc.*, 319 N.C. 274, 354 S.E.2d 459 (1987). Upon a motion for class certification pursuant to Rule 23, the trial court first must determine whether the party seeking certification has satisfied its burden of showing that the three prerequisites to certification have been met. *See id.* at 7, 254 S.E.2d at 230.

The first prerequisite to certification is the existence of a class. *See Crow*, 319 N.C. at 282, 354 S.E.2d at 465. "[A] 'class' exists under Rule 23 when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Id.* at 280, 354 S.E.2d at 464. Additionally, as mandated by Rule 23, the class members must be so numerous that it is impracticable to bring them

all before the court. N.C. Gen. Stat. § 1A-1, Rule 23(a) (2005). This numerosity prerequisite does not require that the party seeking certification must demonstrate the impossibility of joining class members, but rather the party must show "substantial difficulty or inconvenience in joining all members of the class." *Crow*, 319 N.C. at 283, 354 S.E.2d at 466.

In the case *sub judice*, plaintiff sought to certify a class of 376 Alamance County employees who, at the time the action was brought, had more than five, but less than twenty, years of employment with the county, and who might retire due to a non[-] work related disability and thus be denied county insurance benefits under the new ordinance. Upon remand, the trial court concluded that the potential class for consideration consisted of seven employees, including plaintiff, who had retired and were denied insurance benefits because they had less than twenty years of service. However, the trial court declined to certify plaintiff's proposed class of 376 employees because the identity and number of individuals who might retire under such conditions was unknown and could not be known. In *Faulkenbury v. Teachers' & State Employees' Retirement System*, our Supreme Court held that the trial court did not abuse its discretion in refusing to certify a class whose members were unknown at the time of the action. 345 N.C. 683, 699, 483 S.E.2d 422, 432 (1997) (certifying class of three government employees in action challenging calculation of disability benefits, but refusing to certify members of two state retirement systems who might become disabled in the future). Thus, it was not an abuse of discretion in the instant case for the trial court to refuse to certify employees who were unknown and could not be known at the time the action was brought.

As the potential class numbered only seven individuals, the trial court concluded that plaintiff failed to establish that the potential class would be so numerous as to make it impracticable to bring each member before the court. Further, the court concluded that plaintiff failed to establish that common issues of law and fact predominated over individual issues such that certifying the class would accomplish the goal of preventing a multiplicity of suits or inconsistent results. The court's conclusions of law were predicated on findings of fact numbers 10, 11, and 12, to which plaintiff assigned error. These findings of fact state:

> 10. Plaintiff has not shown that any County of Alamance employee, other than himself, applied for, and was approved for, retirement benefits . . . at a time when the County of

> Alamance policy provided that the County would provide Insurance Benefits to employees who retired with a non[-]work related disability after five years of service, but was later denied County Insurance Benefits due to the new ordinance that was approved on August 15, 1999 with a retroactive effective date of July 1, 1999.
>
> 11. As of July 24, 2003 there were six County of Alamance employees (not including Plaintiff) that retired after August 1999, due to a non-work related disability who had less than twenty years of employment who were denied Insurance Benefits with the County under the new ordinance.
>
> 12. As of July 24, 2003 there were 376 County of Alamance employees who had been employed with the County for more than five years, but less than twenty years. The number and names of these employees who will eventually retire due to a non-work related disability prior to having worked for the County for twenty years is unknown and cannot be known at this time.

In reviewing these findings of fact, we are bound by the trial court's findings of fact if they are supported by competent evidence. *See Nobles*, 108 N.C. App. at 132, 423 S.E.2d at 315. "Such findings must be made with sufficient specificity to allow effective appellate review." *Id.* at 133, 423 S.E.2d at 316.

Plaintiff's amended complaint and his deposition demonstrate that plaintiff submitted a claim for retirement disability on 21 July 1999, and his claim was approved on 11 August 1999, with a retroactive effective date of 1 August 1999. At the time plaintiff's retirement was approved, no changes had been made to the county's insurance policy. The new ordinance amending the policy was not approved until 16 August 1999, after the plaintiff had retired. Joanne Garner ("Garner"), the Human Resources Director for Alamance County at the time the action was brought, stated in her 24 July 2003 deposition that only seven employees had actually retired who did not qualify for insurance due to the new ordinance. Garner testified that the six employees (excluding plaintiff) who were denied insurance benefits retired after the county's policy was amended, and thus their vested plans differed from plaintiff's. Moreover, plaintiff's counsel admitted at the first hearing on class certification that the numerosity requirement might be problematic for plaintiff's case, because the trial court would have to certify an undefined number of people who might eventually retire due to non-work related disability.

This evidence, which was before the court when it rendered its order upon remand, demonstrates that the only potential class for certification consisted of seven individuals who had been denied benefits. Six of these individuals retired after the plan was changed; plaintiff retired prior to the change. Thus, the plaintiff and the other six employees were denied benefits under two different sets of circumstances. As such, plaintiff's claim and the other six employees' claims are disparate in law and fact because their potential claims derive from potentially different insurance plans. The evidence supports the trial court's findings of fact, and the findings further support the court's conclusions that plaintiff failed (1) to satisfy the numerosity requirement for certification, and (2) to establish that common issues of law and fact predominated over individual issues.

In addition to the aforementioned requirements, a plaintiff seeking class certification must establish that he is an adequate representative of the potential class, a mandate specifically imposed by Rule 23 and further directed under North Carolina case law. *See Faulkenbury*, 345 N.C. at 698, 483 S.E.2d at 432; *Crow*, 319 N.C. at 282, 354 S.E.2d at 465. As an adequate representative of the potential class, a plaintiff also must establish that he has no conflict of interest with any member of the class who is not a named party, "so that the interests of the unnamed class members will be adequately and fairly protected." *Crow*, 319 N.C. at 282, 354 S.E.2d at 465.

In *Harrison v. Wal-Mart Stores, Inc.*, this Court upheld the denial of class certification, based upon, *inter alia*, the trial court's finding that a conflict of interest existed between class members who each had different oral contracts with their employer for lunch and rest breaks. 170 N.C. App. 545, 554-55, 613 S.E.2d 322, 329-30 (2005). This Court further agreed with the trial court's conclusion that individual issues predominated as to the formation of the employees' oral contracts, and held that the trial court did not abuse its discretion in denying class certification. *See id.* at 550-54, 613 S.E.2d at 327-29.

In the case *sub judice*, plaintiff assigned error to findings of fact numbers 14 and 15, which support the trial court's conclusions that plaintiff failed to establish that he was an adequate representative of the potential class and that he has no conflict of interest with the other members. These findings state:

> 14. Since Plaintiff is the only potential class member who retired prior to the vote of the Commissioners to change the plan, he has a conflict of interest with the other potential class members who

> retired due to a non[-]work related disability after the new plan was voted on and took effect. Plaintiff has additional and different arguments for recovery that are different from and in conflict with the other potential members of the class as to when and why his contractual rights would have allegedly vested and which plan was in effect at his or her date of retirement.
>
> 15. None of the other potential class members are similarly situated with Plaintiff because he is the only potential class member whose retirement date was approved prior to the vote to change the County plan.

We disagree with plaintiff's argument that the findings are unsupported by competent evidence. Plaintiff's amended complaint and deposition, along with the deposition of Garner, indicate that different insurance plans were in effect when plaintiff and the other potential class members were denied benefits. Just as the employees' contracts in *Harrison* created a conflict of interest, the class members here have different claims and arguments for recovery because their contractual rights existed under different insurance plans. Accordingly, as plaintiff's individual claim for relief is different from the other members of the potential class, plaintiff cannot be an adequate representative of the class.

Further indicative of the potential class members' disparate claims is the expected variance in their damages. Plaintiff assigned error to finding of fact number 13, which states that "[s]ince each potential class member will necessarily have different amounts of medical expenses that they may allege as damages—ranging from $00.00 to unknown amounts, one would expect a large variance in damages among potential the class members." Although the existence of congruent damages is not an absolute prerequisite for class certification, "[t]he trial court has broad discretion in determining whether class certification is appropriate . . . and is not limited to those prerequisites which have been expressly enunciated in either Rule 23 or in *Crow*." *Nobles*, 108 N.C. App. at 132, 423 S.E.2d at 315. In his deposition on 3 September 2003, plaintiff stated that he had incurred medical bills, but could not recall either the basis for or the amount of the bills. Plaintiff also stated that he had not attempted to obtain other health insurance, and that he did not know of any detrimental effect on his credit rating. There is no evidence as to the amount of monetary damages, if any, that the other six potential class members suffered. As such, the damages of the potential class could

be expected to vary greatly, and thus denial of class certification was warranted by the trial court. *See Perry v. Cullipher*, 69 N.C. App. 761, 763, 318 S.E.2d 354, 356 (1984).

Plaintiff failed to satisfy the prerequisites for class certification delineated in Rule 23 as well as *Crow* and its progeny. The trial court's conclusions were supported by its findings, and its findings were supported by competent evidence in the record. In sum, the trial court's ruling was not "manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Frost v. Mazda Motor of Am., Inc.*, 353 N.C. 188, 199, 540 S.E.2d 324, 331 (2000) (internal quotation marks, citations, and alteration omitted). Accordingly, we hold that the trial court did not abuse its discretion in denying plaintiff's motion for class certification.

Affirmed.

Judge HUNTER concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

For the reasons stated in *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 183 N.C. App. ——, —— S.E.2d —— (2007) and in the dissenting opinion in *McKinley Bldg. Corp. v. Alvis*, 183 N.C. App. ——, —— S.E.2d —— (2007), I agree with defendant's argument to dismiss plaintiff's appeal for multiple rules violations of and his failure to comply with the North Carolina Rules of Appellate Procedure after notice. I respectfully dissent.

I. Appellate Rule Violations

The majority's opinion correctly states plaintiff violated Rule 28(b)(6) and Rule 10(c) of the North Carolina Rules of Appellate Procedure. Defendant identified and argued plaintiff's appeal should be dismissed for multiple appellate rule violations in his brief. Plaintiff failed to respond to defendant's arguments or to take any further action to explain or remedy these 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)). I find merit in defendant's argument that plaintiff's appeal should be dismissed. *See Dogwood Dev. & Mgmt. Co., LLC*, 183 N.C. App. at ——, —— S.E.2d at —— (Dismissing defendant's appeal for violation of Appellate Rules 28(b) and 10(c)).

In *Stann v. Levine*, this Court dismissed the appeal in part because the appellant failed to state an applicable standard of review. 180 N.C. App. 1, 5, 636 S.E.2d 214, 216 (2006). 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, 700, 629 S.E.2d 902, 908, *appeal dismissed and disc. rev. denied*, 360 N.C. 653, 637 S.E.2d 192 (2006). Plaintiff's failure to adequately state the applicable standard of review for the question presented violates Appellate Rule 28(b)(6) and warrants dismissal of his appeal.

II. Appellate Rule 2

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 the appellant's appellate rule violations and review the merits of their appeal. *State v. Hart*, 361 N.C. 309, ——, —— S.E.2d ——, —— (2007). I would decline to do so.

Nothing in the record or briefs demonstrates the need to disregard plaintiff's 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 plaintiff's appeal contains multiple violations, 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. Also here, unlike in *Hart*, defendant identified the violations, argues for dismissal, and this Court would not be dismissing *ex mero motu*. *Id.* Plaintiff took no action, after notice of the violations, to remedy the defects.

III. Conclusion

Plaintiff 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 plaintiff's multiple and egregious violations of the appellate rules and invoke Appellate Rule 2 under the circumstances at bar. *Dogwood Dev. & Mgmt. Co., LLC*, 183 N.C. App. at ——, —— S.E.2d at ——. I respectfully dissent.

EUGENE S. BALL, PEGGY M. BALL, PATRICIA G. MILLER AND KENNETH C. MILLER, SR., PLAINTIFFS-APPELLEES v. ROBERT E. MAYNARD, JR., DEFENDANT-APPELLANT

No. COA06-1545

(Filed 19 June 2007)

1. Vendor and Purchaser— real estate sale—time of performance changed—waiver

There was no error where the trial court concluded that the parties had modified a real estate sales contract to extend the time for performance. Defendant waived the original closing date by agreeing to obtain and provide plaintiffs with a valid septic permit and the court was not required to make findings regarding the Statute of Frauds or consideration.

2. Vendor and Purchaser— real estate sale—invalid septic permit—ready, willing and able to perform

The evidence supported a finding that plaintiffs were ready, willing, and able to close on a real property purchase where it was discovered that the existing septic permit was invalid after the parties entered the contract. Neither plaintiffs' readiness, willingness, nor ability to perform were negated by plaintiffs' insistence that defendant comply with the terms of the original contract.

3. Vendor and Purchaser— real estate sale—duty to perform—breach by other party

Plaintiffs were relieved of their duty to perform a real estate purchase contract where defendant was obligated to provide a valid septic permit, sent a letter to plaintiffs demanding that plaintiffs close without the permit, and then attempted to terminate the contract. Defendant was in breach and plaintiffs was relieved of the duty to perform.

4. Vendor and Purchaser— real estate sale—time of the essence—not a unilateral determination

No authority was found for the proposition that one party may unilaterally determine that time is of the essence after the parties have entered into a contract which does not include such a clause. The trial court did not err here by concluding that defendant had breached a real estate sales contract by demanding that plaintiffs close without a valid septic permit no later than a specified date.

5. Vendor and Purchaser— real estate sale—mutual mistake—waiver

Defendant waived any ability to avoid a real estate sales contract based on mutual mistake where defendant learned that a septic permit was not valid after the parties entered into the contract, and defendant agreed to obtain a valid permit and then applied for a new permit. Even assuming that defendant could avoid the contract on the ground of mutual mistake, that right was waived at that point.

Appeal by Defendant from judgment entered 11 August 2006 by Judge Benjamin G. Alford in Superior Court, Pender County. Heard in the Court of Appeals 9 May 2007.

H. Kenneth Stephens, II for Plaintiffs-Appellees.

White & Allen, P.A., by Gregory E. Floyd and Richard J. Archie, for Defendant-Appellant.

McGEE, Judge.

Eugene S. Ball, Peggy M. Ball, Patricia G. Miller, and Kenneth C. Miller, Sr. (Plaintiffs) filed a complaint on 23 December 2003 against Robert E. Maynard, Jr. (Defendant). Defendant sent a letter dated 24 February 2004 to the trial court and to Plaintiffs. In the letter, Defendant stated that the letter was in response to Plaintiffs' action. Defendant filed an amended answer dated 17 June 2005. The amended answer was accepted by the trial court in an order filed 18 July 2005, and the trial court entered judgment on 11 August 2006.

The trial court made the following unchallenged findings of fact: Plaintiffs, as buyers, and Defendant, as seller, entered into an Offer to Purchase and Contract (the contract) for real property located in Pender County (the property) on 11 December 2002. At

the time the parties entered into the contract, Plaintiffs were provided a Septic Improvements Permit (the permit) for the property, and Defendant represented to Plaintiffs that the permit was valid. A section of the contract entitled "Sewer System" stated the following: "[Plaintiffs] [have] investigated the costs and expenses to install the sewer system approved by the Improvement Permit attached hereto as Exhibit A and hereby approve[] and accept[] said Improvement Permit." (R p. 36).

The trial court further found that prior to entering into the contract with Plaintiffs, Defendant had previously conveyed an approximately ten-foot strip of the property to a third party. Unbeknownst to Defendant, this conveyance invalidated the permit. Plaintiffs later learned that the permit was invalid and requested that Defendant provide them with a valid permit. However, Plaintiffs agreed to purchase the real property minus the ten-foot strip of land previously conveyed by Defendant. Defendant then agreed to apply for a valid permit for the property, and did so in April 2003.

Defendant attempted to terminate the contract and tendered Plaintiffs' earnest money on or about 4 September 2003, which Plaintiffs refused. Plaintiffs again requested that Defendant provide them with a valid permit, and that Defendant close on the purchase of the property pursuant to the terms of the parties' contract. Defendant refused. The Pender County Health Department subsequently issued a new Septic Improvements Permit for the property on 21 November 2003.

The trial court concluded the following:

> 2. That the parties had modified the [c]ontract to the extent that the time for performance on the part of . . . Plaintiffs was extended to allow . . . Defendant to obtain a valid Septic Improvements Permit.
>
> 3. That . . . Plaintiffs had a reasonable time in which to close the purchase of the . . . property which reasonable time had not run as of the date that . . . Defendant attempted to terminate the contract.
>
> 4. That the attempted termination of the contract by . . . Defendant and . . . Defendant's refusal to transfer the property to . . . Plaintiffs was a breach of the agreement between the parties.

> 5. That . . . Plaintiffs are entitled to the Court's Order ordering specific performance of the contract on the part of . . . Defendant.

The trial court ordered Defendant to convey the property to Plaintiffs pursuant to the terms and conditions of the parties' contract. Defendant appeals.

"In an appeal from a judgment entered in a non-jury trial, our standard of review is whether competent evidence exists to support the trial court's findings of fact, and whether the findings support the conclusions of law." *Resort Realty of the Outer Banks, Inc. v. Brandt*, 163 N.C. App. 114, 116, 593 S.E.2d 404, 407-08, *disc. review denied*, 358 N.C. 236, 595 S.E.2d 154 (2004). A trial court's conclusions of law are reviewable *de novo*. *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980).

I.

[1] Defendant argues the trial court erred by concluding that "the parties had modified the [c]ontract to the extent that the time for performance on the part of . . . Plaintiffs was extended to allow . . . Defendant to obtain a valid Septic Improvements Permit." Specifically, Defendant argues that any modification of the contract did not comply with the Statute of Frauds and lacked consideration.

Generally, the obligations of a buyer and a seller under a real estate purchase agreement "are deemed concurrent conditions—meaning, that neither party is in breach of the contract until the other party tenders his/her performance, even if the date designated for the closing is passed." *Dishner Developers, Inc. v. Brown*, 145 N.C. App. 375, 378, 549 S.E.2d 904, 906, *aff'd per curiam*, 354 N.C. 569, 557 S.E.2d 528 (2001). "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.' " *Id.* (quoting *Fletcher v. Jones*, 314 N.C. 389, 393, 333 S.E.2d 731, 734 (1985)). " '[W]hen time is not of the essence, the date selected for closing can be viewed as "an approximation of what the parties regard as a reasonable time under the circumstance of the sale." ' " *Id.* (quoting *Fletcher*, 314 N.C. at 393-94, 333 S.E.2d at 735 (quoting *Drazin v. American Oil Company*, 395 A.2d 32, 34 (D.C. Ct. App. 1978))). "[T]he parties may waive or excuse non-occurrence of or delay in the performance of a contractual duty." *Id.* (citing *Fletcher*, 314 N.C. at 394-95, 333 S.E.2d at 735-36).

In *Dishner Developers*, the defendant's contract to purchase real property from the plaintiff contained a thirty-day cure provision after written notice of a title defect, and further provided that closing would take place on or before 1 August 1997. *Id.* at 375, 549 S.E.2d at 904. At closing on 28 July 1997, the defendant learned there were three outstanding deeds of trust encumbering the real property. *Id.* at 376, 549 S.E.2d at 904. The defendant was unwilling to close under the circumstances, but she left the documents and funds necessary for closing at a later date with her attorney. *Id.* The plaintiff's attorney subsequently informed the defendant's attorney that the deeds of trust would be canceled and that the plaintiff was prepared to close. *Id.* However, on or about 4 August 1997, the defendant's attorney communicated to the plaintiff's attorney that the defendant wanted to void the contract and have her earnest money refunded. *Id.* at 376, 549 S.E.2d at 905.

Our Court recognized that the parties' purchase agreement did not contain a time-is-of-the-essence clause. *Id.* at 378, 549 S.E.2d at 906. Therefore, the plaintiff had a reasonable time after the closing date to perform the contract. *Id.* However, the defendant "failed to give [the] plaintiff the thirty days provided under the contract, or 'reasonable time' provided by existing case law, to cure the defect. Therefore, when [the] defendant declared the contract null and void on 4 August 1997—just a week after the failed closing—she breached the contract." *Id.*

In *Fletcher*, the "defendant and [the] defendant's attorney continued to orally reassure and represent to [the] plaintiff and her husband that [the] defendant intended to close and consummate the transaction beyond the 10 March 1981 closing date." *Fletcher*, 314 N.C. at 394, 333 S.E.2d at 735. On 4 August 1981, almost five months after the scheduled closing, the defendant's attorney informed the plaintiff's attorney that the defendant was prepared to close. *Id.* at 391, 333 S.E.2d at 733. However, on 24 September 1981, the defendant's attorney returned the plaintiff's earnest money and sent a letter to the plaintiff's attorney declaring that the contract was null and void. *Id.* at 392, 333 S.E.2d at 733. Two days later, the plaintiff tendered the full amount that was due at closing along with a properly executed promissory note for the balance, as was required by the contract. *Id.* The contract did not contain a time-is-of-the-essence clause. *Id.* at 393, 333 S.E.2d at 734.

The Court recognized that "[a] waiver can be defined as an 'excuse of a non-occurrence or of a delay in the occurrence of a con-

dition of a duty.' " *Id.* at 394, 333 S.E.2d at 735 (quoting E. Farnsworth, *Contracts* § 8.5, at 561 (1982)). "The basis for a waiver can be inferred from conduct or expressed in words. '[C]onduct such as continuing performance with knowledge that the condition has not occurred might be questionable as the manifestation needed for a modification but sufficient for waiver.' " *Id.* (quoting E. Farnsworth, *Contracts* § 8.5, at 562) (internal citation omitted). Our Supreme Court held that the defendant had waived the 10 March 1981 closing date. *Id.* at 395, 333 S.E.2d at 735.

Our Supreme Court further held that the trial court's findings of fact supported the trial court's conclusion that the plaintiff " 'made full and sufficient tender' " within a reasonable time after receiving notice that the defendant was ready to close. *Id.* at 399, 333 S.E.2d at 738. The Court noted that "[a]lthough it would have been more desirable for the [trial court] to include within [its] conclusions of law that [the] plaintiff's tender of performance was within a 'reasonable time,' we do not think that omission alone is fatal to the validity and correctness of the judgment." *Id.* at 399-400, 333 S.E.2d at 738.

In the present case, Defendant does not challenge the trial court's findings of fact that when Plaintiffs learned that the permit was invalid, they requested that Defendant correct the problem and provide them with a valid permit. Defendant then agreed to obtain a valid permit and applied for a new Septic Improvements Permit in April 2003. Because these findings are unchallenged by Defendant, they are binding on appeal. *See Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003). We hold that Defendant waived the closing date originally agreed upon by the parties by agreeing to obtain and provide Plaintiffs a valid permit. Therefore, the parties had a reasonable time after the original closing date in which to close. *See Dishner Developers*, 145 N.C. App. at 378, 549 S.E.2d at 906.

Although the trial court determined that Plaintiffs and Defendant had modified the contract, we hold that Defendant's conduct was in the nature of a waiver of a condition of the contract, rather than a modification of the contract. This is demonstrated by examining the trial court's conclusion in light of the remainder of the judgment. In *White v. Graham*, 72 N.C. App. 436, 325 S.E.2d 497 (1985), our Court stated that:

> An elementary North Carolina rule in the interpretation of judgments is that the pleadings, issues and other circumstances of the

> case must be considered. Judgments must be interpreted like other written documents, not by focusing on isolated parts, but as a whole, in light of practicality and the intention of the court.

Id. at 441, 325 S.E.2d at 501 (citations omitted).

In the present case, the trial court did not make any findings or conclusions related to the Statute of Frauds or consideration sufficient for a contractual modification. This demonstrates that the trial court's ruling was in the nature of a finding of waiver on the part of Defendant, rather than a modification of the contract by the parties. Also, other conclusions made by the trial court demonstrate that the trial court concluded that Defendant waived the closing date in the parties' contract. The trial court concluded that "Plaintiffs had a reasonable time in which to close the purchase of the . . . property which reasonable time had not run as of the date that . . . Defendant attempted to terminate the contract." This conclusion is in line with the conclusion of law upheld by our Supreme Court in *Fletcher*. In *Fletcher*, our Supreme Court held that the trial court's findings of fact supported the trial court's conclusion that the plaintiff " 'made full and sufficient tender' within a reasonable time after being notified that [the] defendant was ready to close." *Fletcher*, 314 N.C. at 399, 333 S.E.2d at 738. Moreover, our Supreme Court in *Fletcher* upheld the conclusion of law despite the omission that the plaintiff's tender was within a "reasonable time." *Id.* at 399-400, 333 S.E.2d at 738. In the case before us, the trial court did conclude that Plaintiffs' reasonable time to close had not run as of the date Defendant attempted to terminate the contract.

Our Court has also held that where "a court's ruling [is] based upon a misapprehension of law, '[but] the misapprehension of the law does not affect the result[,] . . . the judgment will not be reversed.' " *Smith v. Beaufort County Hosp. Ass'n.*, 141 N.C. App. 203, 212, 540 S.E.2d 775, 781 (2000) (quoting *Bowles Distributing Co. v. Pabst Brewing Co.*, 69 N.C. App. 341, 348, 317 S.E.2d 684, 689 (1984)), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 435, *aff'd per curiam*, 354 N.C. 212, 552 S.E.2d 139 (2001). Therefore, in this case, even if the trial court's ruling could be characterized as misapprehending the law regarding modification, any misapprehension did not affect the result in the present case. We hold Defendant waived the original closing date and that Plaintiffs had a reasonable time after that date in which to perform. Therefore, because Defendant waived the timeliness of Plaintiffs' performance, the trial court was not required to make find-

ings regarding the Statute of Frauds or consideration sufficient for a modification of the contract.

Defendant further cites *Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 323 S.E.2d 23 (1984), which is distinguishable. In *Clifford*, the plaintiff purchased real property from the defendant and the property subsequently flooded. *Id.* at 462, 323 S.E.2d at 24. The defendant told the plaintiff the house was "warranted" and sent a letter to the plaintiff stating that warranties on homes for workmanship, material and subcontractors were for one year. *Id.* When the defendant's efforts to correct the flooding problem were unsuccessful, the plaintiffs filed suit against the defendant. *Id.*

Our Supreme Court held that neither the defendant's statement, nor the letter, were sufficient to create a warranty. *Id.* at 464-65, 323 S.E.2d at 26. Moreover, even if they had been sufficient, neither the statement nor the letter complied with the Statute of Frauds. *Id.* at 465-66, 323 S.E.2d at 26. The Court recognized that oral modifications of an agreement within the Statute of Frauds are ineffectual. *Id.* at 465, 323 S.E.2d at 26. Furthermore, the letter was ineffectual to modify the contract because it did not contain all essential elements of a warranty. *Id.* at 465-66, 323 S.E.2d at 26. The Court further held that even if the letter had complied with the Statute of Frauds, the modification would be unenforceable because of a lack of new consideration. *Id.* at 466, 323 S.E.2d at 26-27.

In the present case, Defendant argues that *Clifford* is analogous because the parties in the present case did not memorialize any contract modification in writing. Defendant further argues that any contract modification in the present case lacked new consideration. However, as we have already held, Defendant waived the closing date set forth in the original contract. We do not find that the parties modified the contract. Therefore, no new writing or consideration was required, and *Clifford* is inapplicable. We hold the trial court did not err.

II.

[2] Defendant next argues there was insufficient evidence to support the trial court's finding that at all relevant times, Plaintiffs were ready, willing, and able to close on the purchase of the real property. 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." *McLean v. Keith*, 236 N.C. 59, 71, 72 S.E.2d 44, 53 (1952). 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). " 'The term "ready, willing, and able" means that the prospective purchaser desires to purchase, is willing to enter into an enforceable contract to purchase, and has the financial and legal capacity to purchase within the time required on the terms specified by the seller.' " *Resort Realty*, 163 N.C. App. at 118, 593 S.E.2d at 408 (quoting James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 8-11, at 253 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999)). "Further, 'the purchaser indicates readiness and willingness by executing a valid offer to purchase that either complies with the seller's requirements as set forth in the listing contract or is accepted by the seller.' " *Id.* at 118, 593 S.E.2d at 409 (quoting James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 8-11, at 253).

In the present case, at the time Plaintiffs and Defendant entered into the contract, Plaintiffs were provided a Septic Improvements Permit and Defendant represented to Plaintiffs that the permit was valid. Under the section of the contract entitled "Sewer System" the contract provided: "[Plaintiffs] [have] investigated the costs and expenses to install the sewer system approved by the Improvement Permit attached hereto as Exhibit A and hereby approve[] and accept[] said Improvement Permit." In Defendant's letter dated 24 February 2004, Defendant stated as follows: "In December 2002 [the property] went under contract with . . . [P]laintiffs with a proposed closing of February 14th 2003. One of the conditions of the purchase was a valid septic tank permit which was supplied to the buyer." Therefore, because Plaintiffs and Defendant contemplated the permit in their contract and because Defendant admitted that a valid permit was a condition of the contract, we hold that a valid permit was a condition of the contract.

As established by *Resort Realty*, a buyer indicates readiness and willingness to purchase when the buyer " 'execut[es] a valid offer to purchase that . . . is accepted by the seller.' " *Resort Realty*, 163 N.C. App. at 118, 593 S.E.2d at 409 (quoting James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 8-11, at 253.) Thus, Plaintiffs in this case were ready and willing to perform when they

entered into the contract. Thereafter, it was discovered that the permit was invalid. Plaintiffs continued to insist that Defendant provide a valid permit, which was a condition of the original contract. Defendant agreed to do so and applied for a new permit, thereby waiving the original closing date. At that point, Plaintiffs remained ready and willing to perform as long as Defendant provided a valid permit. Neither Plaintiffs' readiness, willingness, nor ability to perform were negated by Plaintiffs' insistence that Defendant comply with the terms of the original contract. Therefore, we hold that the challenged finding of fact was supported by the evidence.

III.

[3] Defendant argues the trial court erred by concluding that Defendant breached the contract. Defendant argues that Plaintiffs had previously terminated the contract by their failure to close the transaction when demanded by Defendant. Defendant argues that under the parties' contract, Defendant was not required to provide Plaintiffs with a valid permit. Therefore, Defendant argues, Plaintiffs' refusal to close without a valid permit was a breach of the contract.

It is well settled that where one party breaches a contract, the other party is relieved from the obligation to perform. *Dishner Developers*, 145 N.C. App. at 378-79, 549 S.E.2d at 906 (citing *Mizell v. Greensboro Jaycees*, 105 N.C. App. 284, 289, 412 S.E.2d 904, 908 (1992)). In the present case, Defendant was obligated to provide a valid permit to Plaintiffs. When Defendant sent a letter to Plaintiffs demanding that Plaintiffs close without the permit, and then attempted to terminate the contract, Defendant was in breach of the contract. Therefore, Plaintiffs were relieved of the duty to perform.

[4] Defendant also argues that his letter demanding that Plaintiffs close without a valid permit no later than 4 September 2003 served to make time of the essence. This argument lacks merit. In support of this argument, Defendant cites *Johnson v. Smith, Scott & Assoc., Inc.*, 77 N.C. App. 386, 335 S.E.2d 205 (1985), where our Court stated: "The contract here does not expressly provide that time is of the essence, nor do we find anything in the contract or in the parties' actions which demonstrate their intent to make time of the essence." *Id.* at 390, 335 S.E.2d at 207. However, Defendant has not cited, nor do we find, any authority for the proposition that one party may unilaterally determine that time is of the essence after the parties have entered into a contract which does not include such a clause.

We hold the trial court did not err by concluding that Defendant breached the contract.

IV.

[5] Defendant also argues the trial court erred by concluding that Defendant breached the contract and that Plaintiffs were entitled to specific performance because the evidence established that the parties entered into the contract based upon a mutual mistake of fact. Therefore, Defendant argues he was entitled to rescind the contract.

In *MacKay v. McIntosh*, 270 N.C. 69, 153 S.E.2d 800 (1967), our Supreme Court recognized:

> "The formation of a binding contract may be affected by a mistake. Thus, a contract may be avoided on the ground of mutual mistake of fact where the mistake is common to both parties and by reason of it each has done what neither intended. Furthermore, a defense may be asserted when there is a mutual mistake of the parties as to the subject matter, the price, or the terms, going to show the want of a consensus *ad idem*. Generally speaking, however, in order to affect the binding force of a contract, the mistake must be of an existing or past fact which is material; it must be as to a fact which enters into and forms the basis of the contract, or in other words it must be of the essence of the agreement, the *sine qua non*, or, as is sometimes said, the efficient cause of the agreement, and must be such that it animates and controls the conduct of the parties."

Id. at 73, 153 S.E.2d at 804 (quoting 17 Am. Jur. 2d, Contracts § 143). However, in the present case, we need not decide whether Plaintiffs and Defendant entered into the contract under a mutual mistake of fact. Even assuming the existence of a mutual mistake of fact as to the validity of the permit, we hold that Defendant waived any opportunity to avoid the contract on this basis.

> A waiver is sometimes defined to be an intentional relinquishment of a known right. The act must be voluntary and must indicate an intention or election to dispense with something of value or to forego some advantage which the party waiving it might at his option have insisted upon. The waiver of an agreement or of a stipulation or condition in a contract may be expressed or may arise from the acts and conduct of the party which would naturally and properly give rise to an inference that the party intended to waive the agreement. Where a person with full knowledge of

> all the essential facts dispenses with the performance of something which he has the right to exact, he therefore waives his rights to later insist upon a performance. A person may expressly dispense with the right by a declaration to that effect, or he may do so with the same result by conduct which naturally and justly leads the other party to believe that he has so dispensed with the right.

Guerry v. Trust Co., 234 N.C. 644, 648, 68 S.E.2d 272, 275 (1951).

In the present case, after it was discovered that the permit provided by Defendant was invalid, Defendant agreed to obtain a valid permit, and applied for a new permit. We hold that by these actions, Defendant waived any ability to avoid the contract on the ground of mutual mistake. It is clear that after Plaintiffs and Defendant entered into the contract, Defendant learned the permit was invalid. At that point in time, even assuming that Defendant had the right to avoid the contract on the ground of mutual mistake of fact, Defendant chose to waive that right. Defendant could not thereafter unilaterally resurrect the right he had previously waived. Therefore, the trial court did not err.

Affirmed.

Judges LEVINSON and JACKSON concur.

BEAUFORT COUNTY BOARD OF EDUCATION, PLAINTIFF v. BEAUFORT COUNTY BOARD OF COMMISSIONERS, DEFENDANT

No. COA06-1419

(Filed 19 June 2007)

1. Appeal and Error— appealability—mootness—capable of repetition yet evading review

Although the pertinent gag order was lifted and the court proceedings were completed before this controversy could be fully resolved by the Court of Appeals, Media General's appeal from the gag order is not moot, because: (1) a reasonable likelihood remains that the trial court might attempt to repeat the conduct at issue in this case and subject Media General to the same or a similar action in another case; and (2) the trial court's failure to

rule upon Media General's motion, the short duration of the trial, and the elapsed time to obtain appellate review shows Media General's allegations are capable of repetition yet evading review.

2. Constitutional Law— right to free speech—prior restraints—gag order—failure to enter findings on required standards

The trial court erred by entering and then failing to dissolve a gag order prohibiting the parties and their attorneys from communicating with the media during civil litigation between two publically elected bodies disputing the adequacy of funding for the public school system, because: (1) the trial court neglected to enter findings of fact that either a clear threat existed to the fairness of the trial, that the threat was posed by the publicity to be restrained, or that it considered less restrictive alternatives as required by *Sherrill*, 130 N.C. App. 711 (1998); and (2) the gag order was not reduced to writing, signed by the judge, or filed with or entered by the Clerk of Superior Court.

3. Constitutional Law— right to free speech—prior restraints—gag order—right of access to civil judicial proceeding or to judicial record in proceeding

The trial court did not err by failing to rule upon Media General's motion under N.C.G.S. § 1-72.1 to dissolve a gag order that prohibited either party or their attorneys from talking to the press, because: (1) the statute applies to a person asserting a right of access to a civil judicial proceeding or to a judicial record in that proceeding, and Media General admits it was not denied a right of access to a civil judicial proceeding or to any judicial record in that proceeding; (2) the gag order prevented the parties and their attorneys from communicating with the press, not from attending the trial or gaining access to any proceeding or record in this matter; (3) Media General stipulated that it was free to attend and did attend the trial of this matter and freely accessed any public judicial records of this proceeding; and (4) under the facts and issues of this case, it was unnecessary to determine the outer ranges of what constitutes "access to a civil judicial proceeding."

Appeal by movant Media General Operations, Inc. from oral order rendered 19 July 2006 by Judge William C. Griffin, Jr., in Beaufort County Superior Court. Heard in the Court of Appeals 23 May 2007.

Schwartz & Shaw, P.L.L.C., by Richard A. Schwartz, Brian C. Shaw, and Rachel B. Hitch, for plaintiff-appellee.

No brief filed for defendant-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Mark J. Prak, Charles E. Coble, and Elizabeth E. Spainhour; and The Bussian Law Firm, PLLC, by John A. Bussian, for movant-appellant.

TYSON, Judge.

Media General Operations, Inc. ("Media General") appeals from an oral order prohibiting the parties and their attorneys from communicating with the media ("the gag order") during civil litigation between the Beaufort County Board of Education ("the School Board") and the Beaufort County Board of Commissioners ("the Commissioners"). We vacate the gag order.

I. Background

Media General operates WNCT-TV, a television station engaged in gathering and broadcasting news. WNCT-TV is located in Greenville and its broadcast coverage area includes Beaufort County.

On 14 July 2006, the School Board filed a complaint in the Beaufort County Superior Court against the Commissioners. The complaint alleges the Commissioners deliberately underfunded the public school system in the Beaufort County budget ordinance for the fiscal year 2006-2007, and the revenues it appropriated to the school system were "based on the personal demands of various . . . Commissioners and in retaliation against the [School Board] for its refusal to capitulate to funding threats made by various individual . . . Commissioners and combinations of Commissioners acting in concert." The School Board demanded the trial court order the Commissioners to appropriate the amount of money needed to maintain the public school system from financial resources under the Commissioners control.

WNCT-TV sought to gather information and report news to the public regarding the funding dispute between the School Board and the Commissioners. Prior to trial, on 19 July 2006, the trial court orally rendered the gag order *ex mero motu*, which forbade the parties and their attorneys from communicating with members of the news media regarding the litigation. The following day, on 20 July 2006, Media General moved for the trial court to determine its right of

access to the courtroom proceedings, the parties, and their attorneys and sought dissolution of the gag order.

On Friday, 21 July 2006, after the jury selection was completed and motions *in limine* had been heard, the trial court heard arguments from Media General's counsel on its motion. Following the arguments, the trial court stated it would consider Media General's motion over the weekend. Opening statements and presentation of evidence began on the morning of 24 July 2006 and continued throughout the week. The trial court failed to rule on Media General's motion prior to proceeding with the trial.

On 26 July 2006, Media General filed with this Court a Petition for Writs of Mandamus and Prohibition and a Petition for Writ of Supersedeas and Motion for Temporary Stay. On 4 August 2006, Media General filed with this Court a Supplemented Petition for Writs of Mandamus and Prohibition and a Petition for Writ of Certiorari. By order dated 23 August 2006, this Court denied the Petition for Writs of Mandamus and Prohibition, dismissed as moot the Petition for Writ of Supersedeas, and dismissed the Petition for Writ of Certiorari.

On 27 July 2006, the trial court dissolved the gag order after the matter had been submitted to the jury and stated, "Let the record show that the Court now terminates any restrictions that may have been imposed on anybody about speaking to anybody." Media General appeals.

II. Issues

Media General argues the trial court erred by: (1) entering and failing to dissolve the unconstitutional gag order; (2) denying its motion pursuant to N.C. Gen. Stat. § 1-72.1 and allowing the gag order to remain in place for the duration of the trial; and (3) violating the procedural requirements of N.C. Gen. Stat. § 1-72.1.

III. Mootness

[1] The trial of this matter has concluded and Media General cannot obtain the relief it sought through the dissolution of the gag order. When the trial court dissolved the gag order after trial, it stated, "[t]hat makes [Media General's] suit moot." The threshold question is whether Media General's appeal is moot and should its appeal be dismissed.

Our Supreme Court has stated, "Whenever, during the course of litigation it develops . . . that the questions originally in controversy

between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979) (citations omitted).

Our Courts have long recognized an exception to dismissals for mootness and have held it is proper for the appellate courts to hear appeals where the issues are "capable of repetition, yet evading review." *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 654, 566 S.E.2d 701, 703-04 (citing *Crumpler v. Thornburg*, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711, *disc. rev. denied*, 324 N.C. 543, 380 S.E.2d 770 (1989)), *disc. rev. denied*, 356 N.C. 297, 571 S.E.2d 221 (2002); *see Spencer v. Kemna*, 523 U.S. 1, 17, 140 L. Ed. 2d 43, 56 (1998) (The capable-of-repetition exception to mootness applies where: "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." (quotation omitted)).

This Court adopted these factors and has stated:

> There are two elements required for the exception to apply: (1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.

Boney Publishers, Inc., 151 N.C. App. at 654, 566 S.E.2d at 703-04.

In *Boney Publishers, Inc.*, the plaintiff, a newspaper publisher, alleged the Burlington City Counsel had violated the Open Meetings Law and Public Records Act, and sought declaratory and injunctive relief. 151 N.C. App. at 652, 566 S.E.2d at 702-03. We stated the appeal was "technically moot because the information sought by plaintiff ha[d] been fully disclosed." *Id.* at 654, 566 S.E.2d at 703. However, this Court applied an exception to dismissing the plaintiff's appeal as moot because: (1) all the requested information was disclosed in open session well before the controversy could be fully litigated and (2) there was a reasonable likelihood that the defendant, in considering the acquisition of other property for municipal purposes, could repeat the challenged conduct and subject the plaintiff to the same action and restrictions. *Id.* at 654, 566 S.E.2d at 704.

Here, as in *Boney Publishers, Inc.*, the gag order was lifted and the court proceedings completed before this controversy could be fully resolved. The trial court and this Court had not ruled upon Media General's motion and appeal prior to the completion of the trial. A reasonable likelihood remains that the trial court might attempt to repeat the conduct at issue in this case and subject Media General to the same or a similar action in another case. Due to the trial court's failure to rule upon Media General's motion, the short duration of the trial, and the elapsed time to obtain appellate review, Media General's allegations are "capable of repetition, yet evading review" and are properly before this Court. *Id.* at 651, 566 S.E.2d at 703-04.

IV. Constitutionality of the Gag Order

[2] Media General argues the trial court erred by entering and then failing to dissolve the unconstitutional gag order. We agree.

A. Standard of Review

"It is well settled that *de novo* review is ordinarily appropriate in cases where constitutional rights are implicated." *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001). We review this issue *de novo*.

B. Analysis

In *Branzburg v. Hayes*, the United States Supreme Court stated, "We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." 408 U.S. 665, 681, 33 L. Ed. 2d 626, 639 (1972).

Similarly, the United States Court of Appeals for the Fourth Circuit has held, "There are 'First Amendment interests in newsgathering.' " *Food Lion, Inc. v. Capital Cities/ABC Inc.*, 194 F.3d 505, 520 (4th Cir. 1999) (quoting *In re Shain*, 978 F.2d 850, 855 (4th Cir. 1992)).

The United States Court of Appeals for the Fifth Circuit has held:

> The first amendment's broad shield for freedom of speech and of the press is not limited to the right to talk and to print. The value of these rights would be circumscribed [if] those who wish to disseminate information [were] denied access to it, for freedom to speak is of little value if there is nothing to say.

In re Express-News Corp., 695 F.2d 807, 808 (5th Cir. 1982).

In *Sherrill v. Amerada Hess Corp.*, this Court discussed controlling precedents concerning gag orders and unanimously stated:

> "The issuance of gag orders prohibiting participants in judicial proceedings from speaking to the public or the press about those proceedings is a form of prior restraint." 1 Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech* § 15:41 (1996) [hereinafter 1 *Smolla and Nimmer*]. The phrase "prior restraint" refers to "judicial orders or administrative rules that operate to forbid expression before it takes place." *Id.* at § 15:1. "Prior restraints" are not unconstitutional *per se*, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558, 43 L. Ed. 2d 448, 459 (1975), but are presumptively unconstitutional as violative of the First Amendment, *New York Times Co. v. United States*, 403 U.S. 713, 714, 29 L. Ed. 2d 822, 824-25 (1971); *State v. Williams*, 304 N.C. 394, 403, 284 S.E.2d 437, 444 (1981), *cert. denied*, 456 U.S. 832, 72 L. Ed. 2d 450 (1982); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558, 49 L. Ed. 2d 683, 697 (1976), and are "repugnant to the basic values of an open society," 1 *Smolla and Nimmer* § 15:10.

130 N.C. App. 711, 719, 504 S.E.2d 802, 807 (1998).

As "prior restraints," gag orders are subject to strict and rigorous scrutiny under the First Amendment. *Id.* The party asserting validity of the order must establish: (1) "a clear threat to the fairness of the trial;" (2) "such threat is posed by the actual publicity to be restrained;" and (3) "no less restrictive alternatives are available" to rebut the presumptive unconstitutionality of gag orders. *Id.* at 719-20, 504 S.E.2d at 807-08. "Furthermore, the record must reflect findings [of fact] by the trial court that it has considered each of the above factors . . . and contain evidence to support [each] such finding[]." *Id.* at 720, 504 S.E.2d at 808 (citing *Nebraska Press Ass'n*, 427 U.S. at 563, 49 L. Ed. 2d at 700; *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101-02, 68 L. Ed. 2d 693, 703-04 (1981)). The trial court's findings of fact must support its conclusions of law in order to enter a lawful order. *Blanton v. Blanton*, 40 N.C. App. 221, 225, 252 S.E.2d 530, 533 (1979). "Finally, [the gag order] must comply with the specificity requirements of the First Amendment." *Sherrill*, 130 N.C. App. at 720, 504 S.E.2d at 808 (citing *Nebraska Press Ass'n*, 427 U.S. at 568, 49 L. Ed. 2d at 703).

In *Sherrill*, the trial court entered a gag order that prohibited the parties to a civil proceeding and their attorneys from communicating with the public and the press about the case. 130 N.C. App. at 718, 504

S.E.2d at 806. In support of this directive, the trial court found as a fact, "[T]hat communications concerning the [a]ctions with media representatives and with other persons not parties to this action by the parties and their counsel . . . will be detrimental to the fair and impartial administration of justice in such [a]ctions." *Id.* at 718, 504 S.E.2d at 807. The plaintiffs argued the gag order constituted an unconstitutional prior restraint of their First Amendment right to free speech. *Id.* A unanimous panel of this Court reversed the gag order and held:

> Although the record reflects a finding that communications concerning the action by the parties to persons not involved in the suit would "be detrimental to the fair and impartial administration of justice," there is no evidence in the record to support this finding. Furthermore, the trial court made no findings reflecting the consideration of less restrictive alternatives.

Id. at 720, 504 S.E.2d at 808.

Here, the entirety of the trial court's consideration and rendering of the gag order is contained in the transcript:

> The Court: Let me see the lawyers back one moment. Let me see you and Mr. Schwartz again, please. I'm going to reconvene court momentarily.
>
> [Mr. Schwartz, Ms. Edwards, Mr. Yarborough, and Mr. Mayo are present in the courtroom; the prospective jury panel is not present in the courtroom.]
>
> The Court: Gag order.
>
> Mr. Schwartz: Yes, sir.
>
> The Court: No talking to the press. I believe we'll all be better off if nobody talks to the press.
>
> Mr. Yarborough: I assume that applies to not only myself and Mr. Mayo and Mr. Schwartz and Ms. Edwards but also to—
>
> The Court: To the parties. All parties. All press off-limits. We are going to try this case on the issue specified in the statute, That's all we're here for, and I think if I impose this requirement on everyone, we'll get along better in getting that done.

The *ex mero motu* gag order utterly failed to meet any of the required standards set forth in *Sherrill*. The trial court neglected to

enter findings of fact that either a "clear threat" existed to the "fairness of the trial" and that the threat was posed by the "publicity to be restrained," or that it considered "less restrictive alternatives." *Id.* at 719-20, 504 S.E.2d at 807-08. The gag order was not reduced to writing, signed by the judge, filed with or entered by the Clerk of Superior Court.

The issue in this civil proceeding is between two publically elected bodies disputing the adequacy of funding for the public school system—an issue of paramount public interest. *See Leandro v. State*, 346 N.C. 336, 353, 488 S.E.2d 249, 258 (1997) (N.C. Const. art. IX, § 2(1), imposes on government the duty to provide the children of every school district with access to a "sound basic education.").

Subsequent to the entry of the gag order, on 21 July 2006, the trial court heard arguments on Media General's motion to dissolve the gag order. Counsel specifically cited this Court's decision in *Sherrill* to the trial court. The trial court responded, "*Educate me. Who was on the panel of the Court of Appeals that ruled*?" (Emphasis supplied). Counsel responded that Judges Greene, Smith, and Timmons-Goodson comprised the panel in *Sherrill*. Counsel began to discuss N.C. Gen. Stat. § 1-72.1. The trial court asked, "How many trial judges participated in drafting the statute?" Counsel responded that he did not know. At the end of the arguments, the trial court informed counsel that he would consider the motion over the weekend, and stated:

> As always . . . I'm concerned that the parties that make the decisions that impact these processes have never tried a case, never been in a courtroom. Now, Judge Smith has, of course. But it's troublesome to me that a lot of decision-making goes on that's made by people who have never been there and done that.

Over 123 years ago, our Supreme Court set forth the relationship and duties between the appellate and trial court divisions of the General Court of Justice:

> Upon the plainest principle, the courts, whose judgments and decrees are reviewed by an appellate court of errors, must be bound by and observe the judgments, decrees and orders of the latter court, within its jurisdiction. Otherwise the court of errors would be nugatory and a sheer mockery. There would be no judicial subordination, no correction of errors of inferior judicial tribunals, and every court would be a law unto itself.

Murrill v. Murrill, 90 N.C. 120, 122 (1884).

> Nothing is more basic to the jurisprudence of our State than:
>
> "[w]here an appellate court decides questions and remands a case for further proceedings, *its decisions* on those questions *become the law of the case*, both in the subsequent proceedings in the trial court and upon a later appeal, *where* the same facts and *the same questions of law are involved*."

Sloan v. Miller Building Corp., 128 N.C. App. 37, 41, 493 S.E.2d 460, 463 (1997) (emphasis supplied).

To further "educate" the trial court, both Judge Greene and Judge (now Justice) Timmons-Goodson, in addition to Judge Smith, served long and distinguished terms of service as judges in the trial court division of the General Court of Justice prior to service on this Court. The trial court's inquiry of and remarks to counsel were irrelevant, repugnant, and reflect disdain for both the legislative and judicial processes. The trial court's duty, as is required by the solemn judicial oath, is to follow the laws, general statutes, and precedents of this Court, our Supreme Court, the Supreme Court of the United States, and the North Carolina and United States Constitutions. We admonish the trial judge for these remarks, as such conduct does nothing to promote the public's confidence in our courts at any level. N.C. Code of Judicial Conduct, Cannon 2A.

The trial court erred in entering the gag order in this matter. The gag order did not contain the required findings of fact and conclusions of law set forth in *Sherrill*. The gag order was not reduced to writing, signed by the judge, filed, or entered in the Office of the Clerk of Superior Court as is required.

V. N.C. Gen. Stat. § 1-72.1

[3] In addition to asserting its motion under our State and Federal Constitutions, Media General also asserted its motion under N.C. Gen. Stat. § 1-72.1. Media General argues the trial court erred by not ruling upon its motion pursuant to N.C. Gen. Stat. § 1-72.1 by leaving in place the unconstitutional gag order and by violating the procedural requirements set forth in the statute.

N.C. Gen. Stat. § 1-72.1(a) (2005), entitled, "Procedure to assert right of access," states in part, "Any person asserting a right of access to a civil judicial proceeding or to a judicial record in that proceeding may file a motion in the proceeding for the limited purpose of determining the person's right of access." The statute further provides that

upon receipt of the motion, "the court *shall* establish the date and location of the hearing on the motion *that shall be set at a time before conducting any further proceedings relative to the matter for which access is sought under the motion*." N.C. Gen. Stat. § 1-72.1(b) (emphasis supplied). This statute further states:

> *The court shall rule* on the motion after consideration of such facts, legal authority, and argument as the movant and any other party to the action desire to present. *The court shall issue a written ruling* on the motion that *shall contain* a statement of reasons for the ruling sufficiently specific to permit appellate review. The order may also specify any conditions or limitations on the movant's right of access that the court determines to be warranted under the facts and applicable law.

N.C. Gen. Stat. § 1-72.1(c) (emphasis supplied).

" 'Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give [the statute] its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.' " *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974) (quoting 7 Strong, N.C. Index 2d, Statutes § 5 (1968)). Here, the statute plainly and unambiguously applies to "[a]ny person asserting a right of access to a civil judicial proceeding or to a judicial record[.]" N.C. Gen. Stat. § 1-72.1(a). Media General admits it was not denied "a right of access to a civil judicial proceeding" or to any "judicial record in that proceeding." *Id.*

The gag order prevented the parties and their attorneys from communicating with the press, not from attending the trial or gaining access to any proceeding or record in this matter. Media General argues that the words, "right of access to a civil judicial proceeding," should be broadly construed and encompass any and every aspect of a "civil judicial proceeding." *Id.*

Media General stipulates that it was free to attend and did attend the trial of this matter and freely accessed any public judicial records of this proceeding. Under the facts and issues before us, it is unnecessary to determine the outer ranges of what constitutes "access to a civil judicial proceeding." *Id.*

VI. Conclusion

No current relief is available to Media General because the trial proceeding in which the gag order arose is completed. This appeal is

technically moot. However, we find the issues regarding the trial court's failure to timely rule upon the gag order and the propriety of the gag order as rendered to be "capable of repetition, yet evading review." *Boney Publishers, Inc.*, 151 N.C. App. at 654, 566 S.E.2d at 703-04.

The gag order wholly failed to meet any of the standards set forth in *Sherrill*, 130 N.C. App. at 719-20, 504 S.E.2d at 807-08, or N.C. Gen. Stat. § 1-72.1. The trial court failed to enter any findings of fact of the existence of "a clear threat to the fairness of the trial," that "such threat is posed by the actual publicity to be restrained," and that it considered "less restrictive alternatives." *Sherrill*, 130 N.C. App. at 719-20, 504 S.E.2d at 807-08. The trial court erred in orally rendering the gag order and in not entering a written order containing the required findings and conclusions on Media General's motion prior to proceeding with the trial.

The gag order at issue prohibits either party or their attorneys from "talking to the press." The gag order did not restrict Media General's "access to a civil judicial proceeding" or "judicial record in that proceeding." N.C. Gen. Stat. § 1-72.1(a). Media General attended the trial and freely accessed records of this proceeding. The statute plainly and unambiguously applies to a "person asserting a right of access to a civil judicial proceeding or to a judicial record in that proceeding." *Id.* The gag order is vacated.

Vacated.

Judges ELMORE and GEER concur.

TERESA C. HARTLEY, PLAINTIFF-APPELLANT v. DWIGHT BLAN HARTLEY, II, DEFENDANT-APPELLEE

No. COA06-833

(Filed 19 June 2007)

Child Support, Custody, and Visitation— modification—deviation from guidelines—third-party contributions—social security benefits

The trial court abused its discretion in a child support case by reducing defendant father's required child support obligation from $644 to $379 per month solely based on social security ben-

efits being received by the two minor children due to the death of plaintiff mother's husband, because: (1) although our Supreme Court has concluded that nothing in North Carolina case law or in N.C.G.S. § 50-13.4(c) suggests that contributions of third parties may not be considered when determining whether to deviate from the guidelines, the trial court made ample findings supported by the evidence that defendant was able to support his children; (2) the trial court made no finding of fact that defendant was unable to provide support to the children; and (3) the social security payments were made to the children directly.

Judge CALABRIA dissenting.

Appeal by Plaintiff from order entered 13 February 2006 by Judge Otis M. Oliver in District Court, Surry County. Heard in the Court of Appeals 8 February 2007.

Randolph and Fischer, by J. Clark Fischer, for Plaintiff-Appellant.

Kara L. Daniels for Defendant-Appellee.

McGEE, Judge.

Teresa C. Hartley (Plaintiff) and Dwight Blan Hartley, II (Defendant) were married on 30 January 1993. The parties separated on or about 15 February 1997 and were divorced on 6 April 1998. Plaintiff and Defendant are the parents of two minor children, D.H. and T.H. Pursuant to a court order filed on 21 May 1998, D.H. and T.H. were placed in the primary custody of Plaintiff. This order also required Defendant to pay child support in the amount of $664.00 per month.

Plaintiff and Defendant each remarried after their divorce. Plaintiff's husband was killed in November 2002. Plaintiff continued working after her husband's death. However, Plaintiff left her job in May 2004 because her employer would not allow her to work part-time. As a result of the death of Plaintiff's husband, D.H. and T.H. each receive social security benefits in the amount of $1,095.00 each month.

Defendant filed a motion on 31 August 2005 to modify the amount of child support paid by Defendant. Defendant alleged "a substantial change in the needs of [D.H. and T.H.] in that those needs [were] being partially met through social security payments through [Plaintiff's husband]." Defendant requested the trial court deviate

from the North Carolina Child Support Guidelines (the guidelines) as a result of the social security payments.

The trial court heard Defendant's motion on 4 January 2006 and filed its order on 13 February 2006. The trial court found that although Plaintiff was unemployed, she suffered no disability that would prevent her from being gainfully employed. The trial court found Plaintiff's efforts to obtain employment were "minimal" and imputed income to her in the amount of $892.00 per month, representing minimum wage for forty hours per week. The trial court also found that Defendant: (1) earned a monthly wage of $3,653.00, (2) paid child support in the amount of $650.00 per month for two other minor children he had with a previous wife, (3) had a newborn child with his current wife, and (4) provided health insurance for each of his five children. The trial court further found that Defendant's current wife earned $2,664.00 monthly.

Pursuant to the guidelines, the trial court found that Defendant was responsible for $630.20 per month for D.H. and T.H. (the children). The trial court found that the reasonable needs of the children would not exceed $2,700.00 per month, notwithstanding Plaintiff's claim that the children's reasonable needs were $2,841.93. The trial court also found that the children received the sum of $2,190.00 per month in social security benefits to meet these reasonable needs. The trial court concluded, therefore, that the children had $510.00 per month of reasonable needs unmet. Applying Defendant's guideline percentage of seventy-four percent, the trial court set Defendant's child support at $379.00 per month. The trial court found that "[a]nything over this amount paid by [] Defendant would exceed the reasonable needs of the children." Finally, the trial court concluded that "[t]he only reason and basis for the downward deviation is the social security benefits being received by the children due to the death of [Plaintiff's husband]." From this order, Plaintiff appeals.

N.C. Gen. Stat. § 50-13.4(c) (2005) governs child support determinations and provides that payments

> shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

The statute permits any party to request a deviation from the guidelines, whereupon the trial court shall "hear evidence" and "find the

facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support." *Id.* Where the trial court determines "that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the [trial court] may vary from the guidelines." *Id.*

This Court has stated

> [a] trial court's deviation from the [g]uidelines is reviewed under an abuse of discretion standard, and its determination as to the proper amount of child support will not be disturbed on appeal absent a clear abuse of discretion, *i.e.* only if manifestly unsupported by reason. However, the [trial] court must make adequate findings of the specific facts supporting its ultimate decision in a case to enable a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law.

State ex rel. Fisher v. Lukinoff, 131 N.C. App. 642, 644, 507 S.E.2d 591, 593 (1998) (internal citations and quotations omitted). "When discretionary rulings are made under a misapprehension of the law, this may constitute an abuse of discretion." *Gailey v. Triangle Billiards & Blues Club, Inc.*, 179 N.C. App. 848, 851, 635 S.E.2d 482, 484 (2006).

In *Guilford County ex rel. Easter v. Easter*, 344 N.C. 166, 167, 473 S.E.2d 6, 7 (1996), our Supreme Court addressed "whether third-party contributions may be used to support a deviation from the North Carolina Child Support Guidelines." In *Easter*, the defendant-mother requested a deviation from the guidelines based on support provided by the defendant-mother's parents. *Id.* at 168, 473 S.E.2d at 7. Her parents owned the house in which the plaintiff-father and the children resided, and did not charge the plaintiff-father rent. *Id.* The defendant-mother's parents also paid the water bill and provided other support in the form of clothing, haircuts, and medical bills. *Id.* The Supreme Court concluded that "nothing in North Carolina case law or in N.C.G.S. § 50-13.4(c) . . . suggests that the contributions of third parties may not be considered when determining whether to deviate from the guidelines." *Id.* at 169, 473 S.E.2d at 8. The Court noted that the statutory duty of the trial court was "to determine whether the reasonable needs of the children are being met and whether imposing the presumptive amount would not meet or would

exceed the reasonable needs of the children or would be otherwise inappropriate or unjust." *Id.* at 169-70, 473 S.E.2d at 8. In doing so, "the trial court should have at its disposal any information that sheds light on this inquiry." *Id.* at 170, 473 S.E.2d at 8. The Court emphasized that it was holding "that the trial court *may* consider support by third parties when determining whether there is evidence to support a deviation" but found it important to note that "contributions from a third party will not always support deviation from the guidelines." *Id.* at 171, 473 S.E.2d at 9. The Court stated that

> [i]n each case where the trial court considers whether the contributions of a third party support deviation from the guidelines, that court must examine the extent and nature of the contributions in order to determine whether a deviation from the guidelines is appropriate considering the criteria for deviation set out in N.C.G.S. § 50-13.4(c).

Id.

In *Gaston Cty. ex rel. Miller v. Miller*, 168 N.C. App. 577, 578, 608 S.E.2d 101, 102 (2005), the issue before this Court was whether the trial court erred by failing to credit adoption assistance payments received by two adopted children against the defendant-father's child support obligation. The defendant-father argued that the trial court should have applied the entire benefit received by the children against his child support obligation. *Id.* at 579, 608 S.E.2d at 103. We rejected the defendant-father's argument and held that the trial court did not abuse its discretion by failing to credit the payments against defendant-father's support obligation. *Id.* at 580, 608 S.E.2d at 103. In our analysis, we concluded that "the child, rather than the adoptive parent, is the recipient of adoption assistance payments administered pursuant to North Carolina's adoption assistance program." *Id.* at 579, 608 S.E.2d at 103.

In *Browne v. Browne*, 101 N.C. App. 617, 625, 400 S.E.2d 736, 741 (1991), this Court upheld the trial court's decision not to "diminish or relieve" the father's child support obligation even though each of the two children had an estate valued in excess of $300,000.00, although we ultimately remanded for further findings. We stated that "[t]he supporting parent who can do so remains obligated to support his or her minor children, even though [the minor children] may have property of their own." *Id.* In *Browne*, "there [were] ample findings of fact supported by the evidence that the defendant father was able to support his children." *Browne*, 101 N.C. App. at 625, 400 S.E.2d at 741. We

therefore concluded that "the trial court was correct in refusing to 'diminish or relieve' the father of his obligation to provide for his children simply because the children had their own separate estates." *Id.*

Additionally, in *Gowing v. Gowing*, 111 N.C. App. 613, 617, 432 S.E.2d 911, 913 (1993), this Court reversed a trial court's decision not to award child support where the minor child was the beneficiary of a structured settlement which provided $2,000.00 per month. We reversed the trial court for making insufficient findings of fact to justify relieving the defendant of his support obligation. *Id.* We stated:

> If a parent can support his minor children, the trial court *must refuse* to diminish or relieve him of this obligation to provide for his children if the sole ground for that relief is that the children have their own separate estates. *For the child's settlement money to be a factor in deviating from the guidelines and awarding no support, the trial court must also find that the defendant father is unable to provide support.*

Id. (emphasis added and citations omitted).

In the present case, the trial court's order clearly stated that "[t]he only reason and basis for the downward deviation [from the guidelines was] the social security benefits being received by the children due to the death of [Plaintiff's husband]." As in *Browne*, in the present case the trial court made ample findings which were supported by the evidence that Defendant was able to support his children. As in *Gowing*, the trial court made no finding that Defendant was unable to provide support. Like *Browne* and *Miller*, and unlike *Easter*, this case involves payments made to the children directly. We conclude, therefore, that the trial court erred by crediting the social security benefits when it determined the unmet reasonable needs of the children and Defendant's corresponding obligation. The trial court was clear that the sole reason for diminishing Defendant's support obligation was the social security benefits received by the children. The trial court made no finding of fact that Defendant was unable to provide support to the children. Therefore, the trial court erred by diminishing Defendant's support obligation based upon the children's social security payments without finding that Defendant could not pay. We reverse and remand the trial court's order.

Reversed and remanded.

Judge STEPHENS concurs.

Judge CALABRIA dissents with a separate opinion.

CALABRIA, Judge, dissenting.

I respectfully dissent from the majority's decision to reverse and remand the trial court's order granting a modification of defendant's child support obligation for his minor children. The trial court did not abuse its discretion by deviating from the child support guidelines based on contributions the children received from a third party.

The majority essentially holds that it is an abuse of discretion for a trial court to base a deviation from the child support guidelines on third party contributions unless there is a finding that the supporting parent is completely unable to provide support. This holding is overly restrictive and eviscerates the trial court's discretion to consider third party payments when modifying child support payments.

Based on the presumptive guidelines, child support payments "shall be in such amount as to meet the reasonable needs of the child . . . ." N.C. Gen. Stat. § 50-13.4(c) (2005). A trial court may vary from the guidelines if "the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support *or would be otherwise unjust or inappropriate*." *Id.* (emphasis added). "A trial court's deviation from the [g]uidelines is reviewed under an abuse of discretion standard." *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 644, 507 S.E.2d 591, 593 (1998). A trial court has committed an abuse of discretion when its ruling is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Ugochukwu v. Ugochukwu*, 176 N.C. App. 741, 747, 627 S.E.2d 625, 628-29 (2006).

The majority relies upon *Gaston Cty. ex rel. Miller v. Miller*, 168 N.C. App. 577, 608 S.E.2d 101 (2005), to support its conclusion. However, *Miller* actually holds that the trial court properly exercised its discretion in considering payments from a third party in determination of child support. In *Miller*, this Court upheld the trial court's decision to deviate from the guidelines when it considered how the trial court treated the adoption assistance payments. The majority's statement that the trial court failed to credit the adoption assistance payments against the defendant-father's support obligation is misleading. The defendant-father requested a one hundred percent credit. The trial court, in its discretion, reduced the defendant-

father's obligation by only twenty percent of the children's income. *Id.* The trial court found:

> [A]lthough the children are considered special needs children for the purpose of receiving adoption assistance income, the children do not have any additional or extraordinary expenses relating to any physical or emotional health needs, educational needs, or other special needs that should be considered by the court.

Id. at 580, 608 S.E.2d at 103. The trial court also made findings as to the parties' employment circumstances and sources of income. However, there was no finding made that the defendant was unable to provide support for the children. The trial court determined that the presumptive amount would exceed the reasonable needs of the children and that a deviation from the guidelines was appropriate. *Id.* at 578, 608 S.E.2d at 102. Despite the fact that the trial court did not find that the defendant was unable to support the children, the *Miller* court concluded that the trial court did not abuse its discretion by deviating from the guidelines based on the payments to the children.

The *Miller* court relied on *Guilford County ex rel. Easter v. Easter*, 344 N.C. 166, 473 S.E.2d 6 (1996), where our Supreme Court held that contributions from third parties may be used to determine whether deviations from the guidelines are appropriate. The *Easter* Court stated, "We find nothing in North Carolina case law or in N.C.G.S. § 50-13.4(c) which suggests that the contributions of third parties may not be considered when determining whether to deviate from the guidelines." *Id.* at 169, 473 S.E.2d at 8. In reaching its decision, the *Easter* Court reiterated that "[t]he role of the trial court is to determine whether the reasonable needs of the children are being met and whether imposing the presumptive amount would not meet or would exceed the reasonable needs of the children or would be otherwise inappropriate or unjust." *Id.* The *Easter* Court further stated:

> We emphasize that we are holding that the trial court may consider support by third parties when determining whether there is evidence to support a deviation. It is important to note that contributions from a third party will not always support deviation from the guidelines. In each case where the trial court considers whether the contributions of a third party support deviation from the guidelines, that court must examine the extent and nature of the contributions in order to determine whether a deviation from

> the guidelines is appropriate considering the criteria for deviation set out in N.C.G.S. § 50-13.4(c).

Id. at 171, 473 S.E.2d at 9.

The majority also relies upon *Browne v. Browne*, 101 N.C. App. 617, 400 S.E.2d 736 (1991), to support its holding. However, *Browne* is distinguishable from the case *sub judice*. In *Browne*, the father appealed an initial child support order arguing that the trial court did not give due consideration to the estates of each child. The children in *Browne* each owned separate $300,000.00 estates consisting of real and personal property. The *Browne* Court affirmed the trial court's decision not to reduce the father's child support obligation merely because the children owned separate estates. The *Browne* court placed great emphasis on the father's income from his employment, annual income distributions from a trust fund and payments previously received from the children's estates as reimbursement for expenditures on behalf of the children. In the case *sub judice*, defendant's motion to modify child support payments was not based on separate estates owned by the children but based on monthly payments made on behalf of the children for their support. Further, the defendant in the present case only has one source of income and is obligated to support his four non-custodial children as well as his newborn child. In addition, he provides health insurance for all five of them.

Finally, the majority misapplies *Gowing v. Gowing*, 111 N.C. App. 613, 432 S.E.2d 911 (1993), to the case *sub judice*. In *Gowing*, this Court vacated the trial court's initial child support determination because the trial court denied the plaintiff's request for child support without making findings regarding the reasonable needs of the child, the earning capacity or incomes of the parties, the relative ability for each parent to pay support, and the child care and homemaker contributions. In *Gowing*, the trial court conclusively determined there was no need for child support because the child received monthly payments from a structured settlement. The *Gowing* Court remanded the order because the trial court did not make adequate findings. The Court stated, "If the trial court varied from the guidelines because their application would exceed the reasonable needs of the child considering the relative ability of each parent to provide support, then the court must make findings as to the abilities of each parent to provide support and the reasonable needs of the child." *Id.*, 111 N.C. App. at 617, 432 S.E.2d at 913. Unlike the trial court in *Gowing*, the trial court in the case *sub judice* took into consideration eleven factors to

support both the basis for its decision and the basis for the amount of the modified child support payment. Here, the trial court's findings regarding the reasonable needs of the children, the income and earning capacities of the parties, and the defendant's other support obligations were sufficient to support its decision to deviate from the guidelines.

The majority opinion creates an artificial limitation to the trial court's discretion and is contrary to the rule set forth by our Supreme court in *Easter* and followed by this Court in *Miller*, *Browne and Gowing*. Specifically, the majority holds that a deviation from the child support guidelines based on third party contributions is an abuse of discretion unless there is a finding that the supporting parent is completely unable to provide support when other findings supporting the deviation have been made.

Based on our statutes and case law, the trial court has discretion to determine whether deviation from the guidelines is appropriate when there is a substantial change in the needs of the minor children by making findings regarding the reasonable needs of the children as well as the contributions from the parents and their ability to provide support. The trial court made sufficient findings of fact and its decision is manifestly supported by reason. Therefore, the trial court did not abuse its discretion when it considered the social security payments in ordering a modification of defendant's liability for child support.

STATE OF NORTH CAROLINA v. JOHN JOSEPH MANNING

No. COA06-1314

(Filed 19 June 2007)

1. Drugs— weight of marijuana—foundation for scales

The trial court did not abuse its discretion in a trafficking in marijuana, possession with intent to sell or distribute marijuana, maintaining a dwelling for the purpose of keeping controlled substances, and double possession of drug paraphernalia case by admitting evidence of the weight of the marijuana allegedly without adequate foundation that the instrument used to weigh the marijuana was properly assembled, calibrated, and tested, be-

cause: (1) the State's evidence tended to show that ordinary scales, common procedures, and reasonable steps to ensure accuracy were utilized when the marijuana was weighed; (2) the testimony of two witnesses established an adequate foundation that the scale used to weigh the marijuana was properly functioning; and (3) the weight element upon a charge of trafficking in marijuana becomes more critical if the State's evidence of the weight approaches the minimum weight charged, and the weight recorded at Toledo Scales was 25.5 pounds which exceeded the minimum weight charged by 15.5 pounds.

2. Drugs— trafficking in marijuana—motion to dismiss—sufficiency of evidence—weight of marijuana

The trial court did not err by failing to dismiss the charge of trafficking in marijuana based on alleged insufficient evidence of the weight of the marijuana, because: (1) although defendant was allowed to present evidence that the State's offered weight of marijuana included substances not within the definition such as mature stalk, it then becomes the jury's duty to accurately weigh the evidence; and (2) the State presented sufficient evidence tending to show the weight of the marijuana exceeded the minimum ten pounds.

Appeal by defendant from judgment entered 2 March 2006 by Judge John E. Nobles, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 4 June 2007.

Attorney General Roy Cooper, by Assistant Attorney General Harriet F. Worley, for the State.

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

TYSON, Judge.

John Joseph Manning ("defendant") appeals from judgment entered after a jury found him to be guilty of trafficking in marijuana pursuant to N.C. Gen. Stat. § 90-95(H)(1), possession with intent to sell or distribute marijuana pursuant to N.C. Gen. Stat. § 90-95(A), maintaining a dwelling for the purpose of keeping controlled substances pursuant to N.C. Gen. Stat. § 90-108(A)(7), and two counts of possession of drug paraphernalia pursuant to N.C. Gen. Stat. § 90-113.22. We find no error.

I. Background

Around April 2001, Brian Gonzales ("Gonzales") approached defendant and offered to pay him $1,000.00 per month to use defendant's property to grow marijuana. Defendant agreed. Gonzales acquired two metal shipping containers and placed them on defendant's property. One of the metal shipping containers measured approximately forty feet long, and the other was approximately twenty feet long. Both containers extended eight feet high.

Over a period of time covering three to five months, Gonzales, with defendant's assistance, constructed marijuana growing facilities inside the containers. Gonzales testified defendant assisted in the construction and operation of the growing facilities inside the containers by: (1) installing the electrical lines for lighting; (2) installing water pumps; (3) diverting water from a well on defendant's property to water the marijuana plants; (4) planting seeds; (5) picking out strains of marijuana that were sufficient for the operation; (6) growing seeds; and (7) harvesting the plants to sell.

On 3 April 2002, officers with the New Hanover County Sheriff's Office obtained a search warrant and searched defendant's residence and shipping containers. The officers cut locks off the container doors to gain access. Inside the containers, the officers discovered 731 marijuana plants in various stages of growth, lights, a sprinkler system, fertilizer, soil, and growth charts for the marijuana.

The officers called narcotics officers to the scene to collect and preserve the evidence found inside the containers. The narcotics officers collected the plants by cutting each plant above the root ball and placing them inside two thirty-gallon black plastic bags. The officers took the bags to the vice and narcotics office where they transferred the plants into more breathable brown paper bags.

On the following morning, 4 April 2002, Lieutenant Barney Lacock ("Lieutenant Lacock") transported the brown paper bags containing the marijuana to Toledo Scales to determine the marijuana's green weight—the plant material's weight at the time it is harvested. James Martin ("Martin"), service manager at Toledo Scales, weighed the bags. The total green weight of the bags and their contents was 25.5 pounds.

During cross-examination Martin testified: (1) he did not possess personal knowledge about whether the scales were properly assembled; (2) the scale used to weigh the marijuana was newly assembled;

(3) if the scale was not properly assembled, it would not balance at zero; (4) if the scale balances at zero, it is correctly calibrated; (5) when he weighed the marijuana, the scales balanced at zero; (6) he had checked approximately 100 scales, and of those scales, only one was incorrectly calibrated, and it was manufactured by a different company than the scale in question; (7) the particular scale in question was sold sometime after the day it was used to weigh the marijuana; and (8) since that date, he had not received any service calls on that particular scale. Lieutenant Lacock testified that he observed Martin zero the scale.

After being weighed, the bags containing marijuana were transferred into three boxes and stored inside a drug vault at the New Hanover County Sheriff's Office. Some of the plant material decomposed while being stored. On 19 April 2002, the evidence was sent to the SBI laboratory, where it was analyzed and weighed again. On 7 May 2002, an SBI chemist recorded the marijuana's dry weight to be 6.9 pounds.

On 25 August 2005, the marijuana was examined by Charles Williams ("Williams"), an expert for the defense in the fields of agronomy and horticulture. Williams agreed with the State that the only way to determine the true weight of the plant material, including stalks, roots, leaves, and flowers was to determine its green weight. Williams testified: (1) the plant material was significantly decomposed at the time he examined it; (2) approximately thirty to forty percent of the plant material was mature stalks; (3) approximately ten percent of the plant material had reached sufficient maturity to produce a flower or bud at the time law enforcement officers harvested the plants; (4) the stalks of a plant can be considered mature even if a plant is not ready to be harvested; (5) it did not appear that the mature stalks were separated from any of the other parts of the plants; and (6) the green weight of the marijuana plants, excluding the mature stalks, at the time of the seizure was 5.1 to 10.2 pounds. Defendant did not testify.

Defendant was tried before a jury on 27 February 2006. At the close of the State's evidence, the trial court granted defendant's motion to dismiss the charges of trafficking and conspiracy to traffic more than ten pounds by manufacturing.

The jury found the defendant to be guilty of: (1) trafficking in marijuana pursuant to N.C. Gen. Stat. § 90-95(H)(1); (2) possession with intent to sell and distribute marijuana pursuant to N.C. Gen.

Stat. § 90-95(A); (3) two counts of possession of drug paraphernalia pursuant to N.C. Gen. Stat. § 90-113.22; and (4) maintaining a dwelling for the purpose of keeping a controlled substance pursuant to N.C. Gen. Stat. § 90-108(A)(7). Defendant was sentenced to a minimum of twenty-five and a maximum of thirty months imprisonment. Defendant appeals.

II. Issues

Defendant argues the trial court erred in: (1) admitting evidence of the weight of the marijuana without adequate foundation that the instrument used to weigh the marijuana was properly assembled, calibrated, and tested and (2) failing to dismiss the charge of trafficking in marijuana because the State tendered insufficient evidence of the weight of the marijuana.

III. Weight of the Marijuana

A. Standard of Review

> "The standard of review for this Court assessing evidentiary rulings is abuse of discretion. *State v. Boston*, 165 N.C. App. 214, 218, 598 S.E.2d 163, 166 (2004). 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. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985) (citing *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985))."

State v. Hagans, 177 N.C. App. 17, 23, 628 S.E.2d 776, 781 (2006).

B. Analysis

[1] Defendant argues that the trial court erred in admitting evidence of the weight of the marijuana without an adequate foundation that the scale used to weigh the marijuana was properly functioning, maintained, and calibrated. We disagree.

Defendant contends the testimony showed: (1) the scales used to weigh the marijuana were assembled recently; (2) the person who weighed the plants had no knowledge of whether the scales were assembled or calibrated properly; and (3) no tests were performed on the scale to determine whether it was accurate.

In *State v. Diaz*, this Court considered a proper foundation for evidence of weight of marijuana. 88 N.C. App. 699, 365 S.E.2d 7, *cert. denied*, 322 N.C. 327, 368 S.E.2d 870 (1988). In *Diaz*, the defendant

claimed the trial court erred in admitting evidence of the weight of the marijuana because the State failed to establish a proper foundation for that testimony. 88 N.C. App. at 701-02, 365 S.E.2d at 9. The defendant asserted the State failed to show that the person who weighed the marijuana was qualified and failed to demonstrate the scales were in working order on the day of the weighing. *Id.* at 701, 365 S.E.2d at 9. We stated, "Unlike tests that are prescribed by statute such as the breathalyzer test, the criminal statutes do not provide specific procedures for obtaining weights of contraband. Thus ordinary scales, common procedures, and reasonable steps to ensure accuracy must suffice." *Id.* at 702, 365 S.E.2d at 9.

In *Diaz*, Agent McLeod, the law enforcement agent present when the marijuana was weighed, described the procedure by which the weight was taken. 88 N.C. App. at 702, 365 S.E.2d at 9. Law enforcement officers transported three trucks to a fertilizer store where they were weighed full. *Id.* The marijuana was unloaded and the trucks were weighed empty. *Id.* The cargo weighed 43,450 pounds. *Id.* Agent McLeod stated that the scales were certified within seven months of the weighing. *Id.* Based upon Agent McLeod's testimony, this Court concluded that "the foundation was adequate for admission of the evidence of weight." *Id.*

Here, the State's evidence tended to show that "ordinary scales, common procedures, and reasonable steps to ensure accuracy" were utilized when the marijuana was weighed. *Id.* Martin and Lieutenant Lacock's testimony established an adequate foundation that the scale used to weigh the marijuana was properly functioning. Martin testified: (1) if the scale was not properly assembled, it would not balance at zero; (2) if the scale balances at zero, it is correctly balanced; (3) the scale balanced at zero on the day he weighed the marijuana; (4) he had seen 100 or more of the particular scale model in question; (5) he assembled approximately twenty-five scales of the same model; (6) once the scale is assembled, it was normal procedure to put weight on the scale to check calibration; (7) over a period of twenty years he had checked approximately 100 scales, and of those scales, only one was incorrectly calibrated, and it was manufactured by a different company than the scale in question; (8) the particular scale in question was sold sometime after the day it was used to weigh the marijuana; and (9) he had not received any services calls on that particular scale. Lieutenant Lacock testified that he took the marijuana to Toledo Scales to be weighed and observed Martin zero the scale.

Moreover, this Court noted in *Diaz* that " 'the weight element upon a charge of trafficking in marijuana becomes more critical if the State's evidence of the weight approaches the minimum weight charged.' " *Id.* (quoting *State v. Anderson*, 57 N.C. App. 602, 608, 292 S.E.2d 163, 167, *cert. denied*, 306 N.C. 559, 294 S.E.2d 372 (1982)). Here, the weight recorded at Toledo Scales was 25.5 pounds, which exceeds the minimum weight charged by 15.5 pounds.

In support of his contentions, defendant cites *State v. Mason*, 144 N.C. App. 20, 26-27, 550 S.E.2d 10, 15-16 (2001) (error to admit evidence of a videotape recording when "[n]one of the State's witnesses gave testimony to indicate that there was any routine maintenance or testing" of the security system in question) and *State v. Sibley*, 140 N.C. App. 584, 586, 537 S.E.2d 835, 837-38 (2000) (videotape inadmissible because not properly authenticated since State failed to call any witnesses to testify that the camera was functioning properly or that the tape accurately represented the events that were filmed).

Both *Mason* and *Sibley* involve authentication of videotape recordings, which have specific requirements in laying a proper foundation for their admission. *Mason* sets out four elements needed to lay a proper foundation before a videotape can be admitted. 144 N.C. App. at 25, 550 S.E.2d at 14. These elements are unique to videotapes and are different from those set out in *Diaz* for a proper foundation for the admission of evidence of weight.

Diaz only requires that the State present evidence of "ordinary scales, common procedures, and reasonable steps to ensure accuracy." 88 N.C. App. at 702, 365 S.E.2d at 9. The State presented sufficient evidence to establish a proper foundation through the testimony of Martin and Lieutenant Lacock to support the admission of the weight of the marijuana. The trial court did not err in admitting evidence of the marijuana's weight. This assignment of error is overruled.

IV. Motion to Dismiss

A. Standard of Review

The standard for ruling on a motion to dismiss is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must consider all of the evi-

> dence 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*, "[i]n '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 (internal citations omitted), *disc. rev. denied*, 315 N.C. 593, 341 S.E.2d 33 (1986).

B. Analysis

[2] Defendant argues the State presented insufficient evidence of the marijuana's weight and that the trial court erred in denying his motion to dismiss the trafficking charge. We disagree.

Defendant claims the State included mature stalks in the weight of the marijuana, which are excluded from the statutory definition of marijuana. N.C. Gen. Stat. § 90-87(16) (2005). Defendant was indicted under N.C. Gen. Stat. § 90-95(h)(1), which provides:

> Any person who sells, manufactures, delivers, transports, or possesses in excess of 10 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance involved is in excess of 10 pounds, but less than 50 pounds, such person shall be punished as a Class H felon and shall be sentenced to a minimum term of 25 months and a maximum term of thirty months in the State's prison and shall be fined not less than five thousand dollars ($5,000).

N.C. Gen. Stat. § 90-95(h)(1) (2005).

"Proving the weight of the marijuana is an essential element of the trafficking offense." *State v. Gonzales*, 164 N.C. App. 512, 515, 596 S.E.2d 297, 299 (2004), *aff'd*, 359 N.C. 420, 611 S.E.2d 832 (2005). To prove the element of weight, the State "must either offer evidence of its actual, measured weight or demonstrate that the quantity of marijuana itself is so large as to permit a reasonable inference that its

weight satisfied this element." *State v. Mitchell*, 336 N.C. 22, 28, 442 S.E.2d 24, 27 (1994). The statutory definition of marijuana reads:

> "Marijuana" . . . *shall not include the mature stalks of such plant*, fiber produced from such stalks, oil, or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks, . . . fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

N.C. Gen. Stat. § 90-87(16) (2005) (emphasis supplied).

In *State v. Gonzales*, this Court held, "[t]hose parts of the plant not included in the statutory definition of marijuana, *such as the mature stalks* and sterilized seeds, are necessarily not to be included in the weight of the marijuana when determining a trafficking charge." 164 N.C. App. 512, 515, 596 S.E.2d 297, 299 (2004) (emphasis supplied). Under the statute, "mature stalks and sterilized seeds" are not "marijuana." *Id.*

Defendant must make an affirmative showing that the weight of the marijuana improperly included materials excluded from the definition of marijuana. *Id.* In *Gonzales*, this Court concluded "it is the defendant's burden to show that any part of the seized matter is not 'marijuana' as defined." 164 N.C. App. at 516, 596 S.E.2d at 300. In *State v. Anderson*, this Court held "the burden is on the defendant to show that stalks were mature or that any other part of the matter or material seized did not qualify as 'marijuana.' " 57 N.C. App. 602, 608, 292 S.E.2d 163, 167, *cert. denied*, 306 N.C. 559, 294 S.E.2d 372 (1982).

Once defendant offers evidence tending to show the total weight may have included mature stalks, the burden does not shift to the State for further evidence, as defendant contends. The issue of the "weight" of the marijuana becomes one for the jury. We held in *Gonzales*, "where the defendant does come forth with evidence that the State's offered weight of the marijuana includes substances not within the definition (e.g., mature stems or sterile seeds), it then becomes the jury's duty to accurately 'weigh' the evidence." 164 N.C. App. at 516, 596 S.E.2d at 300. We concluded, "[i]n North Carolina, establishing the weight element of a trafficking charge is a question the jury must determine beyond a reasonable doubt." *Id.* at 519, 596 S.E.2d at 301.

The State met its burden on the issue of weight by presenting the testimony of Martin and Lieutenant Lacock that the marijuana's green

weight was 25.5 pounds. Martin testified that he calibrated the scale, weighed the marijuana, and recorded its weight at 25.5 pounds. Lieutenant Lacock testified that he observed Martin zero the scale and weigh the marijuana. The State also offered evidence that the 25.5 pounds was the marijuana's green weight. The marijuana was taken by Lieutenant Lacock and weighed the morning after it had been harvested. Defendant's own expert agreed that the only way to determine the true weight of marijuana was to determine its weight at the time it was harvested. The SBI Laboratory determined the marijuana's weight to be 6.9 pounds. This weight was taken a month after the marijuana had been harvested and only represented the marijuana's dry weight.

Defendant's expert witness, Williams, estimated between thirty to forty percent of the plant material appeared to be mature stalks and twenty to forty percent, or 5.1 to 10.2 pounds, of the original green weight was leaves and flowers. Using defendant's expert's estimate that forty percent of the plant material was mature stalk, the total weight of the remaining marijuana would be 15.3 pounds, more than the ten pound minimum required by the statute. Under *Gonzales*, defendant was allowed to present this evidence to rebut the State's evidence and this evidence only creates an issue of fact for the jury to determine the "weight." 164 N.C. App. at 516, 596 S.E.2d at 300.

The State presented sufficient evidence tending to show the weight of the marijuana exceeded ten pounds to overcome defendant's motion to dismiss the trafficking charge. This assignment of error is overruled.

V. Conclusion

The State established a proper foundation and presented sufficient evidence to introduce evidence that the weight of the marijuana seized from defendant exceeded the ten pound minimum as required by statute. Defendant received a fair trial, free from prejudicial errors he preserved, assigned and argued.

No Error.

Chief Judge MARTIN and Judge McCULLOUGH concurs.

STATE OF NORTH CAROLINA v. ALFONZA DWANTA COLTRANE

No. COA06-895

(Filed 19 June 2007)

1. Motor Vehicles— driving while license suspended—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a driving while license suspended charge even though defendant concedes the State proved each of the elements except for knowledge of the suspension, because: (1) the State raised prima facie presumption of receipt of notice of suspension through the signed certificate of an employee of the Division of Motor Vehicles that constituted proof of the giving of notice under N.C.G.S. § 20-48(a), and defendant was obligated to rebut the presumption; and (2) defendant chose not to present any evidence at trial, thus failing to rebut the presumption.

2. Motor Vehicles— felony operation of motor vehicle to elude arrest—aggravated factor of driving while license suspended

Although defendant contends his conviction for felony operation of a motor vehicle to elude arrest must be vacated based on the State's alleged improper reliance on a driving while license suspended charge as an aggravating factor for that conviction, the Court of Appeals already concluded the driving while suspended charge was proper.

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

Although defendant contends the trial court erred in a driving while license suspended, felony operation of a motor vehicle to elude arrest, failing to heed light and siren, reckless driving, transporting unsealed spiritous liquor in the passenger area, and failure to stop for a stop sign case by admitting the DMV record and other related testimony, this assignment of error is dismissed because: (1) defendant did not raise any objection on the grounds of relevancy or undue burden that he now argues on appeal; and (2) although defendant referenced plain error, he did not make any argument regarding plain error in his brief.

Judge TYSON dissenting.

STATE v. COLTRANE

[184 N.C. App. 140 (2007)]

Appeal by defendant from judgment entered 1 February 2006 by Judge R. Stuart Albright in Randolph County Superior Court. Heard in the Court of Appeals 7 March 2007.

Attorney General Roy Cooper, by Assistant Attorney General Allison A. Pluchos, for the State.

Anne Bleyman, for defendant-appellant.

ELMORE, Judge.

Alfonza Dwanta Coltrane[1] (defendant) appeals the judgment of the trial court, entered 1 February 2006, convicting him of driving while license suspended; felony operation of a motor vehicle to elude arrest; failing to heed light and siren; reckless driving; transporting unsealed spiritous liquor in the passenger area; and failure to stop for a stop sign. After a thorough review of the record, we find no error.

On 12 December 2004, Liberty Police Department Officers William Lee Whitfield and Ray Chapuis (Officers Whitfield and Chapuis) were driving a marked police car in Randolph County when they observed defendant driving past them in the opposite direction. Officer Chapuis recognized defendant from past interactions, the most recent of which occurred a few months prior to that night. That interaction involved Officer Chapuis giving defendant a citation and telling defendant that he was not licensed to drive a motor vehicle. Based on this last encounter, Officer Chapuis checked the status of defendant's license and was informed that defendant's license was indefinitely suspended. The officers therefore turned the police car around and followed defendant.

The officers observed defendant drive up to a residence and parked the police car to continue watching defendant. After about ten minutes, defendant got back into the car, accompanied by a black male. Defendant began to drive down the street, and the officers followed him with the police car's blue lights on. Rather than pulling over to the side of the road, defendant accelerated, despite passing several appropriate places where he could have stopped his car. During the ensuing chase, defendant failed to stop at a four way stop sign that was clearly visible. Shortly thereafter, defendant swerved around a stopped car at another stop sign on a residential street,

1. We note that defendant's name has apparently been spelled in many different ways throughout his dealings with our courts. For the sake of simplicity, we use the spelling as presented in the judgment.

again proceeding past the stop sign without stopping. Eventually, defendant came to an abrupt stop in the middle of the road, exited his car, looked at the officers, and fled towards some nearby houses. Although Officer Whitfield chased after defendant and searched for him for approximately ten to fifteen minutes, he was not able to locate defendant at that time.

Defendant was subsequently indicted by a Randolph County Grand Jury on 11 July 2005, and on 1 February 2006, a jury found him guilty of driving while license suspended; felony operation of a motor vehicle to elude arrest; failing to heed light and siren; reckless driving; transporting unsealed spiritous liquor in the passenger area; and failure to stop for a stop sign. Defendant appealed in open court from the trial court's entry of judgment.

[1] On appeal, defendant first argues that the trial court erred in denying his motion to dismiss the driving while license suspended charge for insufficient evidence. Because we hold that the evidence was sufficient to submit the charge to the jury, this argument fails.

"In ruling on a defendant's motion to dismiss, the trial court should consider if the state has presented substantial evidence on each element of the crime and substantial evidence that the defendant is the perpetrator." *State v. Replogle*, 181 N.C. App. 579, 580-81, 640 S.E.2d 757, 759 (2007) (quoting *State v. Fowler*, 353 N.C. 599, 621, 548 S.E.2d 684, 700 (2001)). The elements of driving while license revoked are "(1) [defendant] operated a motor vehicle, (2) on a public highway, (3) while his operator's license was suspended or revoked, and (4) had knowledge of the suspension or revocation." *State v. Woody*, 102 N.C. App. 576, 578, 402 S.E.2d 848, 850 (1991) (citation omitted). "The evidence should be viewed in the light most favorable to the state, with all conflicts resolved in the state's favor. . . . If substantial evidence exists supporting defendant's guilt, the jury should be allowed to decide if the defendant is guilty beyond a reasonable doubt." *Replogle*, 181 N.C. App. at 580-81, 640 S.E.2d at 759 (quoting *Fowler*, 353 N.C. at 621, 548 S.E.2d at 700) (alteration in original).

Defendant concedes that the State proved each of the elements except for knowledge of the suspension. "This Court has previously held that the State satisfies its burden of proof of a G.S. 20-28 violation when, nothing else appearing, it has offered evidence of compliance with the notice requirements of G.S. 20-48 because of the

presumption that he received notice and had such knowledge." *State v. Cruz*, 173 N.C. App. 689, 697, 620 S.E.2d 251, 256 (2005) (internal quotations, citations, and alterations omitted).

The notice requirements, in pertinent part, are as follows:

> [N]otice shall be given . . . by deposit in the United States mail of such notice in an envelope with postage prepaid, addressed to such person at his address as shown by the records of the Division. The giving of notice by mail is complete upon the expiration of four days after such deposit of such notice. Proof of the giving of notice in . . . such manner may be made by the certificate of any officer or employee of the Division or affidavit of any person over 18 years of age, naming the person to whom such notice was given and specifying the time, place, and manner of the giving thereof.

N.C. Gen. Stat. § 20-48(a) (2005).[2]

Defendant argues that "[b]ecause the State failed to present evidence raising a *prima facie* presumption that the revocations notices sent to an [allegedly] incorrect address were received, [defendant] was not obligated to put on evidence that would rebut such a presumption." Defendant is simply incorrect. In this case, the State produced the signed certificate of Tina Raynor (Raynor), an employee of the Division of Motor Vehicles. The certification states that Raynor deposited notice of suspension in the United States mail in a postage paid envelope, addressed to the "address . . . shown by the records of the Division" as defendant's address. This certification constitutes "[p]roof of the giving of notice," under the statute. N.C. Gen. Stat. § 20-48(a) (2005). Therefore, the State raised *prima facie* presumption of receipt, and defendant was obligated to rebut the presumption. Defendant chose not to present any evidence at trial; the presumption was clearly not rebutted. Accordingly, the State met its burden of producing "substantial evidence on each element of the crime," and defendant's argument is without merit.

[2] Defendant also argues that his conviction for felony operation of a motor vehicle to elude arrest must be vacated because the State relied on the driving while license suspended charge as an aggravating factor for that conviction. Because we have held that defendant's

2. We note that N.C. Gen. Stat. § 20-48 has since been amended. However, as the quoted material was the version of the statute in effect at the time of the offense and trial, we apply it to the case at hand.

conviction for driving while license suspended was proper, this argument, too, must fail.

[3] Finally, defendant argues that the trial court erred in admitting the DMV record and other related testimony. Defendant argues that this evidence was irrelevant and overly prejudicial. However, these arguments were not properly preserved for appeal. Accordingly, we must dismiss this assignment of error.

> Our Supreme Court has recently addressed this issue:
>
> > Generally . . . issues occurring during trial must be preserved if they are to be reviewed on grounds other than plain error. Rule 10(b)(1) provides, in part, that 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."

Reep v. Beck, 360 N.C. 34, 36-37, 619 S.E.2d 497, 499 (2005) (quoting N.C.R. App. P. 10(b)(1)) (footnote omitted). We note that although defendant objected to the admission of the DMV evidence at trial, he did so purely on the basis of his contention that the addresses did not match. After the trial court determined that defendant's objection on the basis of the allegedly incorrect addresses was "more of a jury argument as opposed to what is admissible evidence," the trial court gave defendant two additional opportunities to raise other potential grounds for objection:

> THE COURT: Okay. Do you want anything more on this at this point?
>
> [DEFENSE COUNSEL]: Not at this point.
>
> THE COURT: Okay. But he's going to admit it after this, I assume, so there's no—Your objection is noted. Do you have any other objections at this point?
>
> [DEFENSE COUNSEL]: Not at this point.

Defendant did not raise any issue regarding relevancy or undue prejudice, which are the only arguments he now seeks to bring on appeal. Moreover, although defendant referenced plain error, he did not make any argument regarding plain error in his brief. We are mindful that

> [t]he purpose of [Rule 10(b)] is to require a party to call the court's attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal. A trial

> issue that is preserved may be made the basis of an assignment of error pursuant to Rule 10, and the scope of review by an appellate court is usually limited to a consideration of the assignments of error in the record on appeal and if the appealing party has no right to appeal the appellate court should dismiss the appeal *ex mero motu*.

Reep, 360 N.C. at 37, 619 S.E.2d at 499-500 (quotations, citations, and alterations omitted). Accordingly, we will not further address defendant's arguments on this matter.

Having conducted a thorough review of the record and the briefs on appeal, we find no error.

No error.

Judge GEER concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge dissenting.

The majority's opinion holds the trial court properly denied defendant's motion to dismiss the charge of driving while license suspended. I disagree.

I. Driving While License Suspended

To sustain a conviction of driving while license suspended, the State must show: "(1) [defendant] operated a motor vehicle, (2) on a public highway, (3) while his operator's license was *suspended or revoked*, and (4) had knowledge of the suspension or revocation." *State v. Woody*, 102 N.C. App. 576, 578, 402 S.E.2d 848, 850 (1991) (emphasis supplied) (citing *State v. Chester*, 30 N.C. App. 224, 226 S.E.2d 524 (1976)).

A. Knowledge

The State must prove the defendant had knowledge that his driver's license was suspended. "[T]he burden is on the State to prove that defendant had knowledge at the time charged that his operator's license was suspended or revoked; the State satisfie[s] this burden when, nothing else appearing, it has offered evidence of compliance with the notice requirements of G.S. 20-48[.]" *Chester*, 30 N.C. App. at 227, 226 S.E.2d at 526.

B. Required Notice

N.C. Gen. Stat. § 20-48(a) (2005) states:

> Whenever the Division is authorized or required to give any notice under this Chapter or other law regulating the operation of vehicles, unless a different method of giving such notice is otherwise expressly prescribed, *such notice shall be given* . . . by deposit in the United States mail of such notice in an envelope with postage prepaid, addressed to such person *at his address as shown by the records of the Division*. . . . Proof of the giving of notice in either such manner may be made by the certificate of any officer or employee of the Division or affidavit of any person over 18 years of age, naming the person to whom such notice was given and specifying the time, place, and manner of the giving thereof.

(Emphasis supplied).

The State presented no evidence that the post office box address to where the Division of Motor Vehicles' ("DMV") sent notices of suspension was the street address shown on defendant's driver's license record. The only address shown on defendant's DMV's driver's license record was his street address. All notices DMV sent to defendant were addressed to a post office box. The State presented no evidence tending to show defendant ever provided DMV with a different address from his street address contained on the certified driver's license report, or that the report contained any other address. DMV failed to prove it provided defendant with the required statutory notice in accordance with N.C. Gen. Stat. § 20-48. The warrants for defendant's arrest reflect his street address, not a post office box.

C. Presumption

"In North Carolina, as elsewhere, there is a *prima facie* presumption that material which is marked, postage prepaid, and correctly addressed, was received in due course." *In re Terry*, 317 N.C. 132, 136, 343 S.E.2d 923, 925 (1986). Because the notices were not correctly addressed and sent to defendant's address appearing on his DMV record, no presumption arises that defendant received the required statutory notices. Defendant is not obligated to present any evidence to rebut the presumption that he received notice when the State's evidence failed to raise such a presumption.

The majority's opinion holds the certificate signed by a DMV employee, Tina Raynor, is sufficient to constitute "proof of giving

notice" under N.C. Gen. Stat. § 20-48. The certificate must be "sworn to and signed by an employee of the Department of Motor Vehicles, certifying that the original of the document was mailed to defendant on [a specific date] at his address shown on the records of the Department." *State v. Herald*, 10 N.C. App. 263, 264, 178 S.E.2d 120, 121 (1970). The notices were not sent to the address shown on defendant's DMV driver's license record as statutorily required, but to another address. DMV's signed affidavit raised no presumption that defendant received the notices.

The State failed to present any evidence that the address in DMV's record was the post office box address where the revocation notices were sent, and failed to show that defendant received notice of the suspension of his license. The trial court erred in denying defendant's motion to dismiss the charge of driving while license suspended.

II. Felony Operation to Elude Arrest

Defendant was also convicted under N.C. Gen. Stat. § 20-141.5 for felony operation of a motor vehicle to elude arrest. N.C. Gen. Stat. § 20-141.5 (2005) states:

> (a) It shall be unlawful for any person to operate a motor vehicle on a street, highway or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties. Except as provided in subsection (b) of this section, violation of this section shall be a Class 1 misdemeanor.
>
> (b) If two or more of the following aggravating factors are present at the time the violation occurs, violation of this section shall be a Class H felony.
>
> (1) Speeding in excess of 15 miles per hour over the legal speed limit.
>
> (2) Gross impairment of the person's faculties while driving due to:
>
> a. Consumption of an impairing substance; or
>
> b. A blood alcohol concentration of 0.14 or more within a relevant time after the driving.
>
> (3) Reckless driving as proscribed by G.S. 20-140.

(4) Negligent driving leading to an accident causing:

a. Property damage in excess of one thousand dollars ($1,000); or

b. Personal injury.

(5) Driving when the person's drivers license is revoked.

(6) Driving in excess of the posted speed limit, during the days and hours when the posted limit is in effect, on school property or in an area designated as a school zone pursuant to G.S. 20-141.1, or in a highway work zone as defined in G.S. 20-141(j2).

(7) Passing a stopped school bus as proscribed by G.S. 20-217.

(8) Driving with a child under 12 years of age in the vehicle.

The jury found defendant to be guilty of: (1) driving while license suspended; (2) felony operation of a motor vehicle to elude arrest; (3) failure to heed light and siren; (4) reckless driving to endanger; (5) failure to stop for a stop sign; and (6) transporting unsealed spiritous liquor in the passenger area.

Pursuant to N.C. Gen. Stat. § 20-141.5, the combination of convictions for reckless driving and driving while license revoked supports the felony operation of a motor vehicle to elude arrest conviction. Due to the lack of statutorily required notice by DMV and the absence of any other evidence tending to show defendant knew his license was suspended, defendant's charge of driving while license suspended should not have been submitted to the jury. In addition, defendant was not convicted of two of the required aggravating factors required to elevate his conviction for operation of a motor vehicle to elude arrest from a misdemeanor to a felony. The only aggravating factor the jury found defendant to be guilty of was reckless driving.

III. Conclusion

I vote to reverse defendant's conviction for driving while license suspended, vacate the felony operation of a motor vehicle to elude arrest, and remand to the trial court for entry of judgment and resentencing for misdemeanor speeding to elude arrest pursuant to N.C. Gen. Stat. § 20-141.5(a) and defendant's other uncontested convictions. Otherwise, I find no error in defendant's remaining convictions and the judgments entered thereon. I respectfully dissent.

STATE OF NORTH CAROLINA v. STANLEY RAY JAMES

No. COA06-896

(Filed 19 June 2007)

1. Embezzlement— by public officer—sheriff—instruction—fraudulent intent

The trial court did not err in an embezzlement by a public officer case by its instruction to the jury explaining the element of fraudulent intent, because: (1) N.C.G.S. § 14-92 encompasses two forms of embezzlement by a public officer; (2) although only the first portion of the statute applied and language was pulled from the second portion, it did not misstate the definition of intent required by the crime described in the first portion of the statute; and (3) the instruction given by the court equated to "defendant fraudulently or with unlawful intent failed to give certain money to those entitled to it in spite of a legal requirement to do so."

2. Constitutional Law— right to unanimous verdict—embezzlement by public officer—fraudulent intent instruction

Although defendant contends it is impossible to determine whether the jury unanimously concluded that defendant acted with fraudulent intent in an embezzlement by a public officer case based on the trial court's alleged misstatement of the requirement of fraudulent intent in its instructions, the Court of Appeals already concluded the instruction was correct.

3. Embezzlement— by public officer—sheriff—failure to instruct on lesser-included offenses

The trial court did not err in an embezzlement by a public officer case under N.C.G.S. § 14-92 by refusing to instruct the jury on two alleged lesser-included offenses including violations under N.C.G.S. §§ 159-8(a) and 159-181(a), because the two offenses defendant requested to be included in the jury instructions do not qualify as lesser-included offenses when they do not have the same essential elements or require additional facts to be proven.

4. Embezzlement— by public officer—sheriff—refusal to instruct on good faith mistaken belief

The trial court did not err in an embezzlement by a public officer case by refusing to instruct the jury that a good faith mis-

taken belief that defendant sheriff was not violating the law was a defense, because: (1) all of the terms in the instruction conveyed the fact that if the jury decided that defendant had made a good faith mistake, they could not find him guilty of the charge; and (2) the jury instructions inherently included an instruction on good faith mistake.

Appeal by defendant from judgment entered 3 February 2006 by Judge Clifton W. Everett, Jr. in Washington County Superior Court. Heard in the Court of Appeals 21 March 2007.

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

Ferguson, Stein, Chambers, Gresham & Sumter, P.A., by William G. Simpson, Jr. and Julius Chambers, for defendant-appellant.

HUNTER, Judge.

Stanley Ray James ("defendant") appeals from a jury verdict of guilty on one count of embezzlement by a public officer. After careful review, we find no error.

Defendant was sheriff of Washington County from 1998 until August 2004, when he was removed from office. On or before 3 January 2001, defendant received a check for $2,665.00 from the United States Treasury made out to "Washington County Detention" in payment for housing a military prisoner. The county budgetary policy for money received by the sheriff's office was for the money to be turned over to the county's finance office to be put in the general fund, from which it was then disbursed. In this case, however, defendant instead used the money directly for sheriff's office purposes: Two thousand dollars went to an account belonging to the Washington County Law Enforcement Association, and the remaining $655.00 was used as petty cash for the sheriff's office. Five hundred dollars of that petty cash amount was given or loaned to a deputy for moving expenses; the remaining $155.00 was used to purchase a watch for a retiring chief deputy.

A jury found defendant guilty of one count of embezzlement by a public officer on 30 January 2006. He received a suspended sentence of sixteen to twenty months imprisonment, sixty days active sentence, and forty-eight months supervised probation. He was

also ordered to make restitution in the amount of $2,655.00. Defendant appeals.

I.

[1] Defendant first argues that the trial court erred in its instructions to the jury by improperly explaining the element of fraudulent intent. We disagree.

Per statute, a trial judge must instruct the jury on "the law arising on the evidence." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989); *see* N.C. Gen. Stat. §§ 15A-1231, -1232 (2005). "This includes instruction on the elements of the crime." *Bogle*, 324 N.C. at 195, 376 S.E.2d at 748. Failure to instruct the jury on these elements "is prejudicial error requiring a new trial. Prejudicial error is defined as a question of 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.' " *State v. Lanier*, 165 N.C. App. 337, 354, 598 S.E.2d 596, 607 (2004) (citation omitted) (quoting N.C. Gen. Stat. § 15A-1443(a) (2003)).

Fraudulent intent is a necessary element of embezzlement by a public officer under N.C. Gen. Stat. § 14-92 (2005). *See State v. McLean*, 209 N.C. 38, 40, 182 S.E. 700, 701 (1935); *State v. Agnew*, 294 N.C. 382, 390, 241 S.E.2d 684, 690-91, *cert. denied*, 439 U.S. 830, 58 L. Ed. 2d 124 (1978). The court in the case at hand instructed the jury as to this element as follows:

> And, third, that the defendant, Stanley James, unlawfully and willfully did one or more of these things: Intentionally, fraudulently and dishonestly used this money for some purpose other than that for which he received it; or, corruptly used the money; *or, misapplied this money for any purpose other than that for which the same was held; or, failed to pay over and deliver this money to the proper persons entitled to receive the same when lawfully required to do so.*
>
> To satisfy this third element of the offense, the State need only prove to you beyond a reasonable doubt that the defendant unlawfully and willfully did one or more of the alternative acts listed above as I have just instructed you.

(Emphasis added.) Defendant argues that the last two alternatives presented by the trial court misstate the element of fraudulent intent. We disagree.

N.C. Gen. Stat. § 14-92 actually encompasses two forms of embezzlement by a public officer: The first applies to any officer, agent, or employee of a county or other unit of local government who embezzles the funds of that unit; the second applies only to certain types of officers, including sheriffs, who embezzle funds received by virtue of their office in trust for any person or corporation. It is the first part of the statute that applies to the case at hand, because defendant was not holding funds in trust for any person or corporation, but rather accused of misusing funds belonging to the county.

As to intent, the first portion of the statute (the portion applicable here) uses the language "embezzle or otherwise willfully and corruptly use or misapply the same for any purpose other than that for which such moneys or property is held[.]" *Id.* The second uses the language "embezzle or wrongfully convert to his own use, or corruptly use, or shall misapply for any purpose other than that for which the same are held, or shall fail to pay over and deliver to the proper persons entitled to receive the same when lawfully required so to do[.]" *Id.*

The first of the disputed alternatives in the jury instructions—"unlawfully and willfully . . . misapplied this money for any purpose other than that for which the same was held"—comes almost verbatim from the first portion of the statute, and thus correctly states the requirement of intent. N.C. Gen. Stat. § 14-92.

Defendant argues that the second of the disputed alternatives—"unlawfully and willfully . . . failed to pay over and deliver this money to the proper persons entitled to receive the same when lawfully required to do so"—was improperly included by the trial court, as it comes from the second portion of the statute. It is in fact the only definition of intent that is included in the second portion of the statute but not the first. Apparently, language was inadvertently lifted from the second portion of the statute for the jury instructions even though only the first portion of the statute applies.

However, this language pulled from the second portion does not appear to misstate the definition of intent required by the crime described in the first portion of the statute. In *State v. Agnew*, our Supreme Court stated:

> The words "willfully" and "corruption", as they relate to misapplication of funds under G.S. 14-92, have been defined as "[D]one with an unlawful intent," and "The act of an official or

> fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others."

Agnew, 294 N.C. at 392-93, 241 S.E.2d at 691 (quoting *State v. Shipman*, 202 N.C. 518, 540, 163 S.E. 657, 669 (1932)). Our Supreme Court has also upheld jury instructions in which the terms "done in bad faith, fraudulently, wilfully and corruptly" were used synonymously. *Shipman*, 202 N.C. at 539, 163 S.E. at 668 (emphasis omitted).

Thus, the instruction given by the court in this case equates to: "Defendant fraudulently or with unlawful intent failed to give certain money to those entitled to it in spite of a legal requirement to do so." This does not misstate the element of intent required by the applicable portion of the statute, and as such, we find that the instructions were not in error.

II.

[2] Defendant next argues that because the trial court misstated the requirement of fraudulent intent in its instructions to the jury, it is impossible to conclude that the jury unanimously concluded that defendant acted with fraudulent intent, as the jury could have based its verdict on either of the two invalid descriptions of required intent. This argument depends on the validity of the first argument, since without a finding that the instructions were incorrect, there is no disjunctive quality to the instructions. Because the first argument is without merit, this one must also fail.

III.

[3] Defendant next argues that the trial court erred in refusing to instruct the jury on two lesser included offenses. This argument is without merit.

In North Carolina, defendants are entitled to have lesser included offenses supported by evidence submitted to the jury. *State v. Smith*, 351 N.C. 251, 267, 524 S.E.2d 28, 40 (2000); *State v. Brown*, 300 N.C. 731, 735-36, 268 S.E.2d 201, 204 (1980). However, the two offenses defendant requested be included in the jury instructions do not qualify as lesser included offenses.

"The determination of whether one offense is a lesser included offense of another is made on a definitional as opposed to a factual basis." *State v. Westbrooks*, 345 N.C. 43, 55, 478 S.E.2d 483, 490-91 (1996). That is, the test is not whether the facts of the case could war-

rant charges under more than one crime, but whether two crimes include the same essential elements: To be a lesser included offense, "all of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense." *State v. Weaver*, 306 N.C. 629, 635, 295 S.E.2d 375, 379 (1982), *overruled on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993). The three essential elements of N.C. Gen. Stat. § 14-92 are: (1) defendant was an officer, agent, or employee of a named entity (including a county); (2) defendant received and held money belonging to the entity by virtue of that position; and (3) defendant "willfully and corruptly use[d] or misappl[ied]" the money for a purpose other than the purpose for which the entity intended it. *Id.*

Defendant requested the jury be instructed on two lesser included offenses: Violations of N.C. Gen. Stat. §§ 159-8(a) and 159-181(a). Neither of these offenses has the same essential elements as those of N.C. Gen. Stat. § 14-92, and as such they are not lesser included offenses.

The first offense defendant requested be included is a violation of N.C. Gen. Stat. § 159-8(a) (2005), part of the Local Government Budget and Fiscal Control Act: "[N]o local government or public authority may expend any moneys, regardless of their source . . . , except in accordance with a budget ordinance or project ordinance adopted under this Article or through an intragovernmental service fund or trust and agency fund properly excluded from the budget ordinance." This statute prohibits (1) the expending of money (2) by a government or other public authority (3) without proper authority via ordinance or fund.

While defendant is correct that section 159-8(a), like section 14-92, concerns the misapplication of public funds, the former prohibits such action by a government body or authority, not an individual working for such an entity. That is, as part of the Local Government Budget and Fiscal Control Act, it is intended to control the actions of the *entities* named in section 14-92 ("a county, a city or other unit or agency of local government," etc.), while section 14-92 is intended to ensure that the *individuals* employed by such entities act properly on the entity's behalf.

The second requested offense was a violation of N.C. Gen. Stat. § 159-181(a) (2005):

> If any finance officer, governing board member, or other officer or employee of any local government or public authority . . . shall approve any claim or bill knowing it to be fraudulent, erroneous, or otherwise invalid, or make any written statement, give any certificate, issue any report, or utter any other document required by this Chapter, knowing that any portion of it is false, or shall willfully fail or refuse to perform any duty imposed upon him by this Chapter, he is guilty of a Class 3 misdemeanor and upon conviction shall only be fined not more than one thousand dollars ($1,000) and forfeits his office, and shall be personally liable in a civil action for all damages suffered thereby by the unit or authority or the holders of any of its obligations.

Id. This statute prohibits: (1) any officer of local government or public authority: (a) approving a claim knowing it to be fraudulent; (b) making a statement or report knowing it to be false; or (c) willfully failing or refusing to perform any duty imposed on him by Chapter 159.

While defendant might be correct that the portion of section 159-181(a) forbidding the willful failure to perform duties also applies to his situation, again, this failure to perform is not an element shared by section 14-92. Further, when one statute requires proof of a fact that the other does not, the elements of the offenses are not the same, and thus neither is a lesser included offense. *State v. Etheridge*, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987). For a charge under section 14-92, no proof need be offered that defendant refused to perform a duty required of him, though it would be necessary for a charge under section 159-181; and, for a charge under section 159-181, no proof need be offered that defendant fraudulently intended to misappropriate funds, though section 14-92 requires such proof.

Because the two proposed statutes have different essential elements or require additional facts to be proven, they are not lesser included offenses, and the trial court did not err in refusing to instruct the jury on them.

IV.

[4] Finally, defendant argues that because fraudulent intent is an essential element of embezzlement by a public officer, the trial court erred in refusing to instruct the jury that a good faith, mistaken belief that he was not violating the law was a defense. This argument is without merit.

As the trial court pointed out, fraudulent intent is an essential element of the charge of embezzlement by a public officer. If the jury found that defendant did not have the requisite intent—whether because of good faith mistake or otherwise—they would not find him guilty. To be convicted, a "defendant must have a felonious intent. Unless the intent is proved, the offense is not proved." *State v. Agnew*, 33 N.C. App. 496, 509, 236 S.E.2d 287, 295 (1977), *rev'd in part on other grounds*, *Agnew*, 294 N.C. at 382, 241 S.E.2d at 684; *see also State v. Lancaster*, 202 N.C. 204, 162 S.E. 367 (1932). The trial court's instructions to the jury regarding intent, laid out above, describes the four alternatives for intent using the words "fraudulently and dishonestly," "corruptly," "misapplied," and "failed to pay over . . . to the persons entitled to receive [money] when lawfully required to do so." All of these terms properly convey the fact that if the jury decided that defendant had made a good faith mistake, they could not find him not guilty of the charge. Thus, the jury instructions inherently included an instruction on good faith mistake.

Because the trial court's instructions were not incorrect, we find no error in the verdict and judgment entered thereon.

No error.

Judges TYSON and JACKSON concur.

STATE OF NORTH CAROLINA v. TAMON JACOBY LEGINS

No. COA06-1274

(Filed 19 June 2007)

Robbery— attempt—intent—overt act—sufficiency of evidence

The State's evidence was sufficient for the jury to find that defendant had the intent to commit robbery and that he did an overt act in furtherance of such intent, and the charge of attempted armed robbery was properly submitted to the jury, where the evidence tended to show: defendant was familiar with the layout of a convenience store where the charged crime occurred; upon entering the store, defendant went into the store's bathroom and smoked crack cocaine; defendant exited the bath-

room carrying a steak knife in his hand, and immediately walked toward the counter where two cash registers were located; defendant then stepped into the area behind the counter and charged at one of the store clerks with the knife raised; and defendant then raised the knife in the air in a slicing motion with the serrated edge facing the two store clerks.

Judge LEVINSON dissenting.

Appeal by defendant from judgment entered 4 January 2006 by Judge William Z. Wood Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 25 April 2007.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Robert R. Gelblum, for the State.

J. Clark Fischer, for defendant-appellant.

JACKSON, Judge.

On 2 July 2005, Tamon Jacoby Legins ("defendant") entered the Wilco Hess convenience store in Winston-Salem, North Carolina. The store's two clerks working at the time were Keith Deberry ("Deberry") and Wayne Wagoner ("Wagoner"). Upon entering the store, defendant went into the store's bathroom and proceeded to smoke crack. After a few minutes, defendant exited the bathroom carrying a steak knife in his hand. He walked towards the counter where Deberry was working on one of the store's two cash registers. Defendant then stepped into the area behind the store's counter and charged at Deberry with the knife raised.

Defendant waved the knife in the air in a slicing motion with the serrated edge facing Wagoner and Deberry. Once Deberry noticed defendant, Deberry grabbed a trash can and used it "to get a distance between him and [defendant]. So, that way, you know, [defendant] couldn't get a good swing at him." Deberry testified that he feared defendant was going to stab him.

Suddenly, defendant fell into the corner of the counter and then onto the floor. Deberry and Wagoner immobilized defendant by pressing the trash can down onto him. Wagoner "held his knees . . . to the trash can and leaned back, so that way if [defendant] did start swinging [the knife], he wouldn't get a good swing at me. And I yelled at [Deberry] to call 9-1-1."

Upon arriving at the crime scene, Forsyth County sheriff's deputy Priscilla A. Trentham told defendant to drop the knife numerous times without effect. She then tried to make defendant release the knife by using pepper spray multiple times and by hitting his hand with a metal baton. Defendant did not drop the knife until Officer Michael McDonald of the Winston-Salem police arrived and intervened, a few minutes after the sheriff's deputy had arrived. The entire incident was recorded by the store's surveillance camera, and the recording was introduced into evidence at defendant's trial and shown to the jury while Officer McDonald provided commentary.

On 22 August 2005, defendant was indicted on one count of attempted robbery with a dangerous weapon and on the aggravating factor that he was on probation or parole at the time the offense was committed. In a superceding indictment filed 12 September 2005, defendant was also charged with assault on a government officer. Following a trial by jury, defendant was found guilty of attempted robbery with a dangerous weapon and assault on an officer. For the attempted robbery conviction, defendant was sentenced to term of imprisonment of 103 to 133 months. For the assault conviction, defendant was sentenced to 75 days imprisonment.

On 16 May 2006, this Court granted defendant's petition for writ of *certiorari*, thereby enabling us to review defendant's conviction.

Defendant's sole argument on appeal is that the trial court erred in submitting the charge of attempted robbery with a dangerous weapon to the jury, based upon an insufficiency of the evidence to support the charge. Specifically, defendant contends there was no evidence showing defendant's intent to commit a robbery, nor was there evidence showing an overt act in furtherance of such intent.

"In ruling on a defendant's motion to dismiss, the trial court must determine whether the State has presented substantial evidence (1) of each essential element of the offense and (2) of the defendant's being the perpetrator." *State v. Boyd*, 177 N.C. App. 165, 175, 628 S.E.2d 796, 804 (2006). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* (quoting *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001)). "When considering a motion to dismiss, the trial court must view all of the evidence presented 'in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.' " *Id.* (quoting *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert.*

denied, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995)). "[H]owever, if the evidence 'is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed[.]' " *State v. Grooms*, 353 N.C. 50, 79, 540 S.E.2d 713, 731 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001) (citation omitted).

Contradictions and discrepancies in the testimony or evidence are for the jury to resolve and will not warrant dismissal. *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996). Determinations of the credibility of witnesses are issues for the jury to resolve, and they do not fall within the role of the trial court or the appellate courts. *See State v. Hyatt*, 355 N.C. 642, 666, 566 S.E.2d 61, 77 (2002) ("[I]t is the province of the jury, not the court, to assess and determine witness credibility."), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003). When a trial court is considering a defendant's motion to dismiss based upon an insufficiency of the evidence presented, the trial court "is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

"The essential elements of attempted armed robbery, as set forth in G.S. sec. 14-87(a), are: (1) the unlawful attempted taking of personal property from another; (2) the possession, use or threatened use of a firearm or other dangerous weapon, implement or means; and (3) danger or threat to the life of the victim." *State v. Rowland*, 89 N.C. App. 372, 376, 366 S.E.2d 550, 552 (1988). The offense of attempted armed robbery is completed once a person, with the requisite intent to deprive another of property, commits an overt act calculated to achieve that end. *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996). To constitute an overt act, an act "need not be the last proximate act to the consummation of the offense . . . ." *Id.* at 668, 477 S.E.2d at 921 (quotation omitted). However, the act must go beyond mere preparation but fall short of the completed offense. *State v. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003), *cert. denied*, 541 U.S. 1088, 159 L. Ed. 2d 252 (2004). " 'Intent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence[;] it must ordinarily be proven by circumstantial evidence, i.e., by facts and circumstances from which it may be inferred.' " *State v. Mangum*, 158 N.C. App. 187, 192, 580 S.E.2d 750, 754 (quoting *State v. Banks*, 295 N.C. 399, 412, 245 S.E.2d 743, 752 (1978)), *disc. review denied*, 357 N.C. 510, 588 S.E.2d 378 (2003).

Defendant contends the evidence fails to show that at the time of the incident he had the intent to commit robbery, and that there was no evidence of any overt act done in furtherance of an intent to commit a robbery. At trial, defendant testified that upon smoking the crack cocaine in the bathroom, he became very nervous and paranoid, and felt as though something was chasing him. He stated that upon exiting the bathroom, he was afraid to go out of the store, and he went towards Deberry because he knew Deberry. Defendant testified that he had the knife with him for protection, due to the fact that some of the places he goes to get high often are unsafe. He told the jury that when he ran behind the store's counter, he did so because he was trying to get away from whatever was chasing him, and not because he was trying to attack the cashiers or take anything. Defendant argues that the evidence showed nothing more than the crazed conduct of a drug addicted man, and that according to the evidence, defendant merely ran around the store with a knife in his hand and simply fell behind the counter.

As noted, the trial court's role in ruling on a motion to dismiss based upon an insufficiency of the evidence is to determine the sufficiency of the evidence to carry the case to the jury, and not to determine the evidence's weight or the credibility of any witnesses. *Powell*, 299 N.C. at 99, 261 S.E.2d at 117; *Hyatt*, 355 N.C. at 666, 566 S.E.2d at 77. At trial, the evidence showed that defendant was familiar with the convenience store and its layout, and that the cashiers knew defendant as a previous customer. On 2 July 2005, defendant entered the store and proceeded to go into the bathroom and smoke crack cocaine. When defendant came out of the bathroom, he held a steak knife in his hand, and immediately walked towards the counter at the front of the store where two cash registers were located. Defendant then went into the area behind the counter and charged at one of the clerks, placing himself in close proximity to the store's two cash registers. At the same time defendant stepped behind the counter, he held the knife in front of him and moved it in a slicing motion in the direction of the two store clerks, with the serrated edge of the knife facing the clerks. Deberry testified that he was afraid that defendant was going to stab him.

Based upon the evidence presented at trial, we hold there was sufficient evidence for the charge of attempted armed robbery to be submitted to the jury. Defendant's actions constitute sufficient evidence that a reasonable mind might conclude defendant had the intent to commit robbery and that he did an overt act in furtherance

of this intent. The evidence was sufficient to survive defendant's motion to dismiss, and it was then properly left to the jury to weigh the credibility of defendant and the evidence presented. Defendant's assignment of error is therefore overruled.

No error.

Judge McGEE concurs.

Judge LEVINSON dissents in a separate opinion.

LEVINSON, Judge dissenting.

Because the trial court erred by denying defendant's motion to dismiss the charge of attempted robbery with a dangerous weapon, I respectfully dissent. Even considered in the light most favorable to the State, there is insufficient evidence in the record that defendant's purpose was to rob or take the property of another.

" 'An attempted robbery with a dangerous weapon occurs when a person, with the specific intent to unlawfully deprive another of personal property by endangering or threatening his life with a dangerous weapon, does some overt act calculated to bring about this result.' " *State v. Gillis*, 158 N.C. App. 48, 56, 580 S.E.2d 32, 38 (2003) (quoting *State v. Allison*, 319 N.C. 92, 96, 352 S.E.2d 420, 423 (1987)) (citations omitted). To sustain a charge of attempted armed robbery, "there must be evidence of an intent to rob the victim." *State v. Miller*, 344 N.C. 658, 668, 477 S.E.2d 915, 921 (1966); *see also State v. McDowell*, 329 N.C. 363, 407 S.E.2d 200 (1991) (display of weapon without other indicias of intent to rob held insufficient to show attempt to rob where belongings of victim left undisturbed). " 'Evidence is not substantial if it arouses only a suspicion about the fact to be proved, even if the suspicion is strong.' " *McDowell*, 329 N.C. at 389, 407 S.E.2d at 215 (quoting *State v. Reese*, 319 N.C. 110, 139, 353 S.E.2d 352, 368 (1987)).

Here, defendant possessed a weapon and assaulted the storekeeper. That this event occurred in a convenience store that sells goods to others, and that defendant negotiated the counter where the cash register was located in a quest to attack the storekeeper and therefore placed himself in "close proximity to the store's two cash registers" as the majority observes, are insufficient circumstances to constitute substantial evidence that defendant had the requisite spe-

cific intent to perpetrate a robbery. Defendant neither stated anything related to an intent to rob, nor committed any overt acts here other than (1) entering a store; (2) digesting cocaine; and (3) attacking an individual who stood on the side of the counter reserved for employees. *Compare*, *e.g.*, *State v. Ball*, 344 N.C. 290, 474 S.E.2d 345 (1996) (accused assaults victim with knife and states, "give me your money"); *State v. Davis*, 340 N.C. 1, 455 S.E.2d 627 (1995) (defendant pulls weapon on cashier during third visit into shop near closing time and states, "[d]on't even try it"). Were the evidence here sufficient to show an attempted armed robbery, virtually any assault on an individual who is associated or employed by an establishment that occurs at or near something of value might be sufficient to survive a motion to dismiss. This is not the law of North Carolina.

Because the evidence, at best, raises only a suspicion that defendant possessed the requisite intent to rob, the trial court erred by failing to dismiss the attempted robbery with a dangerous weapon charge.

PHILLIP OXENDINE, PLAINTIFF-APPELLEE v. TWL, INC., DEFENDANT-APPELLEE, AND CANAL INSURANCE COMPANY, DEFENDANT-APPELLANT

No. COA06-1397

(Filed 19 June 2007)

Workers' Compensation— cancellation of policy—notice

The Industrial Commission did not err in a workers' compensation case by holding that cancellation of the pertinent workers' compensation policy was required under N.C.G.S. § 58-36-105 even though defendant insurance company contends the insurance contract was void ab initio based on alleged misrepresentations defendant employer made in its application, and thus the insurance contract was in effect at the time of the compensable injury as a matter of law, because: (1) N.C.G.S. § 58-3-10 is a more general statute, and N.C.G.S. § 58-36-105 specifically applies to workers' compensation insurance; (2) N.C.G.S. § 58-36-105 contemplates the very sort of material misrepresentation or nondisclosure of a material fact in obtaining the policy that defendant insurance company alleges in this case; (3) defendant insurance company failed to send its purported notice of cancel-

lation via registered or certified mail as required by N.C.G.S. § 58-36-105; and (4) the bald assertion of "underwriting reasons" does not constitute a precise reason for cancellation as required by the statute.

Appeal by defendant Canal Insurance Company from opinion and award entered 27 June 2006 by Chairman Buck Lattimore of the Full North Carolina Industrial Commission. Heard in the Court of Appeals 9 May 2007.

Van Camp, Meacham & Newman, PLLC, by Thomas M. Van Camp, for plaintiff-appellee.

Hester, Grady, and Hester, P.L.L.C., by H. Clifton Hester, for defendant-appellee.

McAngus, Goudelock & Courie, PLLC, by Trula R. Mitchell, for defendant-appellant.

ELMORE, Judge.

The present appeal stems from the workers' compensation insurance contract between TWL, Inc. (TWL) and Canal Insurance Company (Canal). Canal and TWL entered into an insurance contract in March, 2002; the policy's effective dates were 20 March 2002 through 20 March 2003. On 18 September 2002, Canal prepared a "Notice of Cancellation of Insurance." The notice stated that TWL's policy would be cancelled, effective 7 December 2002, for "underwriting reasons." On 25 November 2002, Patty Watts, who worked for Canal's managing agent, Golden Isle Underwriting, Inc. (Golden), sent TWL a letter thanking TWL for its recent payment and stating that TWL's policy would be cancelled 7 December 2002 due to "underwriting reasons." TWL had paid its premiums through 7 December 2002. All parties agree that the notice of cancellation was sent via regular mail, and that the reason given for the purported cancellation was "underwriting reasons."

On 31 January 2003, Phillip Oxendine (plaintiff) was involved in a car accident. At that time, plaintiff worked for TWL; the accident arose out of his employment with the company. Plaintiff suffered serious injuries and incurred medical expenses in excess of $200,000.00. All parties agree that plaintiff's injury was compensable. However, as a result of the dispute as to insurance coverage, plaintiff's payments were significantly delayed. Accordingly, plaintiff filed a motion to join

Canal as a party on 20 April 2004, which Chief Deputy Commissioner Stephen T. Gheen granted in an order filed 28 April 2004.

On 27 June 2006, Chairman Buck Lattimore, on behalf of the Full Commission, filed an opinion and award affirming Deputy Commissioner George R. Hall, III's 22 August 2005 opinion and award.[1] Canal appealed.

On appeal, Canal argues that TWL made material misrepresentations in its application to Canal for insurance, and that those material misrepresentations prevent recovery under the insurance contract under N.C. Gen. Stat. § 58-3-10 and related case law. *See, e.g.*, *Bell v. Nationwide Ins. Co.*, 146 N.C. App. 725, 726, 554 S.E.2d 399, 401 (2001) (noting, "It is a basic principle of insurance law that the insurer may avoid his obligation under the insurance contract by a showing that the insured made representations in his application that were material and false.") (quotations and citations omitted). Accordingly, argues Canal, the Full Commission erred in holding that cancellation of the policy was required pursuant to N.C. Gen. Stat. § 58-36-105. Canal's argument is without merit.

Our standard of review for cases originating in the Industrial Commission is well established:

> Our review of the Commission's opinion and award is limited to determining whether competent evidence of record supports the findings of fact and whether the findings of fact, in turn, support the conclusions of law. If there is any competent evidence supporting the Commission's findings of fact, those findings will not be disturbed on appeal despite evidence to the contrary. However, the Commission's conclusions of law are reviewed *de novo*.

Rose v. City of Rocky Mount, 180 N.C. App. 392, 395, 637 S.E.2d 251, 254 (2006) (internal quotations, alterations, and citations omitted). "A question of statutory interpretation is ultimately a question of law for the courts." *Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998) (citation omitted). We therefore review this issue, which is controlled by statute, *de novo*.

The crux of Canal's argument is that the insurance contract at issue was void *ab initio* due to alleged misrepresentations TWL made in its application for insurance. Because the contract was never valid

1. The earlier opinion and award does not appear to be a part of the record on appeal.

to begin with, argues Canal, the requirements for cancellation found in N.C. Gen. Stat. § 58-36-105 do not apply. Instead, Canal would have this Court apply N.C. Gen. Stat. § 58-3-10 and hold that no contract was ever formed. We hold that N.C. Gen. Stat. § 58-36-105 does apply; a workers' compensation insurance contract will therefore never be void *ab initio*, but must be cancelled in the manner prescribed by N.C. Gen. Stat. § 58-36-105.

N.C. Gen. Stat. § 58-3-10 reads: "All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed representations and not warranties, and a representation, unless material or fraudulent, will not prevent a recovery on the policy." N.C. Gen. Stat. § 58-3-10 (2005).

N.C. Gen. Stat. § 58-36-105 is titled "Certain workers' compensation insurance policy cancellations prohibited." N.C. Gen. Stat. § 58-36-105 (2005). It reads, in pertinent part:

> (a) No policy of workers' compensation insurance . . . shall be cancelled by the insurer before the expiration of the term or anniversary date stated in the policy and without the prior written consent of the insured, except for any one of the following reasons:
>
> ***
>
> (2) An act or omission by the insured or the insured's representative that constitutes material misrepresentation or nondisclosure of a material fact in obtaining the policy, continuing the policy, or presenting a claim under the policy.

N.C. Gen. Stat. § 58-36-105 (2005).

It is a general rule of statutory construction that

> [w]here one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability. When two statutes apparently overlap, it is well established that the statute special and particular shall control over the statute general in nature . . . unless it clearly appears that the legislature intended the general statute to control.

Fowler v. Valencourt, 334 N.C. 345, 349, 435 S.E.2d 530, 532-33 (1993) (quoting *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C.

230, 238, 328 S.E.2d 274, 279 (1985)) (internal quotations and citations omitted).

In this case, § 58-3-10 is the more general statute, applying to "any application for a policy of insurance." N.C. Gen. Stat. § 58-3-10 (2005). In contrast, § 58-36-105 applies specifically to workers' compensation insurance. As § 58-36-105 contemplates the very sort of "material misrepresentation or nondisclosure of a material fact in obtaining the policy" that Canal alleges in this case, it clearly governs our review of the matter. N.C. Gen. Stat. § 58-36-105(a)(2) (2005).

Having established that N.C. Gen. Stat. § 58-36-105 applies, we must consider whether Canal's attempted cancellation of the policy was effective. N.C. Gen. Stat. § 58-36-105 provides in pertinent part:

> (b) Any cancellation permitted by subsection (a) of this section is **not effective unless written notice of cancellation has been given by registered or certified mail**, return receipt requested, to the insured not less than 15 days before the proposed effective date of cancellation. . . . **The notice shall state the precise reason for cancellation**. Whenever notice of intention to cancel is required to be given by registered or certified mail, **no cancellation by the insurer shall be effective unless and until such method is employed and completed**.

N.C. Gen. Stat. § 58-36-105(b) (2005) (emphasis added).

It is uncontested that Canal failed to send its purported notice of cancellation via registered or certified mail. Despite this, Canal argues that "[t]he legislative intent of N.C. Gen. Stat. § 58-36-105 was fulfilled" by TWL's actual receipt of the notice more than fifteen days prior to cancellation.

As plaintiff points out in his brief, "If the North Carolina Legislature intended to forego the requirement of service by registered or certified mail, it would not have provided language in the statute which specifically states that a cancellation is not effective until service by certified or registered mail is 'employed and completed.' " "[A] statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage." *R.J. Reynolds Tobacco Co. v. N.C. Dep't of Env't & Natural Res.*, 148 N.C. App. 610, 616, 560 S.E.2d 163, 168 (2002) (quoting *Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d

443, 447 (1981)) (internal quotations and citations omitted) (alteration in original). Canal's argument regarding substantial compliance therefore must fail.

Moreover, even if this Court were to agree on that issue, we could not hold that the bald assertion of "underwriting reasons" constitutes a "precise reason for cancellation."[2] No court has interpreted the meaning of "precise reason." As our Supreme Court recently stated, however, "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Patronelli v. Patronelli*, 360 N.C. 628, 631, 636 S.E.2d 559, 561 (2006) (quoting *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006)). The term "precise" is defined as "[c]learly expressed or delineated; definite," or "[e]xact, as in performance or amount; accurate or correct . . . ." The Am. Heritage Coll. Dictionary 1076 (3rd ed. 1997). We think it clear that a vague assertion of "underwriting reasons" fails to meet that standard. Furthermore, we observe that our legislature demands, "[i]n the event of an adverse underwriting decision," that an insurance company "provide[] the applicant, policyholder, or individual proposed for coverage with the *specific reason or reasons* for the adverse underwriting decision . . ." N.C. Gen. Stat. § 58-39-55 (2005) (emphasis added). As noted, we "presume[] that the legislature intended each portion [of a statute] to be given full effect and did not intend any provision to be mere surplusage." *R.J. Reynolds Tobacco Co.*, 148 N.C. App. at 616, 560 S.E.2d at 168. If the legislature believed that the phrase "underwriting reasons" was precise, it is unlikely that it would have included a requirement that insurance companies provide "specific reason or reasons" for adverse underwriting decisions. Accordingly, Canal's purported notice of cancellation stumbles over another statutory hurdle.

Canal concedes that it failed to follow the procedure outlined by N.C. Gen. Stat. § 58-36-105. Accordingly, the insurance contract was in effect at the time of the compensable injury as a matter of law. Canal's remaining arguments on appeal are therefore irrelevant, and the Full Commission's opinion and award are affirmed.

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2. We note that Canal's only treatment of this issue in its brief is a statement that "[t]he reason for cancellation was noted." We will not consider unsupported contentions in the absence of legal argument or authority. *See, e.g.*, *Animal Legal Def. Fund v. Woodley*, 181 N.C. App. 594, 597, 640 S.E.2d 777, 779 (2007) ("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.") (quotations and citations omitted).

Affirmed.

Judges HUNTER and GEER concur.

STATE OF NORTH CAROLINA v. JOHN ROBERT CORRIHER

No. COA06-954

(Filed 19 June 2007)

Evidence— expert testimony—retrograde extrapolation evidence—novel scientific theory

The trial court did not abuse its discretion in a driving while impaired case by allowing the State's expert to offer testimony regarding retrograde extrapolation evidence to explain the novel scientific theory that a blood sample exposed to heat over 12 days might register a lower blood alcohol concentration than it would have at the time it was drawn, because: (1) defendant concedes that retrograde extrapolation evidence has been allowed in North Carolina in a line of cases dating back to 1985; (2) the witness was an expert in the field of retrograde extrapolation with respect to blood alcohol levels and has previously been recognized by the Court of Appeals as such; (3) there was sufficient indicia of reliability to allow the jury to consider the testimony in light of the expert's methods, background, and submission of his study for peer review; and (4) the lack of supporting data from similar tests and published peer review goes to the weight the jury might afford such evidence and not its admissibility.

Appeal by defendant from judgment entered 1 March 2006 by Judge W. David Lee in Rowan County Superior Court. Heard in the Court of Appeals 8 March 2007.

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

Hall & Hall Attorneys at Law, P.C., by Douglas L. Hall, for defendant-appellant.

CALABRIA, Judge.

John Robert Corriher ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of driving while impaired ("DWI"). We find no error.

At trial, Timothy Crews ("Officer Crews"), an officer with the Salisbury Police Department, testified that on 13 June 2004 he observed a motorcycle traveling in his direction. Officer Crews noticed the motorcycle was exceeding the speed limit and initiated his lights and siren. The driver did not stop, but instead increased his speed. Officer Crews stated that the motorcycle reached a speed of approximately 100 miles per hour during the chase. Officer Crews summoned additional officers who joined him in his pursuit of defendant. The officers chased defendant onto the property of Richard Stoner ("Stoner"), where defendant crashed through Stoner's fence before he was tackled and subdued by Officer Crews.

Defendant complained that his shoulder was injured, causing the officers to take him to the emergency room. Officer Crews testified that defendant had a strong odor of alcohol and red, glassy eyes. Based on defendant's demeanor, as well as the odor of alcohol and his red, glassy eyes, Officer Crews formed the belief that defendant was impaired. He read defendant his constitutional and statutory rights, and defendant signed a form consenting to a blood test. The blood test showed a blood alcohol level of .06 and the presence of cocaine.

Paul Glover ("Glover"), a research scientist and training specialist with the North Carolina Department of Health and Human Services, testified that the blood sample's alcohol concentration had likely eroded from lack of refrigeration. Specifically, the sample had never been refrigerated, but instead it was left in a patrol car. Glover based his testimony on a test he conducted with respect to alcohol concentration rates in refrigerated and unrefrigerated blood samples in which unrefrigerated samples showed a decrease in alcohol concentration.

The jury convicted defendant of DWI and felony speeding to elude arrest. Judge W. David Lee entered judgment on those verdicts, sentencing defendant to a minimum of 12 months and a maximum of 12 months in the North Carolina Department of Correction for DWI and a minimum of 7 and a maximum of 9 months for felony speeding to elude arrest. From the DWI judgment, defendant appeals.

On appeal, defendant argues the trial court erred by allowing the State's expert to offer testimony regarding retrograde extrapolation evidence. Defendant concedes that retrograde extrapolation evidence has been allowed in North Carolina in a line of cases dating back to 1985. *State v. Taylor*, 165 N.C. App. 750, 600 S.E.2d 483 (2004); *State v. Catoe*, 78 N.C. App. 167, 336 S.E.2d 691 (1985). However, he argues that the instant case can be distinguished from prior cases.

Typically, retrograde extrapolation evidence has been admitted to explain why a defendant's blood alcohol level might be lower upon testing than it was during his driving because the human body metabolizes alcohol at a rate of .0165 percent per hour. Here, retrograde extrapolation evidence was admitted to explain that a blood sample exposed to heat over 12 days might register a lower blood alcohol concentration than it would have at the time it was drawn. This issue thus presents a case of first impression in North Carolina evidentiary law.

"[T]rial courts are afforded 'wide latitude of discretion when making a determination about the admissibility of expert testimony.' " *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (quoting *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984)). "Given such latitude, it follows that a trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion." *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686. North Carolina General Statute 8C-1, Rule 702 (2005) states in relevant part:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

Id.

In evaluating the admissibility of expert testimony, North Carolina uses the three-step analysis announced in *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995). The inquiries are: 1) whether the expert's proffered method of proof is sufficiently reliable as an area for expert testimony, *id.*, 341 N.C. at 527-29, 461 S.E.2d at 639-41; 2) whether the witness testifying at trial is qualified as an expert in that area of testimony, *id.*, 341 N.C. at 529, 641 S.E.2d at 640; and 3)

whether the expert's testimony is relevant. *Id.*, 341 N.C. at 529, 461 S.E.2d at 641.

In the instant case, it is clear that Glover is an expert in the field of retrograde extrapolation with respect to blood alcohol levels, and has previously been recognized as such by this Court. *See State v. Teate*, 180 N.C. App. 601, 638 S.E.2d 29 (2006); *State v. Taylor*, 165 N.C. App. 750, 600 S.E.2d 483 (2004). Likewise, it is clear that his testimony is relevant. Evidence is relevant if it "has any logical tendency however slight to prove the fact at issue in the case." *State v. Bullard*, 312 N.C. 129, 154, 322 S.E.2d 370, 384 (1984). The issue is whether the trial court abused its discretion by determining that the expert testimony presented was reliable.

In the instant case, we are presented with the issue of whether retrograde extrapolation evidence may be used to explain a decrease in the level of alcohol concentration in a blood sample left unrefrigerated. This requires us to apply the rules regarding the admission of novel scientific theories.

> Where . . . the trial court is without precedential guidance or faced with novel scientific theories, unestablished techniques, or compelling new perspectives on otherwise settled theories or techniques, a different approach is required. Here, the trial court should generally focus on the following nonexclusive "indices of reliability" to determine whether the expert's proffered scientific or technical method of proof is sufficiently reliable: "the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked 'to sacrifice its independence by accepting [the] scientific hypotheses on faith,' and independent research conducted by the expert."

Howerton, 358 N.C. at 460, 597 S.E.2d at 687 (citations omitted).

In the present case, Glover testified on voir dire that he had conducted a test in which blood was drawn from individuals after they had consumed alcohol and then evaluated after being stored for 78 days without being refrigerated. He stated the test was conducted using accepted procedures and methodology and its results were published to the scientific community in newsletters and presented at scientific conferences. Glover, as a research scientist and training specialist with the North Carolina Department of Health and Human Services, undoubtedly has a strong background in this field and has testified often in the courts of this state.

On voir dire, Glover stated that the alcohol content was reduced by approximately 10 percent after the first 72 hours, and was then reduced by an additional one or two percent over the next 75 days. Glover noted that refrigerated samples of the same blood did not show a decreased alcohol concentration. Glover further stated that his study had been presented at peer conferences and the results published in "half a dozen different newsletters."

> [R]eliability is . . . a preliminary, foundational inquiry into the basic methodological adequacy of an area of expert testimony. This assessment does not, however, go so far as to require the expert's testimony to be proven conclusively reliable or indisputably valid before it can be admitted into evidence. In this regard, we emphasize the fundamental distinction between the admissibility of evidence and its weight, the latter of which is a matter traditionally reserved for the jury.

Howerton, 358 N.C. at 460, 597 S.E.2d at 687. Our review of the case law makes it clear that North Carolina allows expert testimony more liberally than many other jurisdictions. "[W]e do not adhere exclusively to the formula, enunciated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and followed in many jurisdictions, that the method of proof 'must be sufficiently established to have gained general acceptance in the particular field in which it belongs.' " *State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 852 (1990).

In light of Glover's methods, background, and submission of his study for peer review, we determine the trial court did not err by concluding there was sufficient indicia of reliability to admit evidence of the study. We note that Glover's explanation of the test and its submission for peer review is not for the purpose of establishing the test or that the test results are conclusively valid; rather it provides sufficient reliability to allow a jury to consider the testimony. The lack of supporting data from similar tests and published peer review goes to the weight the jury might afford such evidence, not its admissibility. "[V]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Howerton*, 358 N.C. 461, 597 S.E.2d at 688 (quoting *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 596 (1993).

Accordingly, we determine the trial court did not abuse its discretion by allowing Glover to testify that a blood sample's alcohol

content may be degraded while stored unrefrigerated in a police car for 12 days.

No error.

Judges McGEE and STEPHENS concur.

IN THE MATTER OF THE WILL OF ALICE WEAVER TURNER, DECEASED

No. COA06-1105

(Filed 19 June 2007)

Wills— caveat—check from attorney's trust account for bond

The trial court erred by granting propounder's motion to dismiss a caveat filed by caveator to the pertinent will based on the use of a check drawn on an attorney's trust account to satisfy the bond requirement under N.C.G.S. § 31-33, because: (1) a personal check drawn on an attorney's trust account constitutes money or bond for the purposes of N.C.G.S. § 31-33; (2) the check was drawn on an in-state account; (3) the check was not simply held, but was cashed in the normal course of business within a few days of its being presented; and (4) the check was not a personal check but rather drawn on an attorney's trust account, which is subject to additional regulations entirely separate from those promulgated by financial institutions thus providing sufficient indicia of reliability.

Appeal by caveator from an order entered 25 May 2006 by Judge Zoro J. Guice, Jr. in Haywood County Superior Court. Heard in the Court of Appeals 21 March 2007.

J. E. Thornton, P.A., by Jack E. Thornton, Jr., for caveator-appellant Baptist Children's Homes of North Carolina, Inc.

Smith Moore LLP, by Sidney S. Eagles, Jr., James G. Exum, Jr. and Allison O. Van Laningham; Law Offices of E.K. Morley, PLLC, by E.K. Morley, for propounder-appellee Marsha Case-Young.

HUNTER, Judge.

Caveator-appellant Baptist Children's Homes of North Carolina, Inc. ("caveator"), appeals from a superior court order granting a motion by propounder-appellee Marsha Case-Young ("propounder") to dismiss the caveat filed by caveator to the will of Alice Weaver Turner ("Turner"). After careful review, we reverse.

Turner died on 25 July 2002, and on 29 July 2002 a last will and testament dated 4 October 2000 ("2000 will") was accepted for probate by the clerk of court in Haywood County. Also on 29 July 2002, Letters Testamentary were issued to propounder, named as executrix and sole beneficiary under the will. The 2000 will revoked all former wills, including one Turner had executed on 9 February 1999 leaving property to a variety of beneficiaries, including propounder.

On Thursday, 28 July 2005, just inside the three-year statute of limitations deadline, caveator filed a Caveat to the 2000 will accepted for probate. Because N.C. Gen. Stat. § 31-33 (2005) requires a $200.00 bond to be filed with a Caveat, on the same day caveator submitted to the clerk of court a $200.00 check drawn on the trust account of a local law firm. Three business days later, on Tuesday, 2 August 2005, the clerk deposited the check, which was accepted by the bank.

Caveator served propounder with a copy of the Caveat on 28 November 2005. On 20 December 2005, propounder moved to dismiss the Caveat pursuant to Rules 12(b) and 41(a) of the North Carolina Rules of Civil Procedure; that motion was granted on 23 May 2006, and caveator appeals.

N.C. Gen. Stat. § 31-33 (2005) states in pertinent part:

> When a caveator shall have given bond with surety approved by the clerk, in the sum of two hundred dollars ($200.00), payable to the propounder of the will, . . . or when a caveator shall have deposited money or given a mortgage in lieu of such bond . . . , the clerk shall transfer the cause to the superior court for trial.

Resolution of this appeal turns on whether a personal check drawn on an attorney's trust account constitutes either "money" or "bond" for the purposes of this statute. If it can be considered neither, caveator failed to meet the statutory requirements for filing a Caveat within the three-year statute of limitations period.

Both parties agree that the sole case on point in our state jurisprudence is *In re Will of Winborne*, 231 N.C. 463, 57 S.E.2d 795

(1950), which concerns precisely the same statute and deposit requirement. In *Winborne*, the caveators submitted a check drawn on an out-of-state bank that was simply held by the clerk of court rather than cashed. The Court held that "[a] check deposited with the clerk is not a bond, and it does not constitute cash deposited in lieu of bond within the meaning of the statute." *Id.* at 465, 57 S.E.2d at 797. The Court opined that:

> A check is nothing more than a bill of exchange drawn on a bank, . . . and it does not operate as an assignment of any part of the funds to the credit of a drawer with the bank until it is presented to and accepted by the bank on which it is drawn. . . . The drawer is at all times, prior to acceptance by the bank, at liberty to stop payment or to withdraw his funds from the bank. *Thus the check secures no one.*

Id. at 465, 57 S.E.2d at 797-98 (emphasis added).

The case and statutes relied on and the facts emphasized by the Court in *Winborne* make evident the Court's primary concern: The check at issue lacked indicia of security and reliability. First, the Court noted, both the bank on which the check was drawn and the caveator's home were located in another state, meaning that the caveator could have stopped payment on the check and retreated to his home state, leaving the propounders without recourse; in addition, the record contained no evidence that the account contained funds sufficient to cover the check. *Id.* at 465, 57 S.E.2d at 798. The Court then cited to a case and two statutes describing a check as essentially a formalized IOU and stating that the bank against which it is drawn bears no liability for funds until the check is presented to and accepted by the bank. *See Insurance Co. v. Stadiem*, 223 N.C. 49, 52, 25 S.E.2d 202, 205 (1943) ("a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check").

Caveator argues that the case at hand is distinguishable from *Winborne*: Here, the check was drawn on an in-state account; it was not simply held but was cashed in the normal course of business within a few days of its being presented; and it was not a personal check, but rather drawn on an attorney's trust account. Caveator argues that these circumstances constitute indicia of reliability that distinguish the situation here from that in *Winborne*. We agree.

The most compelling distinction is the type of account on which the check was drawn: An attorney's trust account, not a personal account. As stated, the Court's concern in *Winborne* was that the caveator's personal check was unreliable and "secure[d] no one," because the Court could easily be deprived of methods for ensuring that the check was not somehow invalidated. *Winborne*, 231 N.C. at 465, 57 S.E.2d at 798. Unlike personal checks, checks written on attorneys' trust accounts are subject to additional regulations entirely separate from those promulgated by financial institutions: The ethical rules and enforcement mechanisms of the North Carolina State Bar. Rule 1.15-2(k) of the Rules of Professional Conduct for attorneys licensed to practice in North Carolina states: "Every lawyer maintaining a trust account or fiduciary account at a bank shall file with the bank a written directive requiring the bank to report to the executive director of the North Carolina State Bar when an instrument drawn on the account is presented for payment against insufficient funds." Rev. R. Prof. Conduct N.C. St. B. 1.15-2(k), 2007 Ann. R. (N.C.) 717, 781. The Attorney's Trust Account Handbook produced by the State Bar handout states: "If a trust account check is dishonored, the lawyer should immediately ascertain the nature of the problem and promptly correct it, even if this requires a deposit of the lawyer's own funds." N.C. State Bar Attorney's Trust Account Handbook at 10 (Rev. 3/2005). When this occurs, if "no adequate explanation is immediately forthcoming [from the attorney to the Bar], a grievance file will be established and a formal investigation initiated." *Id*. These regulations and enforcement mechanisms give checks written on attorneys' trust accounts an added layer of security that personal checks do not have.

Because of this security, checks written on attorneys' trust accounts have more in common with certified checks than personal checks, and certified checks are frequently equated by state statute with cash money. For example, a statute requiring bonds for upset bids on real property uses the language "a deposit in cash or by certified check or cashier's check satisfactory to the clerk[.]" N.C. Gen. Stat. § 1-339.25(a) (2005). N.C. Gen. Stat. § 25-3-310 (2005) further elucidates the effect of various types of checks on obligations: A certified check taken for an obligation discharges the obligation to the same extent as an equivalent amount of cash money; an uncertified check taken for an obligation suspends the obligation in that amount until the check is dishonored, paid, or certified. These qualities are perhaps why clerks of court generally do not accept personal checks, but do regularly accept checks drawn on attorney trust funds.

Because the check in this case bore indicia of reliability and an added layer of security not present in *Winborne*, including the fact the trust account check was deposited, negotiated, and paid, and because state statutes support a classification of an attorney's trust account check in this case different from the uncashed out-of-state personal check in *Winborne*, we reverse the trial court.

Reversed.

Judges TYSON and JACKSON concur.

IN THE MATTER OF: A.J.H-R. AND K.M.H-R., MINOR CHILDREN

No. COA07-93

(Filed 19 June 2007)

Child Abuse and Neglect— lack of subject matter jurisdiction—improper verification of juvenile petition

The trial court's adjudication and disposition order in a child neglect case is vacated based on lack of subject matter jurisdiction, because: (1) the initial juvenile petitions were not properly signed and verified by the director of DSS as required by N.C.G.S. § 7B-403(a); and (2) although DSS is correct that juvenile petitions may be signed and verified by an authorized representative of the director, the record shows a Child Protective Services Supervisor completed the petitions on behalf of the director and not in her own capacity as the director's authorized representative.

Appeal by Respondent-Mother from order entered 31 October 2006 by Judge Edgar B. Gregory in Wilkes County District Court. Heard in the Court of Appeals 14 May 2007.

Paul W. Freeman, Jr., for Petitioner-Appellee Wilkes County Department of Social Services.

Nelson Mullins Riley & Scarborough LLP, by Reed J. Hollander and Stephen D. Martin, for Guardian ad Litem.

Robert W. Ewing for Respondent-Appellant.

STEPHENS, Judge.

Respondent-Mother appeals adjudication and disposition order as to her son, A.J.H-R., and her daughter, K.M.H-R. Because we conclude that the trial court did not have subject matter jurisdiction over the proceedings, we vacate the trial court's order.

In September of 2006, the Wilkes County Department of Social Services (DSS) filed separate juvenile petitions alleging that A.J.H-R. (06 J 150) and K.M.H-R. (06 J 154) were neglected juveniles. DSS took nonsecure custody of the minor children the same day that each petition was filed. After conducting a hearing on the neglect petitions, the trial court adjudicated the minor children neglected and ordered legal and physical custody of the minor children placed with DSS. Respondent-Mother appeals.

The dispositive issue on appeal is whether the trial court lacked subject matter jurisdiction to enter the adjudication and disposition order because the initial juvenile petitions were not properly signed and verified pursuant to N.C. Gen. Stat. § 7B-403(a).

The issue of jurisdiction over the matter may be raised for the first time on appeal. *See In re Z.T.B.*, 170 N.C. App. 564, 613 S.E.2d 298 (2005) (holding that when defects in a petition raise a question of the trial court's subject matter jurisdiction, the issue may properly be raised for the first time on appeal). Section 7B-200(a) confers on the trial court exclusive, original jurisdiction "over any case involving a juvenile who is alleged to be abused, neglected, or dependent." N.C. Gen. Stat. § 7B-200(a) (2005). In juvenile proceedings, verified pleadings are necessary to invoke the jurisdiction of the court over the subject matter. *In re Triscari Children*, 109 N.C. App. 285, 426 S.E.2d 435 (1993). Section 7B-403 specifically provides that "the petition shall be drawn by the director, verified before an official authorized to administer oaths, and filed by the clerk, recording the date of filing." N.C. Gen. Stat. § 7B-403(a) (2005). Verification requires a petitioner to attest "that the contents of the pleading verified are true to the knowledge of the person making the verification[.]" N.C. Gen. Stat. § 1A-1, Rule 11(b) (2005).

Our Supreme Court recently addressed the effect of verification of a juvenile petition in *In re T.R.P.*, 360 N.C. 588, 636 S.E.2d 787 (2006). The Court noted that "verification of the petition in an abuse, neglect, or dependency action as required by N.C.G.S. § 7B-403 is a

vital link in the chain of proceedings carefully designed to protect children at risk on one hand while avoiding undue interference with family rights on the other." *Id.* at 591, 636 S.E.2d at 791. In interpreting "the integrated nature of the statutes constituting the Juvenile Code[,]" our Supreme Court held that the trial court could not exercise subject matter jurisdiction over an allegedly neglected juvenile in a custody review hearing when the juvenile petition initiating the case was neither signed nor verified as mandated by N.C. Gen. Stat. § 7B-403(a), and therefore, the trial court's review order was void *ab initio*. *Id.* at 593-94, 636 S.E.2d at 791-92.

Here, the petitions were neither signed nor verified by the director of DSS. The verification section of the juvenile petition in case number 06 J 150 shows the "Signature of Petitioner" as: "James D. Bumgarner by MH" with the "Director" box checked. Similarly, the verification section in case number 06 J 154 shows the "Signature of Petitioner" as: "James D. Bumgarner by MHenderson" with the "Director" box checked. It is apparent from the record that the alleged signature which appears on the petitions was not in fact the director's signature. *See* N.C. Gen. Stat. § 10B-3(25) (2005) (defining signature as "the act of personally signing one's name in ink by hand"). Rather, the petitions were completed on the director's behalf, and he did not personally appear and sign or acknowledge signing his name before the person who allegedly verified his oaths.[1]

We are unpersuaded by DSS's contention that Mary E. Henderson, a Child Protective Services Supervisor, signed the petitions as an authorized representative of the director. Although DSS is correct that juvenile petitions may be signed and verified by an authorized representative of the director, *see In re T.R.P.*, 173 N.C. App. 541, 619 S.E.2d 525 (2005), *aff'd*, 360 N.C. 588, 636 S.E.2d 787 (2006), that is not the case here. Instead, the record shows that "MH" and "MHenderson" completed the petitions on behalf of the director, not in her own capacity as the director's authorized representative. Further, we do not construe "MH" and "MHenderson" as signatures within the meaning of section 10B-3(25). Finally, the petitions do not indicate that they were signed by an authorized representative of the

1. The petitions demonstrate that the alleged verifications were "sworn and subscribed to before" different deputy clerks of the Wilkes County Superior Court. " 'Verification' . . . means a notarial act where a person certifies under oath or affirmation that the person witnessed the principal either execute, record, or acknowledge the principal's signature on an already-executed record." N.C. Gen. Stat. § 10B-3(28) (2005).

director.[2] Thus, the petitions were neither signed nor verified by an authorized representative of the director. We conclude the petitions requesting the minor children be adjudicated neglected failed to comply with the mandatory requirements of the statute and the trial court, therefore, lacked subject matter jurisdiction to adjudicate this matter. Accordingly, we vacate the order of the trial court adjudicating the minor children neglected.

VACATED.

Judges JACKSON and STROUD concur.

IN THE MATTER OF: J.L.H.

No. COA06-984

(Filed 19 June 2007)

Agency— principal-agent relationship—Department of Health and Human Services—county Department of Social Services

The Court of Appeals granted appellee Department of Health and Human Services's (DHHS) motion to dismiss the appeal filed by Onslow County DSS and New Hanover County DSS regarding the orders entered 20 January 2006 as amended 2 February 2006, finding the juveniles dependent, giving custody of two of the minor children to Onslow County DSS and New Hanover County DSS, transferring venue to those counties, and the 21 March 2006 order allowing the intervention of DHHS, because: (1) there is a principal-agent relationship between DHHS and the DSS of individual counties; (2) the director of each county's DSS is required, as part of its duties and responsibilities under N.C.G.S. § 108A-14, to act as agent of the Social Services Commission and DHHS in the county; and (3) the nature of the relationship would be destroyed if the agent were capable of acting on the principal's behalf without being subject to the principal's authority and direction.

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2. As stated, Ms. Henderson did not sign the petition in her own behalf, and the "Director" box, not the "Authorized Representative" box, under the signature line was checked.

IN RE J.L.H.

[184 N.C. App. 180 (2007)]

Appeal by Onslow County Department of Social Services from order entered 20 January 2006 as amended 2 February 2006 by Judge Douglas B. Sasser in Brunswick County Superior Court. Heard in the Court of Appeals 7 March 2007.

Dean W . Hallandsworth and Julia Talbutt, for the appellant (New Hanover County Department of Social Services).

James W. Joyner, for the appellant (Onslow County Department of Social Services).

Attorney General Roy Cooper, by Assistant Attorney General David Gordon, for the respondent-appellee (Department of Health and Human Services).

ELMORE, Judge.

Following the mishandling of their cases, three juveniles, Z.D.H., J.L.H., and T.H.,[1] filed suit against Brunswick County Division of Social Services (DSS), the Department of Health and Human Services (DHHS), and various other defendants. The complaint alleged that Brunswick County DSS and the other named defendants were negligent in furnishing social and mental health services to the minors. The case settled, and in the settlement order the Superior Court judge determined that the suit created a conflict of interest between Brunswick County DSS and the juveniles. The Superior Court judge therefore declared the juveniles, who were at that time in the custody of Brunswick County DSS, dependant because it was no longer appropriate for Brunswick County DSS to be legally responsible for the children. The Superior Court issued an order within its settlement order requiring the counties in which the juveniles were then living (Onslow and New Hanover) to file petitions for dependency. Those counties, which were not parties to the litigation, did not file such petitions.

Brunswick County DSS subsequently filed a petition for a review hearing in Brunswick County District Court. The District Court judge, Judge Sasser, found the juveniles dependent as a result of the conflict created by the suit. He placed J.L.H. in the custody of Onslow County DSS, and Z.D.H. in the custody of New Hanover County DSS. Finally,

1. Z.D.H. is the subject of a companion case, *In re Z.D.H.* Brunswick County Department of Social Services filed an adoption petition on T.H.'s behalf and was in the process of facilitating that adoption on 19 January 2006; her case has not been appealed to this Court.

he ordered that the children's cases be transferred to the district courts in the new counties.

Following motions for stay and motions for relief filed by Onslow County DSS and New Hanover County DSS, the DHHS filed a motion to intervene that was allowed on 21 March 2006. Onslow County DSS and New Hanover County DSS now appeal the orders entered 20 January 2006 as amended 2 February 2006, finding the juveniles dependent; giving custody of J.L.H. and Z.D.H. to Onslow County DSS and New Hanover County DSS, respectively; transferring venue to those counties; and the 21 March 2006 order allowing the intervention of DHHS.

Before reaching appellants' assignments of error, we must address the preliminary issue of the principal-agent relationship between appellee DHHS and Onslow County DSS and New Hanover County DSS. Prior to oral arguments, DHHS submitted a motion to dismiss this appeal, contending that the principal-agent relationship between it and the county entities rendered this appeal null and void, and thus subject to dismissal. On 22 January 2007, this panel denied the motion to dismiss. Upon further review of the issue, we rescind our denial of the motion and grant DHHS's motion to dismiss.

As argued in the motions for reconsideration filed in Superior Court, and revisited by the motions to dismiss, there is a principal-agent relationship between DHHS and the DSS of individual counties. It appears that Onslow County DSS does not dispute the agency relationship and that New Hanover County DSS does. Regardless, it is clear that:

> [[b]ased on the plain language of our statutory law governing social services and the provision of child protective services, the Department of Human Resources has substantial and official control over the provision of child protective services and designates the county director as the person responsible for carrying out the policies formulated by the Department, through the Social Services Commission and the Division of Social Services. "Thus, in practice, as well as in name, the role of the County Director in the delivery of [child protective] services is that of an agent. Like the agent, the County Director acts on behalf of the Department of Human Resources and is subject to its control with respect to the actions he takes on its behalf."

Gammons v. North Carolina Dep't of Human Resources, 344 N.C. 51, 64, 472 S.E.2d 722, 729 (1996) (quoting *Vaughn v. North Carolina*

Dep't of Human Resources, 296 N.C. 683, 690, 252 S.E.2d 792, 797 (1979)).

Indeed, the director of each county's DSS is required, as part of its duties and responsibilities as outlined by statute, "[t]o act as agent of the Social Services Commission and Department of Health and Human Services in relation to work required by the Social Services Commission and Department of Health and Human Services in the county." N.C. Gen. Stat. § 108A-14 (2005).

Because there is an agency relationship between DHHS and the counties' DSS, this appeal is improper. It is axiomatic that the principal controls the agent. *See State v. Weaver*, 359 N.C. 246, 258, 607 S.E.2d 599, 606 (2005) ("Two essential elements of an agency relationship are: (1) the authority of the agent to act on behalf of the principal, and (2) the principal's control over the agent."). The nature of the relationship would be destroyed if the agent were capable of acting on the principal's behalf without being subject to the principal's authority and direction.

In the present case, DHHS is the principal to both DSS divisions. Each county's DSS must act as instructed by their principal; the agency relationship therefore renders this appeal a nullity. Accordingly, we rescind our previous denial of DHHS's motion to dismiss, and grant the motion on reconsideration.

Dismissed.

Judges TYSON and GEER concur.

IN THE MATTER OF: Z.D.H.

No. COA06-945

(Filed 19 June 2007)

Agency— principal-agent relationship—Department of Health and Human Services—county Department of Social Services

The Court of Appeals granted appellee Department of Health and Human Services's (DHHS) motion to dismiss the appeal filed by Onslow County DSS and New Hanover County DSS regarding

the orders entered 20 January 2006 as amended 2 February 2006, finding the juveniles dependent, giving custody of two of the minor children to Onslow County DSS and New Hanover County DSS, transferring venue to those counties, and the 21 March 2006 order allowing the intervention of DHHS, because: (1) there is a principal-agent relationship between DHHS and the DSS of individual counties; (2) the director of each county's DSS is required, as part of its duties and responsibilities under N.C.G.S. § 108A-14, to act as agent of the Social Services Commission and DHHS in the county; and (3) the nature of the relationship would be destroyed if the agent were capable of acting on the principal's behalf without being subject to the principal's authority and direction.

Appeal by New Hanover County Department of Social Services from orders entered 20 January 2006 as amended 2 February 2006, and 21 March 2006 by Judge Douglas B. Sasser in Brunswick County District Court. Heard in the Court of Appeals 7 March 2007.

Dean W. Hollandsworth and Julia Talbutt, for the appellant.

Attorney General Roy Cooper, by Assistant Attorney General David Gordon, for the respondent.

ELMORE, Judge.

Following the mishandling of their cases, three juveniles, Z.D.H., J.L.H., and T.H.,[1] filed suit against Brunswick County Division of Social Services (DSS), the Department of Health and Human Services (DHHS), and various other defendants. The complaint alleged that Brunswick County DSS and the other named defendants were negligent in furnishing social and mental health services to the minors. The case settled, and in the settlement order the Superior Court judge determined that the suit created a conflict of interest between Brunswick County DSS and the juveniles. The Superior Court judge therefore declared the juveniles, who were at that time in the custody of Brunswick County DSS, dependant because it was no longer appropriate for Brunswick County DSS to be legally responsible for the children. The Superior Court issued an order within its settlement order requiring the counties in which the juveniles were

1. J.L.H. is the subject of a companion case, *In re J.L.H.* Brunswick County Department of Social Services filed an adoption petition on T.H.'s behalf and was in the process of facilitating that adoption on 19 January 2006; her case has not been appealed to this Court.

then living (Onslow and New Hanover) to file petitions for dependency. Those counties, which were not parties to the litigation, did not file such petitions.

Brunswick County DSS subsequently filed a petition for a review hearing in Brunswick County District Court. The District Court judge, Judge Sasser, found the juveniles dependent as a result of the conflict created by the suit. He placed J.L.H. in the custody of Onslow County DSS, and Z.D.H. in the custody of New Hanover County DSS. Finally, he ordered that the children's cases be transferred to the district courts in the new counties.

Following motions for stay and motions for relief filed by Onslow County DSS and New Hanover County DSS, DHHS filed a motion to intervene that was allowed on 21 March 2006. Onslow County DSS and New Hanover County DSS now appeal the orders entered 20 January 2006 as amended 2 February 2006, finding the juveniles dependent; giving custody of J.L.H. and Z.D.H. to Onslow County DSS and New Hanover County DSS, respectively; transferring venue to those counties; and the 21 March 2006 order allowing the intervention of DHHS.

Before reaching appellants' assignments of error, we must address the preliminary issue of the principal-agent relationship between appellee DHHS and Onslow County DSS and New Hanover County DSS. Prior to oral arguments, DHHS submitted a motion to dismiss this appeal, contending that the principal-agent relationship between it and the county entities rendered this appeal null and void, and thus subject to dismissal. On 22 January 2007, this panel denied the motion to dismiss. Upon further review of the issue, we rescind our denial of the motion and grant DHHS's motion to dismiss.

As argued in the motions for reconsideration filed in Superior Court, and revisited by the motions to dismiss, there is a principal-agent relationship between DHHS and the DSS of individual counties. It appears that Onslow County DSS does not dispute the agency relationship and that New Hanover County DSS does. Regardless, it is clear that

> [[b]ased on the plain language of our statutory law governing social services and the provision of child protective services, the Department of Human Resources has substantial and official control over the provision of child protective services and designates the county director as the person responsible for carrying out the

> policies formulated by the Department, through the Social Services Commission and the Division of Social Services. "Thus, in practice, as well as in name, the role of the County Director in the delivery of [child protective] services is that of an agent. Like the agent, the County Director acts on behalf of the Department of Human Resources and is subject to its control with respect to the actions he takes on its behalf."

Gammons v. North Carolina Dep't of Human Resources, 344 N.C. 51, 64, 472 S.E.2d 722, 729 (1996) (quoting *Vaughn v. North Carolina Dep't of Human Resources*, 296 N.C. 683, 690, 252 S.E.2d 792, 797 (1979)).

Indeed, the director of each county's DSS is required, as part of his duties and responsibilities as outlined by statute, "[t]o act as agent of the Social Services Commission and Department of Health and Human Services in relation to work required by the Social Services Commission and Department of Health and Human Services in the county." N.C. Gen. Stat. § 108A-14 (2005).

Because there is an agency relationship between DHHS and the counties' DSS, this appeal is improper. It is axiomatic that the principal controls the agent. *See State v. Weaver*, 359 N.C. 246, 258, 607 S.E.2d 599, 606 (2005) ("Two essential elements of an agency relationship are: (1) the authority of the agent to act on behalf of the principal, and (2) the principal's control over the agent."). The nature of the relationship would be destroyed if the agent was capable of acting on the principal's behalf without being subject to the principal's authority and direction.

In the present case, DHHS is the principal to both DSS divisions. Each county's DSS must act as instructed by its principal; the agency relationship therefore renders this appeal a nullity. Accordingly, we rescind our previous denial of DHHS's motion to dismiss, and grant the motion on reconsideration.

Dismissed.

Judges TYSON and GEER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 19 JUNE 2007

ALCHEM, INC. v. N.C. DEP'T OF ENV'T & NATURAL RES. No. 06-1458	Wake (05CVS12073)	Affirmed
BATTS v. FRESENIUS KABI CLAYTON, L.P. No. 06-1182	Ind. Comm. (I.C. 283730)	Affirmed
BAZZARRE v. HARNETT CTY. BD. OF ADJUST. No. 06-1013	Harnett (05CVS2036)	Affirmed
BEDDARD v. ALBRITTON No. 06-1241	Beaufort (04CVS1190)	Affirmed
BORGERSRODE v. BORGERSRODE No. 06-1362	Wayne (98CVD1015)	Affirmed
CANNON & CO., LLP. v. ESTATE OF ALEXANDER No. 06-1019	Davie (04CVS466)	Affirmed
CARPENTER v. MORRIS No. 06-1438	Nash (04CVS575)	Affirmed
DAVIDSON CTY. CSE O/B/O/ WIGGINS v. JOHNSON No. 06-1260	Davidson (05CVD1656)	Affirmed
ESTATE OF BISSETTE v. KERNODLE No. 06-1170	Alamance (04CVS1834)	Reversed
HUFFMAN v. MOORE CTY. No. 06-758	Ind. Comm. (I.C. #480967) (I.C. #500200) (I.C. #564609) (I.C. #481108) (I.C. #481105) (I.C. #924348) (I.C. #521226) (I.C. #509087)	Remanded
IN RE APPEAL OF RICHARD No. 06-1464	Prop. Tax Comm. (05PTC56)	Affirmed
IN RE B.G. No. 07-131	Chatham (05JT60)	Affirmed
IN RE D.Z.F. No. 06-995	Harnett (04J43)	Affirmed

IN RE E.F.M., E.L.M., T.J.M. No. 07-227	Surry (05J81A-83A)	Affirmed
IN RE H.D. No. 06-1093	Harnett (05J226)	Affirmed
IN RE H.M.W. & C.S.R. No. 07-202	Yadkin (05J36-37)	Appeal dismissed; petition denied
IN RE I.S.K. No. 06-1366	Mecklenburg (05JT916)	Reversed
IN RE J.P.M. No. 06-1269	Mecklenburg (05J230)	Affirmed in part, reversed in part and remanded for a new dispositional hearing
IN RE L.A.A. No. 06-1683	Henderson (05J110)	Vacated and remanded
IN RE Q.R. No. 06-970	Caswell (04J18)	Affirmed
IN RE S.J.R. No. 06-986	Davidson (05J128)	Reversed and remanded
IN RE Z.R.G. & A.M.G. No. 07-120	Wake (06J562)	Affirmed
IN RE Z.R.G. & A.M.G. No. 07-121	Wake (06J563)	Affirmed
INTEC USA, LLC v. ENGLE No. 06-1358	Durham (06CVS770)	Dismissed
LEASING UNLIMITED OF S. PINES, INC. v. MOBLEY No. 06-1270	Moore (05CVS1057)	Affirmed
McKYER v. McKYER No. 06-1605	Mecklenburg (00CVD9237 JVH)	Vacated in part and Dismissed in part
MORGAN v. BIG ELM RET. CTR., INC. No. 06-1393	Cabarrus (04CVS2040)	Affirmed
STATE v. BALDWIN No. 06-1141	Guilford (05CRS80271-72)	No error in defendant's trial; remanded for resentencing
STATE v. BAREFOOT No. 06-1056	Cumberland (02CRS28008-25) (02CRS28026-42)	No error
STATE v. BEASLEY No. 06-1151	Mecklenburg (04CR246840) (04CR250368) (05CR243178)	Dismissed in part and affirmed in part

STATE v. BLOUNT No. 06-1482	Wayne (05CRS56983)	No error
STATE v. BRANKS No. 06-1394	Haywood (06CRS1007-08) (06CRS1440)	No error in part, vacated in part
STATE v. CAPLES No. 04-887-2	Alamance (03CRS56601) (03CRS56607) (03CRS56792-93)	Harmless error
STATE v. CLEVELAND No. 06-1026	Rowan (03CRS53656)	No error
STATE v. COBLE No. 06-1544	Guilford (05CRS23184) (05CRS82794-96)	No error
STATE v. COGGINS No. 06-524	Jackson (04CRS51455)	Affirmed
STATE v. COOPER No. 06-946	Halifax (05CRS53135)	No error
STATE v. COVINGTON No. 06-903	Scotland (02CRS52146-47) (02CRS53195-98) (03CRS452-56)	No error
STATE v. DAVIS No. 06-1399	Haywood (05CRS50607) (05CRS50610-11) (05CRS50613) (05CRS50616)	No error
STATE v. EVANS No. 07-19	Lincoln (02CRS50598)	No error
STATE v. GOODE No. 06-880	Rutherford (02CRS1636) (02CRS55870)	Affirmed
STATE v. GUNTER No. 06-1377	Haywood (05CRS1366)	No error
STATE v. GUZMAN-PASCUAL No. 06-707	Forsyth (04CRS56620-21)	Affirmed
STATE v. HALL No. 06-1436	Jackson (04CRS52614-16) (04CRS52618-19) (04CRS52620-21) (04CRS52624-25) (05CRS3352) (05CRS922)	No error

STATE v. HARRIS No. 06-929	Guilford (04CRS24089) (04CRS65976)	No error
STATE v. HIATT No. 06-1324	Surry (04CRS6064)	No error
STATE v. HOLLAR No. 06-1301	Caldwell (05CRS1922)	No error
STATE v. LITTLE No. 06-1095	Guilford (03CRS108522) (04CRS24457-60)	Remanded
STATE v. MILLER No. 06-1373	Rowan (05CRS4423) (05CRS50070)	No error
STATE v. MITCHELL No. 06-1466	Wake (05CRS9423)	Affirmed
STATE v. QUINLAN No. 06-1474	Wilson (03CRS56886)	No error
STATE v. RHODES No. 06-1452	Buncombe (05CRS10034) (05CRS58534)	No error
STATE v. SNIDER No. 06-1180	Davidson (05CRS5749)	No error
STATE v. SWANN No. 06-1410	Buncombe (03CRS9303)	No error
STATE v. TRUESDALE No. 06-1433	Mecklenburg (04CRS250348)	No error
STATE v. WHITFIELD No. 06-1097	Alamance (05CRS55220-25) (05CRS54624-29)	Dismissed in part, no error in part
STATE v. WILLIAMS No. 06-850	Mecklenburg (04CRS227216)	No error
STATE v. WILLIAMS No. 06-1470	Guilford (05CRS24744)	No error
STATE v. WINCHESTER No. 06-1505	Rockingham (06CRS50256)	No error
STEVE MASON ENTERS. v. CITY OF GASTONIA No. 06-1339	Gaston (04CVS4719)	Dismissed

THOMAS v. THOMAS No. 06-1497	Surry (05CVS907)	Dismissed
TORRES v. JOHNSTON CTY. No. 06-1071	Johnston (03CVS3480)	Affirmed
WELLS v. FOUNTAIN No. 06-1033	Onslow (05CVD2387)	Affirmed in part, reversed and remanded in part

BILLY MYERS, EMPLOYEE, PLAINTIFF v. BBF PRINTING SOLUTIONS (FORMERLY WESLEY BUSINESS FORMS), EMPLOYER, SELF-INSURED, DEFENDANT

No. COA06-1298

(Filed 19 June 2007)

1. Workers' Compensation— disability—employer going out of business

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff was permanently and totally disabled where plaintiff injured a thumb and wrist in a printing press, defendant went out of business while plaintiff was working in a limited capacity, and plaintiff was unable to find other employment.

2. Workers' Compensation— attorney fees—insurer not perfecting appeal

The Industrial Commission in a workers' compensation case could not award plaintiff attorney fees under N.C.G.S. § 97-98 (which allows the award of attorney fees in proceedings brought by the insurer) because defendant did not perfect or pursue its appeal, and the issues addressed by the Commission were solely the issues plaintiff appealed.

Judge WYNN concurring in part and dissenting in part.

Appeal by defendant from opinion and award entered 13 July 2006 by Commissioner Thomas J. Bolch for the North Carolina Industrial Commission. Heard in the Court of Appeals 22 May 2007.

Walden & Walden, by Daniel S. Walden, for plaintiff-appellee.

Jane C. Jackson and W. Mark Peck, for defendant-appellant.

TYSON, Judge.

BBF Printing Solutions ("defendant") appeals from the Full Commission of the North Carolina Industrial Commission's ("the Commission") opinion and award entered granting Billy Myers ("plaintiff") permanent total disability benefits. We affirm in part and reverse in part.

I. Background

On 4 June 1979, plaintiff began work for defendant at its plant in Rural Hall, North Carolina. Plaintiff's job duties included setting up and monitoring eleven units on a seventeen-inch printing press.

On 9 August 2001, plaintiff sustained a work-related injury to his non-dominant left hand and arm. Plaintiff was injured while energizing a printing press when a rewind shaft attached to the press rotated in a different direction than he anticipated. The press pulled his left arm toward it and twisted his left thumb and wrist. Plaintiff continued work until his thumb and wrist began to swell. Plaintiff went to a local medical facility, was given a splint, and returned to work the next day.

Plaintiff continued working for defendant in a limited capacity until 15 November 2001, when defendant notified its employees the Rural Hall plant was closing. Defendant laid off most of its employees, including plaintiff. Plaintiff had been employed as a printing press operator with defendant for twenty-two years.

On 4 December 2001, plaintiff filed a claim for workers' compensation benefits. On 20 November 2002, the matter was heard before Deputy Commissioner Nancy W. Gregory. On 15 July 2003, Deputy Commissioner Gregory entered an opinion and award that concluded plaintiff: (1) suffered an injury by accident to his left thumb, wrist, hand, and shoulder; (2) failed to prove he was incapable, because of the injury, to earn the same or greater wages he was receiving at the date of the injury in the same or any other employment; (3) was not entitled to receive temporary total or temporary partial disability; and (4) was entitled to additional medical treatment. Both plaintiff and defendant appealed to the Full Commission. Defendant failed to file a Form 44 Application for Review with the Commission and did not perfect his appeal.

On 20 January 2004, the matter was heard before the Full Commission. On 18 January 2005, plaintiff moved for an award of attorney's fees pursuant to N.C. Gen. Stat. § 97-88. On 13 July 2006, the Commission entered an opinion and award that concluded: (1) plaintiff suffered an injury by accident to his left thumb, arm, hand, and shoulder arising out of and in the course of his employment with defendant; (2) plaintiff was entitled to total disability compensation from 15 November 2001 and continuing each week for his lifetime; and (3) defendant shall pay all of plaintiff's medical expenses relating

to the injury "as long as said treatment tends to effect a cure, give relief, or lessen the period of plaintiff's disability." The Commission also awarded plaintiff $2,000.00 in attorney's fees pursuant to N.C. Gen. Stat. § 97-88. Defendant appeals.

II. Issues

Defendant argues the Commission erred by: (1) concluding plaintiff is permanently and totally disabled and (2) awarding plaintiff attorney's fees.

III. Standard of Review

Defendant set out thirty-six assignments of error in the record on appeal. Defendant assigned error to all but three of the Commission's thirty-four findings of fact. "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) (2007) (emphasis supplied); *see Animal Legal Defense Fund v. Woodley*, 181 N.C. App. 594, 597, 640 S.E.2d 777, 779 (2007) ("[W]e will not review defendants' unargued assignments of error.").

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) (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.

IV. Total Disability

A. Matters Preserved for Appellate Review

[1] By defendant's first argument, it argues the Commission erred by concluding plaintiff was permanently and totally disabled because there was no competent evidence that: (1) he was incapable of earning wages in the same employment; (2) he was incapable of earning

the same wages in any other employment; and (3) plaintiff's inability to earn the same wages is due to his work-related injury. Defendant's argument is the Commission's finding of fact number thirty is not supported by competent evidence. The Commission found as fact:

> 30. Beginning November 15, 2001, and thereafter, plaintiff has been unable to earn the wages he was earning at the time of his injury in the same or any other employment due to his accidental injuries of August 9, 2001.

Within this broad argument, defendant also specifically argues the Commission's findings of fact numbered 9, 28, and 34 are not supported by competent evidence. The Commission found as fact:

> 9. Plaintiff was unable to perform the required normal work duties of a pressman and a forklift operator for the defendant due to his August 9 injuries during the period August 9, 2001, through November 14, 2001, when he last worked for the defendant, which closed its plant on that date and laid off its employees.
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> . . . .
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> 28. During the period of December 12, 2001, through May 28, 2003, plaintiff made a diligent but unsuccessful effort to find employment suitable to his limited work capacities, that is, suitable to use of his right hand with limited ability to use his left hand.
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> . . . .
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> 34. In light of plaintiff's advanced age, his high school education level, his work history primarily as a printing press operator, and his permanent limitation to work activities using his right hand primarily and his left hand as a gross assist, plaintiff is entitled to be paid permanent total disability and medical compensation for his injuries during his lifetime.

Defendant's assignments of error to the Commission's other findings of fact, not argued in its brief, are deemed abandoned. N.C.R. App. P. 28(b)(6) (2007) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned."). The Commission's findings of fact that defendant failed to argue in its brief are binding on appeal. *See Willen v. Hewson*, 174 N.C. App. 714, 718, 622 S.E.2d 187, 190 (2005) ("[D]efendant assigned error to numerous findings of fact by the trial court, but has failed to argue

any of these assignments of error in her brief on appeal. Such assignments of error are therefore abandoned, and the trial court's findings are binding on appeal."), *disc. rev. denied*, 360 N.C. 491, 631 S.E.2d 520 (2006).

B. Finding of Fact Numbered 9

Defendant argues the Commission's finding of fact numbered 9 that "plaintiff was unable to perform the required work duties of a pressman and a forklift operator for the defendant" was not supported by competent evidence. We disagree.

The Commission found as fact:

> 9. Plaintiff was unable to perform the required *normal* work duties of a pressman and a forklift operator for the defendant due to his August 9 injuries during the period August 9, 2001, through November 14, 2001, when he last worked for the defendant, which closed its plant on that date and laid off its employees.

(Emphasis supplied).

Plaintiff worked as a press operator with defendant for twenty-two years. Plaintiff's normal work duties involved "setting up eleven different units on the printing press." Plaintiff testified he used his hands "all day . . . to perform the duties of a press operator" and that the job required the use of both his left and right hands. Plaintiff also operated a forklift to obtain his own stock. Plaintiff testified he used both his left and right hands to operate the forklift.

After plaintiff's injury, he was restricted to "no repetitive use" of his left hand. John Bacon, defendant's director of manufacturing, testified plaintiff was assigned job duties "within his restrictions." Plaintiff sharpened wheels, operated a forklift to obtain stock for the pressman, and used a push broom with only his right hand to keep his work area clean. Plaintiff testified he could not operate the forklift in his normal manner.

Plaintiff also presented medical evidence he was "unable to perform the required normal work duties of a pressman and a forklift operator" from 9 August 2001 through 14 November 2001. Plaintiff presented to Lelia Gentry ("Gentry"), a physician's assistant at PrimeCare Occupational Medicine on 9 August 2001. Gentry limited plaintiff to no repetitive use of his left hand and placed him in a splint. These restrictions continued until October 2001, when plaintiff was referred to an orthopedist.

On 20 August 2001, Gentry ordered physical therapy for plaintiff. On 6 September 2001, the therapist noted plaintiff's overall condition was "worse" and that plaintiff "used L[eft] hand to pull and had sharp pain in the wrist and now pain up into elbow." On 11 September 2001, the therapist noted: (1) plaintiff's pain had "increased" in his left "thumb & radial side of wrist" and (2) plaintiff "woke this am w/[left shoulder] stiffness, [left] elbow pain & [left] wrist & thumb."

The Commission's finding of fact that "[p]laintiff was unable to perform the required normal work duties of a pressman and a fork-lift operator" from 9 August 2001 through 14 November 2001 is supported by competent evidence. The Commission's findings of fact are "conclusive on appeal" when supported by "any competent evidence." *McRae*, 358 N.C. at 496, 597 S.E.2d at 700. This assignment of error is overruled.

C. Finding of Fact Numbered 28

Defendant also argues the Commission's finding of fact numbered 28 is not supported by competent evidence. Defendant asserts the Commission's conclusive finding that plaintiff engaged in a diligent job search is not supported by competent evidence. We disagree.

The Commission found:

> 28. During the period of December 12, 2001, through May 28, 2003, plaintiff made a diligent but unsuccessful effort to find employment suitable to his limited work capacities, that is, suitable to use of his right hand with limited ability to use his left hand.

Plaintiff has not earned any wages since 14 November 2001. Plaintiff testified he: (1) applied for employment with seventy-five different employers; (2) found these potential employers "[i]n classified ads in the paper, yellow pages, on the internet and places (sic) knew about and places a friend had told [him] about;" and (3) applied in person to some of the employers and by mail to others. Plaintiff also admitted into evidence job search logs from 12 December 2001 to 28 August 2002 and 21 November 2002 to 28 May 2003.

The Commission's finding that plaintiff engaged in a diligent job search is supported by competent evidence. The Commission's findings of fact are "conclusive on appeal" when supported by "any competent evidence." *McRae*, 358 N.C. at 496, 597 S.E.2d at 700. This assignment of error is overruled.

D. Findings of Fact Numbered 30 and 34

Defendant also argues the Commission erred by concluding plaintiff is permanently and totally disabled. Defendant asserts the Commission's findings of fact numbered 30 and 34 are not supported by competent evidence and the Commission erred in awarding plaintiff permanent total disability because he failed to carry his burden to prove disability set out by our Supreme Court in *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982). We disagree.

1. Applicable Law

Under North Carolina's Workers' Compensation Act, "The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury *in the same or any other employment*." N.C. Gen. Stat. § 97-2(9) (2005) (emphasis supplied). "In order to obtain compensation under the Workers' Compensation Act, the claimant has the burden of proving the existence of his disability and its extent." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986).

Our Supreme Court has stated:

> [I]n order to support a conclusion of disability, *the Commission must find*: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury *in the same employment*, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury *in any other employment*, and (3) that *this individual's incapacity to earn was caused by plaintiff's injury.*

Hilliard, 305 N.C. at 595, 290 S.E.2d at 683 (emphasis supplied) (internal citation omitted).

Here, the Commission made the required finding under *Hilliard*:

> 30. Beginning November 15, 2001, and thereafter, plaintiff has been unable to earn the wages he was earning at the time of his injury in the same or any other employment due to his accidental injuries of August 9, 2001.

The question is whether the plaintiff met his burden to prove all three of these *Hilliard* factors. *See Coppley v. PPG Indus., Inc.*, 133 N.C. App. 631, 635, 516 S.E.2d 184, 187 (1999) ("[T]he Commission's findings must sufficiently reflect that [the] plaintiff produced evidence to prove all three *Hilliard* factors.").

2. Analysis

Defendant argues the Commission erred in finding as fact the first and second *Hilliard* elements. *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683. We disagree.

In *Russell v. Lowes Product Distribution*, this Court set out four separate and distinct ways a plaintiff could meet his burden to prove the first two *Hilliard* factors:

> The burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, *either in the same employment or in other employment*. The *employee may meet this burden in one of four ways*: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; *or* (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (emphasis supplied) (internal citations omitted).

This Court has also stated:

> [T]his Court has clearly outlined different methods that a plaintiff may employ to prove total loss of wage-earning capacity, and thus, entitlement to total disability benefits under N.C. Gen. Stat. § 97-29 (1999). *See Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). One such method is by "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." *Id.* at 765, 425 S.E.2d at 457.

Zimmerman v. Eagle Elec. Mfg. Co., 147 N.C. App. 748, 752-53, 556 S.E.2d 678, 680-81 (2001) (Plaintiff met her burden of proving total and permanent disability through medical testimony "regarding the extent of her physical limitations" and evidence plaintiff unsuccessfully sought numerous jobs.).

Here, the Commission under the second *Russell* factor found:

> 28. During the period of December 12, 2001, through May 28, 2003, plaintiff made a diligent but unsuccessful effort to find employment suitable to his limited work capacities, that is, suitable to use of his right hand with limited ability to use his left hand.

Here, plaintiff, like the plaintiff in *Zimmerman*, satisfied his burden to prove the first two *Hilliard* factors through medical testimony "regarding the extent of [his] physical limitations" and evidence plaintiff unsuccessfully sought numerous jobs. *Id.* The Commission found in uncontested findings of fact the extent of plaintiff's physical limitations:

> 12. On April 15, 2002, physical therapist Lois Maple with Dr. Taft's office, and at Dr. Taft's request, evaluated plaintiff's ability to use his left hand to perform work duties. This evaluation revealed that plaintiff was limited to using his left hand as a gross assist to his dominant right hand, due to pain and weakness in his left hand and arm.
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> 17. On November 13, 2002, Dr. Taft saw plaintiff again at defendant's request and reviewed Dr. Poehling's evaluation notes and the bone scan. At that time, Dr. Taft wrote that in his opinion plaintiff had reached maximum medical improvement with a 25 percent permanent impairment to his left thumb.
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> . . . .
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> 20. Plaintiff suffers from the following symptoms due to his injuries of August 9, 2001: (a) moderate to severe left hand or wrist pain made worse with use; (b) nocturnal awakenings due to left hand and arm pain; (c) left hand and left thumb weakness; (d) difficulty using his left hand to handle small objects; (e) moderate difficulty with activities of daily living due to left hand pain and weakness; (f) left shoulder and arm pain made worse with use.
>
> 21. On April 13, 2004, Dr. Poehling operated on plaintiff's left thumb, a carpometacarpal fusion using Acutak screw procedure. The surgery provided significant pain relief at plaintiff's CMC joint. By July 22, 2004, plaintiff reached maximum medical improvement concerning his left thumb and hand injuries of August 9, 2001. Plaintiff's left hand grip strength is diminished by

about 60% due to his inability to squeeze with his left thumb. Plaintiff has significant loss of sensation in his left thumb. Plaintiff has suffered a 40% permanent partial loss to his left hand as a result of his August 9, 2001, injury by accident.

. . . .

25. Plaintiff's pain complaints concerning his left hand, left arm, and left shoulder are genuine. The pain is moderate to severe in intensity and made worse with any activity.

26. Plaintiff retains a 7% permanent loss to his left arm as a result of his August 9, 2001, injury by accident.

Competent evidence also shows plaintiff unsuccessfully sought numerous jobs. As stated above, the Commission's finding of fact twenty-eight is supported by competent evidence and is "conclusive on appeal." *McRae*, 358 N.C. at 496, 597 S.E.2d at 700.

Plaintiff met his burden of proving total and permanent disability through medical testimony "regarding the extent of [his] physical limitations" and evidence plaintiff unsuccessfully sought numerous jobs. *Zimmerman*, 147 N.C. App. at 752-53, 556 S.E.2d at 680-81. The Commission properly found in finding of fact number thirty that plaintiff proved the first and second *Hilliard* elements. *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683. Defendant's assignment of error is overruled.

Defendant asserts the Commission erred in finding the second *Hilliard* factor that plaintiff is incapable of earning the same wages in any other employment because the Commission's finding of fact number thirty-four is not supported by competent evidence. *Id.* Defendant contends no physician has testified plaintiff is not physically capable of performing work using his left hand. We disagree.

Like in *Zimmerman*, defendant is arguing the Commission erred in finding plaintiff totally and permanently disabled "based on the assertion that no doctor testified unequivocally that plaintiff is capable of no work whatsoever." 147 N.C. App. at 753, 556 S.E.2d at 681. "Defendant[] appear[s] to be assuming that the only way to prove total disability is by medical evidence." *Id.* at 752, 556 S.E.2d at 681. As stated above, plaintiff met his burden of proving total and permanent disability through medical testimony "regarding the extent of [his] physical limitations" and evidence plaintiff unsuccessfully

sought numerous jobs. *Id.* at 752-53, 556 S.E.2d at 680-81. Defendant's assignment of error is overruled.

Defendant also argues the Commission erred in finding as fact the third *Hilliard* element that plaintiff's "incapacity to earn was caused by plaintiff's injury." 305 N.C. at 595, 290 S.E.2d at 683. Defendant asserts "plaintiff's failure to obtain a new printing job is due to the dearth of jobs available in the printing industry." We disagree.

In part of finding of fact thirty-two, the Commission found as fact:

> 32. . . . Plaintiff has been very diligent in his job search activities and in his efforts to overcome defendant's resistance to providing him with the medical care he needs. The Full Commission finds as contrary to fact defendant's position that plaintiff's inability to obtain employment is the same as it is for any of the other press operator[s] laid off by [defendant] in November 2001—the general economic downturn which struck [defendant] and the printing industry in general.

The Commission's uncontested finding of fact is supported by competent evidence and is "conclusive on appeal." *McRae*, 358 N.C. at 496, 597 S.E.2d at 700. Defendant's assignment of error is overruled.

Plaintiff met his burden to prove all three of these *Hilliard* factors. *Coppley*, 133 N.C. App. at 635, 516 S.E.2d at 187; *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683. The Commission's findings are supported by competent evidence and the findings support the conclusion of law plaintiff is entitled to total disability compensation benefits.

V. Attorney's Fees

[2] Defendant also properly assigned error to and argues the Commission's award of plaintiff's attorney fees pursuant to N.C. Gen. Stat. § 97-88 (2005). Defendant asserts the Commission could not award plaintiff his attorney fees pursuant to N.C. Gen. Stat. § 97-88 because it never pefected its appeal to the Commission and the issues on appeal before the Commission were brought exclusively by plaintiff. We agree.

The Commission stated in its award to plaintiff:

> 5. The costs shall include a $2,000.00 reasonable attorney's fee to be paid to plaintiff's counsel by defendant pursuant to N.C. Gen. Stat. § 97-88. Defendant appealed and the Full Com-

> mission by this Opinion and Award orders compensation to be paid to plaintiff.
>
> N.C. Gen. Stat. § 97-88 states:
>
> If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this Article, shall find that *such hearing or proceedings were brought by the insurer* and the Commission or court by its decision orders the insurer to make, or to continue payments of benefits, including compensation for medical expenses, to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceedings including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs.

(Emphasis supplied). Our Supreme Court has stated, "It is clear that this section of the statute is applicable only *when such hearings or proceedings are brought by the insurer* and the court orders the insurer to make or to continue payments of compensation to the injured employee." *Bowman v. Chair Co.*, 271 N.C. 702, 705, 157 S.E.2d 378, 380 (1967) (emphasis supplied).

Here, plaintiff initially noticed appeal of Deputy Gregory's opinion and award to the Commission, by giving notice of his request for review by the Commission in a letter dated 15 July 2003. Defendant filed its notice of appeal to the Commission on 29 July 2003. Defendant did not file a Form 44 Application for Review with the Commission and never perfected nor pursued its appeal. All issues before and addressed by the Commission "at a hearing on review" were solely the issues plaintiff appealed. N.C. Gen. Stat. § 97-88.

The Commission in its opinion and award stated, "Defendant abandoned its appeal by failing to state with particularity the specific grounds of its appeal[.]" All "hearings or proceedings" before the Commission "at a hearing on review" were brought solely by plaintiff, not defendant. *Bowman*, 271 N.C. at 705, 157 S.E.2d at 380; N.C. Gen. Stat. § 97-88. The Commission erred by awarding attorney fees to "be paid by the insurer" pursuant to N.C. Gen. Stat. § 97-88. The Commission's award of attorney's fees is erroneous and is reversed.

The dissenting opinion asserts plaintiff is entitled to attorney's fees before the Commission and cites cases where this Court has ordered attorney's fees to be paid and remanded the Commission for

a determination of the appropriate amount of fees. None of those cases cited therein apply to the issue before us. On 14 February 2007, plaintiff moved this Court for costs and an award of attorney's fees pursuant to N.C.R. App. P. 34(a) and N.C. Gen. Stat. § 97-88. By order entered 22 May 2007, this panel of judges unanimously denied plaintiff's motion.

VI. Conclusion

Plaintiff met his burden to prove all three *Hilliard* factors. *Coppley*, 133 N.C. App. at 635, 516 S.E.2d at 187; *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683. The Commission's findings are supported by competent evidence and the findings support the conclusion of law plaintiff is entitled to total disability compensation benefits.

The "hearings or proceedings" before the Commission were brought by plaintiff, not defendant. *Bowman*, 271 N.C. at 705, 157 S.E.2d at 380. The Commission erred by awarding attorney's fees pursuant to N.C. Gen. Stat. § 97-88. The Commission's award of attorney's fees is reversed.

Affirmed in Part and Reversed in Part.

Judge CALABRIA concurs.

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

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

I concur with the majority in affirming the Full Commission's award of total disability benefits to Mr. Myers. However, because I conclude that BBF Printing Solutions's abandonment of its appeal does not altogether negate its existence, I would affirm the Commission's award of attorney's fees to Mr. Myers. From that portion of the majority's opinion, I therefore respectfully dissent.

North Carolina General Statute § 97-88 refers to the Industrial Commission's "find[ing] that such hearing or proceedings were brought by the insurer" as a necessary step to ordering the insurer to pay attorney's fees in an appeal from an award by the Commission. N.C. Gen. Stat. § 97-88 (2005). This Court has clarified that attorney's fees could be awarded under Section 97-88 "if (1) the insurer *has*

appealed a decision to the Full Commission or to any court, and (2) on appeal, the Commission or court has ordered the insurer to make, or continue making, payments of benefits to the employee." *Estes v. N.C. State Univ.*, 117 N.C. App. 126, 128, 449 S.E.2d 762, 764 (1994) (emphasis added). Moreover, we have also concluded that Section 97-88 "permits the Full Commission or an appellate court to award fees and costs based on an insurer's *unsuccessful* appeal." *Rackley v. Coastal Painting*, 153 N.C. App. 469, 475, 570 S.E.2d 121, 125 (2002) (emphasis added).

Additionally, we have previously held that the statutory requirements of N.C. Gen. Stat. § 97-88 are met when the defendant appeals the Full Commission's award of benefits to this Court, and this Court affirms the award. *Brown v. Public Works Comm'n*, 122 N.C. App. 473, 477, 470 S.E.2d 352, 354 (1996). In our own discretion, we have ordered attorney's fees to be paid in a number of such cases, generally remanding to the Full Commission for a determination of the appropriate amount of fees. *See, e.g.*, *Brooks v. Capstar Corp.*, 168 N.C. App. 23, 30-31, 606 S.E.2d 696, 701, *appeal dismissed*, 360 N.C. 60, 621 S.E.2d 170 (2005); *Cox v. City of Winston-Salem*, 157 N.C. App. 228, 238, 578 S.E.2d 669, 677 (2003); *Brown*, 122 N.C. App. at 477, 470 S.E.2d at 354; *Estes*, 117 N.C. App. at 129, 449 S.E.2d at 765 (1994); *Poplin v. PPG Indus.*, 108 N.C. App. 55, 57-58, 422 S.E.2d 353, 355 (1992).

Here, BBF Printing Solutions did, in fact, appeal Deputy Commissioner Gregory's award of medical compensation to Mr. Myers; however, their failure to "state with particularity the specific grounds" of the appeal then led to its being dismissed as abandoned. Moreover, the Full Commission noted that, even though BBF Printing Solutions had abandoned their appeal, the company also "continued to delay medical treatment." In its final Opinion and Award, the Full Commission again ordered BBF Printing Solutions to pay the expenses related to the medical treatment of Mr. Myers's compensable injury.

Thus, under the plain language of previous precedents of this Court, BBF Printing Solutions "has appealed" to the Full Commission, and the Commission, in turn, "ordered the insurer to make, or continue making, payments of benefits to the employee." *Estes*, 117 N.C. App. at 128, 449 S.E.2d at 764. Our decision here, affirming the Full Commission, likewise orders BBF Printing Solutions to "make, or continue making, payments of benefits" to Mr. Myers. The appeal by BBF Printing Solutions to the Full Commission was abandoned, not

withdrawn, and their appeal to this Court failed; both were there fore "unsuccessful appeal[s]." *See Rackley*, 153 N.C. App. at 475, 570 S.E.2d at 125. Accordingly, Mr. Myers should be entitled to attorney's fees if so ordered by the Full Commission.[1] I would therefore affirm the Full Commission's award.

WESTON GRIFFITH, JR., PLAINTIFF v. GLEN WOOD COMPANY, INC. D/B/A WOOD BROTHERS, AND ROUSH CORPORATION, D/B/A ROUSH RACING, AND PAT TRYSON, DEFENDANTS

No. COA06-635

(Filed 19 June 2007)

1. Contracts— breach—testing of NASCAR part—summary judgment

Conflicting evidence was sufficient to raise a genuine issue of fact in a breach of contract claim concerning metallurgical testing on a NASCAR part, and the trial court should not have granted summary judgment for defendant.

2. Corporations— foreign—not suspended in N.C.—defense to breach of contract not applicable

There was no evidence that the State of North Carolina had suspended the articles of incorporation or certificate of authority of an Illinois corporation of which plaintiff was the sole shareholder (it had been involuntarily dissolved and reinstated), and the defendant's affirmative defense that a contract was invalid did not apply.

3. Contracts— interference with—prohibited testing of NASCAR part—summary judgment

The trial court did not err by granting summary judgment for a NASCAR crew chief on a claim for tortious interference with contract regarding prohibited metallurgical testing on a NASCAR

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1. I note, too, that we review an award of attorney's fees by the Full Commission for an abuse of discretion. *See Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 394, 298 S.E.2d 681, 683 (1983) ("In the absence of an abuse of discretion the Commission's denial of attorneys' fees will not be disturbed."). Given the Commission's conclusion that BBF Printing Solutions abandoned its appeal yet "continued to delay medical treatment" for Mr. Myers, I see no abuse of discretion in their decision to award attorney's fees to Mr. Myers.

part. There was no evidence that he induced his codefendant to breach the contract (which forbade the testing).

4. Conversion— NASCAR part—serious departure from lease—issue of fact

The trial court erred by granting summary judgment for defendants on a claim for conversion where a NASCAR crew chief retained possession of a leased part when he began working for a competitor and conducted testing prohibited by a contract. The parties' disagreement about whether these actions amounted to a major or serious departure from the terms of the lease creates a genuine issue of material fact.

5. Conversion— respondeat superior—scope of employment—issue of fact

Summary judgment against defendant Wood Brothers was not appropriate on a respondeat superior claim for conversion of a NASCAR part by a crew chief working for Wood Brothers. Reasonable minds could differ on whether the crew chief's action was within the scope of his employment.

6. Trade Secrets— misappropriation—ascertainable through reverse engineering—not a trade secret

The trial court did not err by granting summary judgment for defendant on a claim for misappropriation of trade secrets regarding a NASCAR part. There was testimony that the part was readily ascertainable through reverse engineering; the idea cannot therefore be defined as a trade secret.

7. Unfair Trade Practices— NASCAR part—metallurgical testing

The trial court did not err by granting summary judgment for defendant on a claim for unfair and deceptive trade practices arising from a NASCAR crew chief retaining, sampling, and analyzing the metal in a leased part.

Appeal by plaintiff from judgments entered 27 December 2005 by Judge W. Erwin Spainhour in Superior Court, Cabarrus County. Heard in the Court of Appeals 10 January 2007.

Katten Muchin Rosenman LLP, by Jeffrey C. Grady and Christopher A. Hicks, for plaintiff-appellant.

Hartsell & Williams, by Christy E. Wilhelm, for defendant-appellee Glenn Wood Company, Inc.

Helms Mullis & Wicker, PLLC, by Tracy Strickland, for defendant-appellee Pat Tryson.

STROUD, Judge.

Plaintiff Weston Griffith, Jr. (Griffith) appeals from the trial court order granting summary judgment in favor of defendants Glen Wood Company, Inc., and Pat Tryson (Tryson) as to all claims. For the reasons that follow, we affirm in part, reverse in part, and remand.

I. Facts

The evidence in the record, drawing all inferences in favor of plaintiff, *Collingwood v. G. E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989), tends to show the following: Solid Steel Company, Inc. (Solid Steel) was an Illinois corporation involved in metal recycling. Griffith was the sole shareholder and president of Solid Steel. Solid Steel was involuntarily dissolved on 2 March 1998 and reinstated on 26 February 2004. Glen Wood Company, Inc., a Virginia corporation doing business as Wood Brothers, competed in NASCAR automobile racing. Defendant Wood Brothers was headquartered in Virginia. Eddie Wood was a manager in Wood Brothers. Roush Racing[1] (Roush) was a competitor of defendant Wood Brothers on the NASCAR racing circuit. Defendant Tryson was employed by defendant Wood Brothers as the crew chief for the 2003 NASCAR season. As crew chief, defendant Tryson was responsible for maximizing the performance of the race car. (R. 275)

Griffith, through Solid Steel, re-engineered a truck arm (Part X or truck arm), part of the suspension, to improve the speed and performance of a race car. Solid Steel assigned its rights in Part X to Griffith on 15 March 2004, and Griffith is the sole plaintiff in this case.

At a test session at the Kansas Speedway in September 2003, Part X was installed on a race car owned by defendant Wood Brothers. On 29 September 2003, after the test at the Kansas Speedway, Griffith, on behalf of Solid Steel, entered into a lease contract with defendant Wood Brothers for Part X.

Pursuant to the contract, defendant Wood Brothers leased four (4) sets of Part X from 29 September 2003 to 17 November 2003. In the lease contract, defendant Wood Brothers "agree[d] to not cut, punch, form, deform, . . . or test (in any metallurgical way), [Part X],

1. The original complaint in this case named Roush Racing as a defendant, but plaintiff did not appeal from summary judgment granted in favor of Roush Racing.

without] written consent by Solid Steel." Defendant Wood Brothers also "agree[d] to not 'share' any information obtained [from Part X] with . . . any fellow NASCAR competitor." Defendant Wood Brothers installed a set of Part X on one of its race cars.

After the NASCAR race at Phoenix, defendant Wood Brothers entered an agreement with Roush for the final two races of 2003. As part of the agreement, defendant Pat Tryson, still employed by defendant Wood Brothers, worked as crew chief for Roush for the last two races of 2003. Defendant Tryson took at least one set of Part X with him to Roush.

Defendant Wood Brothers' lease contract with Solid Steel for Part X terminated on 17 November 2003. Defendant Wood Brothers then returned to Griffith and Solid Steel three (3) of the four (4) sets of Part X leased under the contract, but not the set defendant Tryson took to Roush. Plaintiff requested return of the fourth set of Part X, but it was not immediately returned.

Before the fourth set of Part X was returned to Solid Steel, Eddie Wood, in casual conversation with defendant Tryson, remarked, "I wonder what the trick [to Part X] is." Even though Eddie Wood testified in his deposition that he meant nothing by this remark, intending to return Part X to Solid Steel intact, defendant Tryson interpreted this comment as an order to drill a hole in Part X and test it metallurgically. Defendant Tryson drilled a core sample out of one set of Part X and gave the core sample to an engineer for Roush. The final set of Part X, minus the core sample, was returned to Griffith in December 2003.

II. Procedural History

Plaintiff filed a complaint on 24 January 2005, seeking damages from defendant Wood Brothers for misappropriation of trade secrets, conversion, unfair and deceptive trade practices (UDTP), and breach of contract. In the same complaint, he sought damages from defendant Tryson for misappropriation of trade secrets, conversion, UDTP, and interference with contractual relationship. Defendant Tryson answered on or about 31 March 2005, denying the material allegations of the complaint. Defendant Wood Brothers answered on or about 28 April 2005, also denying the material allegations in the complaint.

Defendant Wood Brothers filed a motion for summary judgment on or about 30 November 2005. Defendant Tryson filed a motion for summary judgment on or about 2 December 2005. The trial court

entered summary judgment in favor of both defendants as to all claims on or about 27 December 2005. Plaintiff appeals from entry of summary judgment in favor of defendants.

III. Standard of Review

The trial court must grant summary judgment upon a party's motion when "there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56. (2005) On appeal, an order granting summary judgment is reviewed *de novo*. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004).

Summary judgment is appropriate if: (1) the non-moving party does not have a factual basis for each essential element of its claim; (2) the facts are not disputed and only a question of law remains, *McNair v. Boyette*, 282 N.C. 230, 235, 192 S.E.2d 457, 460 (1972); or (3) if the non-moving party is unable to overcome an affirmative defense[2] offered by the moving party, *Bonestell v. North Topsail Shores Condominiums*, 103 N.C. App. 219, 222, 405 S.E.2d 222, 224 (1991) (holding that summary judgment was properly granted when the claim was filed after the statute of limitations had run).

On the other hand, summary judgment is not appropriate when there are conflicting versions of the events giving rise to the action, or when there is no conflict about the events that occurred, but the legal significance of those events is determined by a reasonable person test. *Lopez v. Snowden*, 96 N.C. App. 480, 482-83, 386 S.E.2d 65, 66 (1989).

IV. Issues

A. Breach of Contract

[1] Plaintiff contends that the trial court erred when it granted summary judgment in favor of defendant Wood Brothers on the breach of contract claim. We agree.

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000). The record contains a contract signed by officers of Solid Steel and defendant

2. "An affirmative defense is a defense that introduces a new matter in an attempt to avoid a claim, regardless of whether the allegations of the claim are true." *Williams v. Pee Dee Electrical Membership Corp.*, 130 N.C. App. 298, 301-02, 502 S.E.2d 645, 647-48 (1998).

Wood Brothers on 29 September 2003 for the lease of four sets of Part X, which plaintiff purports to be a valid contract. In that contract, defendant Wood Brothers "agree[d] to not cut, punch, form, deform, . . . or test (in any metallurgical way), [Part X], [without] written consent by Solid Steel." Defendant Wood Brothers also "agree[d] to not 'share' any information obtained [from Part X] with . . . any fellow NASCAR competitor." The record contains evidence that a core sample was drilled out of Part X and that the core sample was given to a Roush engineer for testing. Defendant Wood Brothers denied drilling out a core sample and giving it to a Roush engineer. If plaintiff proves that defendant Wood Brothers, through its agents, drilled out a core sample or gave any part of it to a Roush engineer for testing, either action would be a breach of an express term of the lease contract. This evidence is sufficient to raise a genuine issue of material fact as to the breach of contract claim. Defendant is therefore not entitled to summary judgment on the breach of contract claim unless it asserts an affirmative defense which plaintiff cannot overcome.

[2] Defendant asserts the affirmative defense that Solid Steel was subject to revenue suspension per N.C. Gen. Stat. § 105-230 at the time the contract was signed, thereby making the contract invalid. If Solid Steel was in fact under revenue suspension per N.C. Gen. Stat. § 105-230, the contract it entered into with defendant Wood Brothers would be invalid under North Carolina law. *South Mecklenburg Painting Contr'rs, v. Cunnane Grp.*, 134 N.C. App. 307, 312, 517 S.E.2d 167, 170 (1999) (holding that a contract entered into during a period of revenue suspension per G.S. § 105-230 is invalid and may not be enforced). However, N.C. Gen. Stat. § 105-230[3] applies only to entities whose "articles of incorporation, articles of organization, or certificate of authority" have been suspended by the State of *North*

3. N.C. Gen. Stat. § 105-230 (2005) reads in pertinent part:

> (a) If a corporation or a limited liability company fails to file any report or return or to pay any tax or fee required by this Subchapter for 90 days after it is due, the Secretary shall inform the Secretary of State of this failure. The Secretary of State shall suspend the articles of incorporation, articles of organization, or certificate of authority, as appropriate, of the corporation or limited liability company. . . . The powers, privileges, and franchises conferred upon the corporation or limited liability company by the articles of incorporation, the articles of organization, or the certificate of authority terminate upon suspension.
>
> (b) Any act performed or attempted to be performed during the period of suspension is *invalid* and of no effect, unless the Secretary of State reinstates the corporation or limited liability company pursuant to G.S. 105-232.

(Emphasis added.)

Carolina. It does not apply to entities that have been subject to similar actions in other states. N.C. Gen. Stat. § 105-230.

The record contains evidence that Solid Steel was incorporated in Illinois, not North Carolina. There is no evidence that Solid Steel was doing business in North Carolina when the contract was entered,[4] and no evidence that Solid Steel ever had a certificate of authority from the State of North Carolina. Drawing inferences from these facts in plaintiff's favor, as we must for purposes of summary judgment, *Collingwood*, 324 N.C. at 66, 376 S.E.2d at 427, there is no evidence that the State of North Carolina suspended the articles of incorporation or certificate of authority of Solid Steel, thereby invalidating the lease contract. If proved, these inferences show that plaintiff is able to overcome defendant Wood Brothers' affirmative defense to the lease contract. Therefore, defendant Wood Brothers has not shown that it is entitled to summary judgment on the basis of its affirmative defense. Because defendant Wood Brothers has not shown that it is entitled to summary judgment on either the elements of plaintiff's claim or on its own affirmative defense, we reverse entry of summary judgment in favor of defendant Wood Brothers on the breach of contact claim.

B. Tortious Interference with Contract

[3] Plaintiff contends that the trial court erred when it granted summary judgment on his claim for tortious interference with contract in favor of defendant Tryson. We disagree.

Plaintiff argues that defendant Tryson interfered with the lease contract between defendant Wood Brothers and Solid Steel by drilling a core sample out of Part X. Defendant Tryson responds that the contract was not breached, or alternatively, if it was breached, there is no evidence that defendant Tryson induced defendant Wood Brothers to breach the contract. An essential element of a claim for tortious interference with a contract is that "the defendant intentionally induces the third person not to perform the contract." *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988).

Drawing all inferences from the evidence in plaintiff's favor, we conclude there is no evidence in the record that defendant Tryson induced defendant Wood Brothers not to perform the lease contract. Because plaintiff has not presented evidence to support an essential

4. At the date of the contract, Wood Brothers was headquartered in Virginia, though it moved its headquarters to North Carolina before this lawsuit was filed.

element of his claim for tortious interference with contract, the trial court did not err in granting summary judgment in favor of defendant Tryson on the claim of tortious interference with contract. Accordingly, we affirm the judgment of the trial court on this claim.

C. Conversion

[4] Plaintiff contends that the trial court erred when it granted summary judgment in favor of defendant Wood Brothers and defendant Tryson on the claim for conversion. We agree as to both defendants.

Plaintiff alleged that defendant Tryson converted Part X when, without authorization, he (1) retained possession of the part, and (2) drilled a core sample out of it. Plaintiff argued that defendant Tryson is personally liable for conversion and also that defendant Wood Brothers is liable for conversion under the doctrine of *respondeat superior*. Defendant Tryson responded that he did not convert Part X because (1) his possession of Part X was authorized by a lease contract between Solid Steel and defendant Wood Brothers, and (2) he did not know that removing the core sample was a violation of that lease contract.

Conversion is defined as "an *unauthorized* assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Lake Mary Ltd. Part. v. Johnston*, 145 N.C. App. 525, 531, 551 S.E.2d 546, 552 (citation omitted) (emphasis added), *disc. review denied*, 354 N.C. 363, 557 S.E.2d 538-39 (2001). A lease of goods authorizes the "right to possession and use of goods for a term." N.C. Gen. Stat. § 25-2A-103 (2005). A lease of goods to a corporation impliedly authorizes the employees or agents of the corporation to possess and use the goods for the lease term, because a corporation can act only through its employees and agents. *See State v. Southern Ry. Co.*, 145 N.C. 359, 403, 59 S.E. 570, 591 (1907) (Clark, C.J., dissenting); 2 William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Corporations* § 275 (rev. vol. 2006); *accord Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 165-66, 150 L. Ed. 2d 198, 206 (2001).

When possession and use of goods is authorized by a lease, an action for conversion may lie if the lessee retains possession of the goods beyond the term authorized by the lease, provided the lessor demands the goods after the end of the lease term and the lessee refuses to return them. *See Hoch v. Young*, 63 N.C. App. 480, 483, 305 S.E.2d 201, 203-04 (holding that because the defendant's possession

was initially authorized, the jury could find that the statute of limitations for conversion does not begin to run until the owner's lawful demand for the goods is refused), *disc. review denied*, 309 N.C. 632, 308 S.E.2d 715 (1983); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 15, at 98-100 (5th ed. 1984) [hereinafter *Prosser*]; Restatement of Torts (Second) § 237 cmt. g (1965); *accord Guaranty Nat. Ins. Co. v. Mihalovich*, 435 P.2d 648, 652 (Wash. 1967) (holding that absent demand and refusal, or some other decisive repudiation of the owner's rights, merely retaining a rental car beyond the return date specified in the contract did not establish conversion). If the defendant's refusal to return the goods is not expressed, it may be implied from the defendant's conduct. Restatement of Torts (Second) § 237 cmt. g (1965). The determination of whether a defendant has impliedly refused to return leased goods is generally a factual determination for a jury. *Id.*

According to the lease between defendant Wood Brothers and Solid Steel, Part X was to be returned to Solid Steel on 17 November 2003. Defendant Tryson had possession of Part X after that date. Plaintiff alleged that defendant Tryson would not return phone calls and that an unidentified employee of defendant Wood Brothers ignored his demand to return Part X in early December. From this evidence, we conclude that whether defendant Tryson refused plaintiff's demand for return of Part X by implication raises a genuine issue of material fact, which creates a jury question.

An action for conversion may also lie if leased goods are used in a manner that is a "major or serious departure" from the use authorized by the lease. *Prosser* § 15, at 101. Whether an action is a major or serious departure from a lease depends wholly on the facts of the case and is a determination best suited for a jury. *See Radford v. Norris*, 63 N.C. App. 501, 503, 305 S.E.2d 64, 65 (1983) (whether a party's behavior is reasonable under the circumstances is a jury question); *see also* 1 Dan B. Dobbs, *The Law of Torts* § 64, at 136-37 (2001) (whether use of property amounts to conversion is determined by an objective standard).

Under the terms of the lease, defendant Wood Brothers "agree[d] to not cut, punch, form, deform, . . . or test (in any metallurgical way), [Part X], [without] written consent by Solid Steel." Defendant Wood Brothers also "agree[d] to not 'share' any information obtained [from Part X] with . . . any fellow NASCAR competitor." It is undisputed that defendant Tryson transported Part X to Roush Racing and that defendant Tryson drilled a core sample out of Part X. The parties dis-

agree, however, about whether these actions amount to a major or serious departure from the terms of the lease. We conclude that this disagreement creates a genuine issue of material fact, appropriate for a jury to determine at trial.

Because there are genuine issues of material fact as to whether defendant Tryson converted Part X by (1) retaining it beyond the term authorized in the lease, or (2) using it in a manner not authorized by the lease, we conclude that the trial court erred when it granted summary judgment in favor of defendant Tryson on the conversion claim. Accordingly, we reverse.

[5] Next we consider whether plaintiff's claim for conversion against defendant Wood Brothers under the doctrine of *respondeat superior* created a genuine issue of material fact sufficient to survive summary judgment.[5] Under the doctrine of *respondeat superior*, an employer may be held vicariously liable for the torts of its employee who is acting within the scope of his employment. *Creel v. N. C. Dep't of Health & Human Servs.*, 152 N.C. App. 200, 203, 566 S.E.2d 832, 834 (2002), *cert. denied*, 357 N.C. 163, 580 S.E.2d 363 (2003). The question as to whether an employee is acting within the scope of his employment is generally a factual determination for the jury. *Edwards v. Akion*, 52 N.C. App. 688, 698, 279 S.E.2d 894, 900, *aff'd per curiam*, 304 N.C. 585, 284 S.E.2d 518 (1981). Summary judgment is not appropriate on this question unless reasonable minds could not differ as to whether the actions of the employee were undertaken in the scope of his employment. 52 N.C. App. at 698, 279 S.E.2d at 900; *see also Boudreau v. Baughman*, 322 N.C. 331, 346, 368 S.E.2d 849, 860 (1988).

It is undisputed that defendant Tryson was employed by defendant Wood Brothers during the time relevant to this lawsuit. Defendant Tryson was responsible to maximize performance of defendant Wood Brothers' race car. Plaintiff contends therefore that drilling a core sample from Part X to determine why it performed the way it did was within the scope of Tryson's employment. Eddie Wood, on the other hand, testified in his deposition that defendant Tryson acted com-

5. In its brief, defendant Wood Brothers' only defense to the conversion claim was that the lease contract for Part X was invalid; therefore, no conversion claim can be based on a purported use of Part X beyond what was authorized in the lease. However, considering the lease contract to be invalid *weakens* defendant Wood Brothers' argument for summary judgment in its favor, because the most fundamental question in this action for conversion is whether the undisputed possession and use of Part X by defendant Tryson and defendant Wood Brothers was authorized by its owner, Solid Steel.

pletely on his own when he drilled out the core sample. We conclude that reasonable minds could differ as to whether or not this action was within the scope of defendant Tryson's employment. Summary judgment was therefore not appropriate as to defendant Wood Brothers' liability for defendant Tryson's actions under the doctrine of *respondeat superior*. Accordingly, we reverse.

D. Misappropriation of Trade Secret

[6] Plaintiff contends that the trial court erred when it granted summary judgment on his claim for misappropriation of trade secret in favor of defendant Wood Brothers and defendant Tryson. We disagree.

Plaintiff argues that Part X meets the statutory definition of a trade secret, and that defendant Wood Brothers and defendant Tryson misappropriated that trade secret to improve performance on their race cars without paying Solid Steel for it. In response, defendant Wood Brothers and defendant Tryson argue that Part X is not a trade secret because it can be reverse engineered, and that even if it is a trade secret, there is no evidence that either defendant Wood Brothers or defendant Tryson ever learned the secret, or that they ever used the secret to profit themselves.

> A "trade secret" is
>
> business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> a. Derives independent actual or potential commercial value from *not being* generally known or *readily ascertainable through* independent development or *reverse engineering* by persons who can obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C. Gen. Stat. § 66-152 (2005) (emphasis added).

As discussed above, summary judgment is appropriate if the facts are undisputed and only a question of law remains. Griffith admitted in his deposition that his idea for Part X was readily ascertainable through reverse engineering. Therefore, Griffith's idea cannot be defined as a "trade secret" as a matter of law, and we affirm the trial court's grant of summary judgment in favor of both defendants on this issue.

E. Unfair and Deceptive Trade Practices

[7] Plaintiff contends that the trial court erred when it granted summary judgment on his claim for unfair and deceptive trade practices in favor of defendant Wood Brothers and defendant Tryson. We disagree.

Plaintiff argues that breach of contract, retention of the core sample drilled out of Part X for three years, together with misappropriation of a trade secret support a claim for UDTP. In response, defendants argue that plaintiff has not presented evidence that defendants committed an unfair or deceptive act or practice. They further argue that plaintiff has not proved any damages resulting from any unfair and deceptive trade practices on the part of defendants.

To succeed on a claim for UDTP, a plaintiff must prove: "(1) defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) that plaintiff was injured thereby." *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998); N.C. Gen. Stat. § 75-1.1 (2005). "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). Mere breach of contract is not sufficient to sustain an action for UDTP, but if the breach is surrounded by substantial aggravating circumstances, it may sustain an action for UDTP. *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700, *disc. review denied*, 332 N.C. 482, 421 S.E.2d 350 (1992); *see also Garlock v. Henson*, 112 N.C. App. 243, 246, 435 S.E.2d 114, 115 (1993) (holding that when the defendant forged a bill of sale and lied for three years in order to deprive plaintiff of a sum of money owed under a contract, the defendant's actions were sufficient to sustain a claim for UDTP); *Foley v. L & L International*, 88 N.C. App. 710, 714, 364 S.E.2d 733, 736 (1988) (holding that evidence the defendant retained plaintiff's down payment for seven months and continually maintained that the car was on its way even though it had not been ordered supported a claim for UDTP); *Mapp v. Toyota World, Inc.*, 81 N.C. App. 421, 426, 344 S.E.2d 297, 301, *disc. review denied*, 318 N.C. 283, 347 S.E.2d 464 (1986) (holding that when agreement to a contract is fraudulently induced by a promise to allow rescission of the contract, breach of that promise is sufficient to sustain an action for UDTP). Plaintiff has presented no evidence of substantial aggravating circumstances surrounding the alleged breach of contract. We already determined that plaintiff's trade secret claim is

without merit. There is no evidence in the record that defendants deceived plaintiff to induce him to enter the contract. Additionally, plaintiff has not forecast evidence which would demonstrate that retaining a small core sample from a leased part for three years is "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403. In sum, plaintiff has failed to support an essential element of his UDTP claim and summary judgment was therefore properly granted on the claim. Accordingly, we affirm the trial court's grant of summary judgment in favor of both defendants on the UDTP claim.

V. Conclusion

The grant of summary judgment by the trial court is affirmed in part and reversed in part. We affirm the trial court orders granting summary judgment in favor of defendants on the trade secret claim, the tortious interference with contract claim, and the UDTP claim. We reverse the trial court orders granting summary judgment in favor of defendant Wood Brothers on the breach of contract claim, and in favor of defendant Wood Brothers and defendant Tryson on the conversion claim, and remand.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges TYSON and STEPHENS concur.

IN THE MATTER OF: M.A.I.B.K.

No. COA07-46

(Filed 19 June 2007)

1. Termination of Parent Rights— grounds—failure to assume responsibility as father

The trial court properly found grounds to terminate respondent-father's parental rights in a child born out of wedlock where he took none of the steps required by N.C.G.S. § 7B-111(a)(5) to legitimate the child and to assume his responsibilities as the child's father.

2. Termination of Parental Rights— decision by same judge who had previously terminated other parent's rights—no error

There was no error where a judge who had previously terminated a mother's parental rights concluded that it was in the best interest of the child to terminate the father's rights. Nothing suggests reliance by the court upon evidence other than that presented at the father's hearing, and the court was entitled to take judicial notice that the mother's rights had been terminated. Moreover, this district has a Family Court, one of the primary characteristics of which is the assignment of one judge to one family.

Appeal by respondent from order entered 13 October 2006 by Judge Debra Sasser in Wake County District Court. Heard in the Court of Appeals 14 May 2007.

Wake County Attorney's Office, by Corinne G. Russell, for Wake County Human Services, petitioner-appellee.

Poyner & Spruill, LLP, by Bryn Dodge Wilson, for Guardian ad Litem.

Annick Lenoir-Peek, for respondent-appellant.

JACKSON, Judge.

Respondent L.B., father of the minor child M.A.I.B.K., appeals from an order terminating his parental rights. In an opinion filed 6 March 2007, this Court affirmed the termination of the respondent-mother S.K.'s parental rights to the child. *In re M.A.I.B.K.*, 182 N.C. App. 175 LEXIS 482, 641 S.E.2d 417 (2007) (unpublished).

M.A.I.B.K. was born out of wedlock in New York in July 1999, and moved to Wake County, North Carolina with respondent-mother. Wake County Human Services ("DSS") obtained nonsecure custody of the child and placed her in foster care on 1 July 2004, following respondent-mother's incarceration on charges of obtaining property by false pretenses and forgery. At the time of her arrest, the mother was unemployed and homeless. Although she identified respondent-father to DSS as the child's putative father, DSS' attempts to locate him in New York were unavailing.

M.A.I.B.K. was adjudicated a neglected and dependent juvenile on 15 September 2004. On 30 January 2006, DSS filed a petition to ter-

minate both respondents' parental rights, alleging the following two grounds for termination as to respondent-father: (1) that he had neglected M.A.I.B.K., and it was probable that such neglect would be repeated if she were placed in his care, and (2) that M.A.I.B.K. had been born out of wedlock, and respondent-father had not established his paternity judicially or by affidavit filed with the North Carolina Department of Health and Human Services, had not legitimated the child, and had not provided substantial financial support or consistent care for the child or her mother. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (5) (2005). Attached to the petition was an affidavit from the North Carolina Department of Health and Human Services ("NCDHHS"), affirming that "[n]o Affidavit of Paternity has been received from any person acknowledging paternity or purporting to be the father of [M.A.I.B.K.]." The petition was served upon respondent-father by publication, and he appeared at the termination hearing scheduled for 21 June 2006. The trial court granted respondent-father's request for appointed counsel and a continuance to prepare for the proceedings. The trial court then proceeded with respondent-mother's termination hearing, and entered an order terminating her parental rights on 20 July 2006.

The trial court held respondent-father's termination hearing on 20 September 2006. DSS Social Worker Heather Shapiro ("Shapiro"), who had supervised M.A.I.B.K.'s foster care since July of 2004, testified that respondent-father was never married to respondent-mother and had not established his paternity of M.A.I.B.K. or legitimated the child prior to the filing of DSS's petition; nor had an affidavit of paternity been filed with NCDHHS. Respondent-father told Shapiro that he had not seen M.A.I.B.K. since she was two years old, and although he was not "in a position to care for" M.A.I.B.K., he "did have relatives that he wanted to see her placed with possibly." Other than inquiring about the results of the paternity test in July 2006, respondent-father did not contact Shapiro about the child after their initial interview. His friend, Trudy Beamon ("Beamon"), called Shapiro to request a visit with the child while respondent-father and Beamon were in North Carolina for the termination hearing. At no time did respondent-father provide any support for respondent-mother or M.A.I.B.K., and even after learning the results of the paternity test which determined he was the child's father, he made no attempt to communicate with the child. In addition to Shapiro's testimony, the trial court took judicial notice of the order terminating the parental rights of respondent-mother and the prior adjudication of neglect entered on 15 September 2004.

Respondent-father testified, *inter alia*, that although respondent-mother told him that he was M.A.I.B.K.'s father within two months of her birth in 1999, he "didn't know for sure one way or the other." He stated that he tried to arrange a paternity test in New York, but that respondent-mother had "just disappeared" with the child. Respondent-father was aware that his friend, William Worth, was in touch with respondent-mother but he made no effort to communicate with her or to ascertain her whereabouts through Worth. In June of 2006, four or five years since his last contact with respondent-mother, respondent-father learned from Worth that "her parental rights were about to be taken from her." After speaking to respondent-mother's attorney, respondent-father obtained a paternity test through DSS in June 2006, and learned conclusively that he was M.A.I.B.K.'s father in July 2006. He acknowledged that he had not established his paternity of M.A.I.B.K. prior to June 2006, and had neither legitimated nor provided any support for the child.

After hearing the parties' evidence, the trial court found each of the grounds for termination as alleged by DSS under section 7B-1111(a)(1) and (5). The court then heard additional testimony from Shapiro, respondent-father, and Beamon regarding the best interests of M.A.I.B.K. The trial court also considered a report on the child's best interests submitted by her guardian ad litem. Based upon the evidence at disposition, the trial court concluded that termination of respondent-father's parental rights would facilitate the permanent placement plan of adoption and would serve the best interests of the child. The order terminating respondent-father's parental rights was entered on 13 October 2006.

We initially note that respondent-father asserts twenty-four assignments of error in the record on appeal. However, respondent-father's brief addresses only eight of the assignments of error. Therefore, the remaining assignments of error for which no argument has been presented are deemed abandoned. N.C. R. App. P. 28(b)(6) (2006).

[1] On appeal, respondent-father asserts that the evidence adduced at the termination hearing was insufficient to support either of the grounds for termination found by the trial court.

At the initial, adjudicatory stage of termination proceedings, the petitioner " 'must show by clear, cogent, and convincing evidence that grounds authorizing the termination of parental rights exist' " under North Carolina General Statutes, section 7B-1111(a). *In re L.A.B.*, 178

N.C. App. 295, 298, 631 S.E.2d 61, 64 (2006) (citation omitted). A finding of any one of the statutory grounds for termination is sufficient. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990). Where, as here, a respondent does not challenge any of the trial court's adjudicatory findings of fact by a properly briefed assignment of error, the findings are deemed to be supported by competent evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Therefore, our review is limited to a determination of whether the facts found by the trial court support its conclusion that a ground for termination exists pursuant to section 7B-1111(a). *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)).

Under North Carolina General Statutes, section 7B-1111(a)(5), the trial court may terminate a father's parental rights if it finds as follows:

> The father of a juvenile born out of wedlock has not, prior to the filing of a petition or motion to terminate parental rights:
>
> a. Established paternity judicially or by affidavit which has been filed in a central registry maintained by the Department of Health and Human Services; provided, the court shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and shall incorporate into the case record the Department's certified reply; or
>
> b. Legitimated the juvenile pursuant to provisions of G.S. 49-10 or filed a petition for this specific purpose; or
>
> c. Legitimated the juvenile by marriage to the mother of the juvenile; or
>
> d. Provided substantial financial support or consistent care with respect to the juvenile and mother.

N.C. Gen. Stat. § 7B-1111(a)(5) (2005). In its termination order, the trial court made particularized findings as to M.A.I.B.K.'s out-of-wedlock birth and respondent-father's failure to take *any* of the actions required by this subsection. Rather than contest the sufficiency of the trial court's findings under section 7B-1111(a)(5), respondent-father asserts that the actions of respondent-mother after the birth of M.A.I.B.K. "prevented [him] from taking any of the steps required to

establish paternity" or to provide support and care for the child. While acknowledging the "bright line test" adopted by our courts in interpreting this subsection, he suggests that this Court "should set aside its' [sic] prior line of cases which apply N.C. Gen. Stat. § 7B-1111(a)(5) without consideration for the particular circumstances of each case."

Respondent-father likens his circumstances to that of the father in *A Child's Hope, LLC v. Doe*, 178 N.C. App. 96, 630 S.E.2d 673 (2006), and he argues that, for reasons similar to those stated in the dissent in *A Child's Hope*, we should set aside the bright line test. We find no merit to respondent-father's claim. In *A Child's Hope*, this Court reiterated that the provisions of section 7B-1111(a)(5) are applied strictly, without regard to the respondent-father's knowledge of the minor child:

> Our Court has previously considered and rejected the argument that a putative father "was unable to take the steps set out in N.C. Gen. Stat. § 7B-1111(a)(5) because he did not know of" the existence of the child. The similarity of the requirements between the statute permitting the termination of a putative father's rights and the statute requiring the consent of a father of a child born out of wedlock to its adoption reflect the intention of the legislature not to make an "illegitimate child's future welfare dependent on whether or not the putative father knows of the child's existence at the time the petition is filed."

Id. at 103, 630 S.E.2d at 677 (quoting *In re T.L.B.*, 167 N.C. App. 298, 302-03, 605 S.E.2d 249, 252 (2004); citing *In re Adoption of Clark*, 95 N.C. App. 1, 8, 381 S.E.2d 835, 839 (1989), *rev'd on other grounds*, 327 N.C. 61, 393 S.E.2d 791 (1990)). In *A Child's Hope*, we held that the respondent-father's failure to take any of the acts set forth in section 7B-1111(a)(5) required the district court to find grounds for termination thereunder, notwithstanding evidence that the mother hid the child's existence from the father by claiming to have miscarried. *Id.* at 105, 630 S.E.2d at 678. While expressing "no doubt that the biological mother thwarted respondent's parental rights by lying about the status of the pregnancy[,]" this Court concluded that section 7B-1111(a)(5) "is explicit in its requirements and there was no evidence that respondent met those requirements." *Id.* at 105, 630 S.E.2d at 678.

Here, the record is equally clear that respondent-father took none of the steps required by section 7B-1111(a)(5) to assume his respon-

sibilities as M.A.I.B.K.'s father. Unlike the father in *A Child's Hope*, respondent-father was aware of his daughter's existence and had been told by the child's mother that he was the father. Respondent-father also saw the child on at least two occasions. Moreover, despite knowing that his friend, William Worth, was in contact with respondent-mother, respondent-father made no attempt to contact her regarding M.A.I.B.K. over a period of almost seven years. In addition, unlike the father in *A Child's Hope*, once respondent-father learned he was the father of M.A.I.B.K., he still took no action to communicate with or provide support for the child. Accordingly, we hold the trial court properly found grounds to terminate respondent-father's parental rights under North Carolina General Statutes, section 7B-1111(a)(5). Because we uphold the court's adjudication under section 7B-1111(a)(5), we need not review the second ground for termination found under section 7B-1111(a)(1). *Taylor*, 97 N.C. App. at 64, 387 S.E.2d at 233-34.

[2] Respondent-father next claims the trial court violated the procedures set forth in North Carolina General Statutes, sections 7B-1109(e) and -1110(a) (2005), by considering M.A.I.B.K.'s best interests prior to adjudicating the existence of grounds to terminate his parental rights. As the basis for this argument, he notes that the trial judge who presided over his termination hearing previously heard evidence and reached conclusions about the best interests of the child in terminating respondent-mother's parental rights on 20 July 2006. Respondent-father suggests that the trial judge's disposition in his case was impermissibly "tainted" by her earlier disposition of the mother's case.

Our Juvenile Code contemplates a two-stage proceeding for the termination of parental rights. *See, e.g.*, *In re White*, 81 N.C. App. 82, 85, 344 S.E.2d 36, 38 (1986) (citing *Montgomery*, 311 N.C. at 110, 316 S.E.2d at 252). During the initial, adjudicatory stage prescribed by section 7B-1109, "[t]he court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent." N.C. Gen. Stat. § 7B-1109(e) (2005). The second, dispositional stage is governed by North Carolina General Statutes, section 7B-1110, which provides, "[a]fter an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest." N.C. Gen. Stat. § 7B-1110(a) (2005). The trial court need not conduct a separate and distinct hear-

ing for each stage, however, and may hear adjudicatory and dispositional evidence concurrently, provided that it applies the appropriate standard of proof at each stage. *White*, 81 N.C. App. at 85, 344 S.E.2d at 38. Moreover, " '[e]vidence heard or introduced throughout the adjudicatory stage, as well as any additional evidence, may be considered by the court during the dispositional stage.' " *In re J.B.*, 172 N.C. App. 1, 23, 616 S.E.2d 264, 277 (2005) (quoting *In re Blackburn*, 142 N.C. App. 607, 613, 543 S.E.2d 906, 910 (2001)). The trial court's determination of a child's best interests at disposition is reviewed only for an abuse of discretion. *Id.* at 24, 616 S.E.2d at 278 (citing *In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 225 (1995)).

We find no error in the procedures employed by the trial court in the instant case. While not required to do so, the trial court conducted a separate dispositional hearing after adjudicating the existence of grounds for termination of respondent-father's rights. Nothing in the trial court's dispositional findings and conclusions suggests its reliance upon any evidence other than what was presented by the parties at the hearing for respondent-father. Moreover, in evaluating the best interests of M.A.I.B.K., the trial court was entitled to take judicial notice that the respondent-mother's parental rights also had been terminated. *See generally J.B.*, 172 N.C. App. at 16, 616 S.E.2d at 273 (" 'A trial court may take judicial notice of earlier proceedings in the same cause.' ") (quoting *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991)). Respondent-father cites no authority that would bar a trial judge from presiding in an action to terminate the parental rights of one parent of a child simply because the judge previously has terminated the rights of the other parent. *See* N.C. R. App. P. 28(b)(6) (2006).

In addition, we note that the Tenth Judicial District has a specialized division of the District Court known as Family Court. The Family Court program began with a pilot program in three judicial districts in 1999, and the Administrative Office of the Courts has since expanded the Family Court program to eleven judicial districts in North Carolina. One of the primary characteristics of the Family Court is its "one judge, one family" policy. This policy is "[o]ften cited as the most critical component of any successful family court," as it helps "avoid the fragmentation, the duplication of effort and expense, and the potential for conflicting court orders" in a domestic case. Cheryl Daniels Howell, *North Carolina's Experiment with Family Court*, Popular Gov't, Summer 2000, at 15, 18.

Pursuant to the authority granted by North Carolina General Statutes, section 7A-146,[1] the Tenth Judicial District has adopted local rules which govern its juvenile Family Court cases. These rules require judicial assignment of one judge to each juvenile's case. Specifically, Rule 19.1 of the Tenth Judicial District Juvenile Abuse/Neglect/Dependency Court Rules, which became effective 15 February 2006, provides as follows:

> 19.1 Judicial Assignment upon Adjudication.
>
> Once a juvenile case involving allegations of abuse, neglect, or dependency has been adjudicated, that case shall be assigned to the judge presiding over the Adjudication/Disposition hearing. All subsequent hearings in the case shall be scheduled before the same judge, including Termination of Parental Rights hearings and future adjudications regarding the same juvenile(s), unless extraordinary circumstances require otherwise.

10th Jud. Dist. Juv. Abuse/Neglect/Dependency Ct. R. 19.1 (Feb. 15, 2006).

The petition for termination of parental rights in this case was filed just prior to the effective date for Rule 19.1, but this Rule was in effect at the time of the termination of parental rights hearings of both the mother and respondent-father. Therefore, Judge Sasser, as the assigned judge in juvenile court, was required pursuant to Rule 19.1 to hear all juvenile matters involving M.A.I.B.K., "unless extraordinary circumstances require[d] otherwise." *Id.* Respondent-father has not argued any extraordinary circumstances in this case which would call for removal or recusal of the assigned judge. The fact that the assigned judge would have heard other matters involving the par-

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1. North Carolina General Statutes, section 7A-146 (2005) states in pertinant part:

> The chief district judge, subject to the general supervision of the Chief Justice of the Supreme Court, has administrative supervision and authority over the opertation of the district courts and magistrates in [her] district. These powers and duties include, but are not limited to, the following:
>
> (1) Arranging schedules and assigning district judges for sessions of district courts;
>
> (2) Arranging or supervising the calendaring of noncriminal matters for trial or hearing;
>
> . . .
>
> (7) Arranging sessions, to the extent practicable for the trial of specialized cases, including traffic, domestic relations, and other types of cases, and assigning district judges to preside over these sessions so as to permit maximum practicable specialization by individual judges . . . .

ticular child and/or family is entirely appropriate in juvenile Family Court cases such as this one.

As further support for his claim that the trial court pre-judged the issue of M.A.I.B.K.'s best interests, respondent-father contends the "only findings of facts which refer to [him]" on the issue of M.A.I.B.K.'s best interests are the following:

> 39. That it is in the best interests of M.A.I.B.K. that the rights of the father, [L.B.], be terminated.
>
> . . . .
>
> 41. That the conduct of the father . . . has been such as to demonstrate that he will not promote the healthy and orderly, physical and emotional well being of the child, M.A.I.B.K.
>
> 42. That the minor child, M.A.I.B.K., is in need of a permanent plan of care at the earliest possible age which can be obtained only by the severing of the relationship between the child and her father, and by termination of the parental rights of the father[.]
>
> 43. That it is in the best interests of the child, M.A.I.B.K., that the parental rights of the father . . . be terminated.

Respondent-father contends these findings "are not supported by competent evidence" and are mere reiterations of conclusions of law appearing elsewhere in the order.

Again, we find no merit to this claim. Regarding the quantity of the trial court's findings on the child's best interests *vis a vis* respondent-father, we note that he fails to reckon with the following uncontested findings pertinent to the issue:

> 18. That when the child was born, the father believed, but was not 100% sure, that he was the father of the child.
>
> 19. That the father last saw the child when she was two and a half years old.
>
> . . . .
>
> 21. That when the mother left with the child the father took no steps to find the child or the child's mother.

22. That the father and mother have, and have had since the birth of the child, a mutual acquaintance in the child's godfather[, Worth].

23. That after the mother left with the child, the father was aware the mother occasionally contacted [Worth].

24. That the father never asked [Worth] if he knew the whereabouts of the mother or the child; the father did not ask [Worth] to relay messages to the mother or the child; and the father took no steps to utilize [Worth] as a way to look for the child.

25. That the father has not legitimated the child by statute or through marriage.

26. That the father has provided no financial support for the child during her life.

27. That the father did not establish paternity for the child prior to the filing of the petition to terminate parental rights.

28. That the father's first appearance in this matter was at a hearing initially held on June 21, 2006. The father met with the social worker at this time. He told the social worker that he is not in a position to care for the child in the future, but wants her to live with family in New York.

29. That since that date the father has not traveled to North Carolina to visit with the child. The father did not send the child any cards or gifts. He did not request a visit until, through his companion, he requested to see the child while he was in town for today's hearing.

. . . .

31. That the permanent plan for M.A.I.B.K. is adoption. The agency at this time is looking at the foster parent who is interested in adopting.

32. That a child needs stability and needs a safe and secure sense of belonging in order to develop a healthy life. It is not a safe, permanent plan for a child to be in limbo in foster care . . . .

33. That the child has been placed with the current foster parent[] since she has been in care and has developed a strong bond with her. M.A.I.B.K. also has a strong bond with the foster parent's extended family.

34. That M.A.I.B.K. is a very adoptable child. She is articulate, intelligent, outgoing, beautiful, has no behavior issues and does well in school.

35. That M.A.I.B.K. and her father have no bond.

36. That M.A.I.B.K. turned seven years of age . . ., and the likelihood of her adoption appears great.

See N.C. Gen. Stat. § 1110(a)(1)-(6) (2005). Moreover, we find ample support for findings of fact 39, and 41-43 in the testimony of Shapiro and respondent-father, and the guardian ad litem's report. The report noted respondent-father's failure to provide the guardian ad litem with promised documentation regarding his criminal and employment histories, housing, and other information pertinent to his ability to care for a child. It also noted that he "made no efforts to acknowledge [M.A.I.B.K.'s] birthday in mid July or to request [] visits or phone call privileges." The report advised the trial court that M.A.I.B.K. "continues to thrive in her original foster care placement" and "is very bonded with her foster mother." The foster mother was described as "anxious to take permanent custody of [M.A.I.B.K.] if [] she becomes free for adoption." The guardian ad litem portrayed M.A.I.B.K. as having experienced "a tremendous amount of grief, loss and stress in her short life[,]" pointing specifically to her loss of respondent-mother after five "very chaotic" years in her care. She concluded her report as follows:

> M.A.I.B.K. needs a stable nurturing permanent home. . . . It is apparent that [she] is doing very well and feels safe and secure in her present home. This Guardian feels that [it] is in the best interest of M.A.I.B.K. to be adopted by her current foster parent.

Finally, although the determination of a child's best interests is in the nature of a conclusion of law rather than pure fact-finding, *see Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676, we hold the trial court's conclusion to be fully supported by its findings of fact and the evidence presented at the hearing. Respondent-father's final assignment of error is overruled.

Affirmed.

Judges STEPHENS and STROUD concur.

CHRISTOPHER BRYAN VENTERS, PLAINTIFF v. JOHN ALBRITTON, DEFENDANT

No. COA06-1261

(Filed 19 June 2007)

1. Judgments— motion to set aside default denied—service of process—sufficiency

The trial court did not err by denying defendant's motion pursuant to Rule 60(b)(4) to set aside an entry of default and a default judgment, made on the ground that the default had been obtained by the misrepresentation of plaintiff's counsel concerning service, where defendant had given a multitude of addresses that he provided to plaintiff and others involved, and the information available to plaintiff made the addresses appear to be proper. Plaintiff's attempts at service complied with N.C.G.S. § 1A-1, Rules 4 and 5.

2. Judgments— default—motion to set aside—service of process issues—no extraordinary circumstances

There were no extraordinary circumstances warranting defendant's relief from a default judgment pursuant to N.C.G.S. § 1A-1, Rule 60(b)(6) where defendant's motion was based on service of process issues, but the trial court's finding that defendant was given proper notice, intentionally refused to receive notices and knowingly refused to respond to interrogatories was supported by the evidence and was thus binding.

3. Process and Service— purposeful evasion—actual notice—due process satisfied

The requirements of N.C.G.S. § 1A-1, Rule 5(b) were met, along with defendant's right to due process and notice, where defendant purposefully used multiple addresses, purposefully avoided service, and had actual notice of the action.

4. Judgments— default—alleged flaws in service—default correctly entered

There was no basis for disturbing liens which resulted from a default judgment where defendant alleged flaws in the service of process and violations of due process, but the trial court properly found that the default judgment had been correctly and properly entered.

5. Appeal and Error— preservation of issues—differing objections at trial and on appeal

Defendant's argument that a print-out from the Secretary of State's website showing the address of his corporation was hearsay was not considered on appeal because his objection at trial was based on relevancy. Moreover, defendant testified to the same information.

6. Evidence— introduction of same evidence—objection waived

Defendant waived any objection to an affidavit concerning his address when he testified to the same information.

Appeal by defendant from order entered 27 April 2006 by Judge William C. Griffin, Jr., in Beaufort County Superior Court. Heard in the Court of Appeals 28 March 2007.

Gaskins & Gaskins, P.A., by Herman E. Gaskins, Jr., for plaintiff-appellee.

William H. Dowdy, for defendant-appellant.

JACKSON, Judge.

On 27 October 2004, Christopher Bryan Venters ("plaintiff") commenced a civil action against John Albritton ("defendant"). The action arose out of an automobile accident on 29 November 2003, in which plaintiff was the owner and driver of a vehicle which struck a horse owned by defendant. The summons in the case listed two addresses for defendant: 430 West Fourth Street, Washington, North Carolina ("430 W. 4th Street"); and 1018 East Fifth Street, Washington, North Carolina ("1018 E. 5th Street"). The record is unclear at which address plaintiff obtained service upon defendant of the summons and complaint on 4 November 2004. On 1 December 2004, defendant filed a Motion and Order for Extension of Time to answer. In his motion, defendant listed the address of 1018 East Fifth Street, Washington, North Carolina 27889, as his address. On 3 January 2005, defendant filed *pro se* a letter with the Beaufort County Clerk of Court generally denying any liability and specifically denying that the horse involved in the accident was his.

On 22 February 2005, the trial court mediator assigned to the case sent a letter to defendant at the 430 W. 4th Street address. Defendant then contacted the mediator's secretary and informed her that Post

Office Box 2102, Washington, North Carolina 27889 ("P.O. Box 2102") should be used as the address at which to contact him.

On 6 July 2005, plaintiff attempted to serve defendant with plaintiff's First Set of Interrogatories and Request for Production of Documents, via certified mail to the P.O. Box 2102 address. Defendant was given several notices of the mailing by the Post Office, however it went unclaimed, and was returned to plaintiff on 22 July 2005. Plaintiff made a second attempt to serve defendant with the discovery request on 28 July 2005, also via certified mail but to the 430 W. 4th Street address. Defendant again was given several notices of this mailing, and it too went unclaimed and eventually was returned to plaintiff on 17 August 2005.

Plaintiff filed a Motion to Compel Answers to Plaintiff's First Set of Interrogatories and Request for Production of Documents on 8 September 2005, which was served on defendant via the 430 W. 4th Street address. The Notice of Hearing for plaintiff's motion was served via mail on defendant on this same date, and also to the 430 W. 4th Street address. Defendant failed to appear at the hearing on plaintiff's motion, and an Order compelling defendant to answer plaintiff's interrogatories was entered 20 September 2005, giving defendant until 10 October 2005 to comply with plaintiff's request for discovery. Defendant failed to comply with discovery as ordered.

A second Order compelling defendant to comply with plaintiff's request for discovery was signed on 17 October 2005, giving defendant until 17 November 2005 to answer plaintiff's First Set of Interrogatories and Request for Production of Documents. Defendant was served personally with this order on 4 November 2005 at his farm located at 6307 Highway 17 South, Chocowinity, North Carolina. Following service of the Order, defendant contacted plaintiff's counsel, went to counsel's office, and received a copy of plaintiff's discovery request. Defendant never responded to plaintiff's interrogatories.

On 18 November 2005, plaintiff filed a Motion to Strike Defendant's Pleadings, based upon defendant's failure to respond to plaintiff's First Set of Interrogatories and Request for Production of Documents. The motion, along with a Notice of Hearing on the motion, was served on defendant via mail at the 430 W. 4th Street address. The hearing on plaintiff's motion to strike defendant's pleadings was held 28 November 2005. Defendant failed to appear. The trial court ordered defendant's pleadings stricken, due to defendant's failure to comply with plaintiff's discovery requests

and the trial court's orders to comply. The trial court then entered default against defendant.

Plaintiff filed a Motion for Default Judgment on 1 December 2005, and the motion, along with a notice of hearing, was served on defendant via mail to the 430 W. 4th Street address. At a hearing held on 15 December 2005, the trial court found that defendant had been served properly with plaintiff's complaint, default properly had been entered against defendant, and the sole remaining issue for the court's determination was the amount of damages due plaintiff. The trial court entered default judgment against defendant in the amount of $13,000.00.

On 17 April 2006, defendant filed a Motion for Preliminary Injunction and a Motion to Set Aside Entry of Default and Default Judgment, in hopes of stopping the upcoming 28 April 2006 auction and public sale of his property to satisfy the judgment against him. The basis of defendant's motions centered around the argument that he was never properly served with notice of the hearings on plaintiff's motion for default and default judgment. Defendant contended that plaintiff violated Rules 4 and 5 of our Rules of Civil Procedure, and he therefore was entitled to an injunction and to have the entry of default and default judgment set aside. Following a hearing on defendant's motions, and in an Order filed 27 April 2006, the trial court denied defendant's motions, and found that "defendant was given proper notice of the proceedings against him, that he intentionally refused to receive notices that were sent to him, and that he knowingly refused to respond to interrogatories after being ordered to do so by this Court." The trial court found that defendant's pleadings properly were stricken, default properly was entered against him, and default judgment properly was entered against him. Defendant now appeals from this order.

On appeal, the primary basis of defendant's argument is that the trial court erred in denying his motion to set aside entry of default and default judgment, pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. Rule 60(b) provides in pertinent part, that:

> (b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.—On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . .

> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) The judgment is void;
>
> . . . or
>
> (6) Any other reason justifying relief from the operation of the judgment.

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2005). Our courts have long held that " '[a] Rule 60(b) motion is addressed to the sound discretion of the trial court and its ruling will not be disturbed absent an abuse of that discretion.' " *Creasman v. Creasman*, 152 N.C. App. 119, 124, 566 S.E.2d 725, 729 (2002) (quoting *Gibson v. Mena*, 144 N.C. App. 125, 128, 548 S.E.2d 745, 747 (2001)). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998).

[1] Defendant first contends the trial court erred in denying his motion to set aside the entry of default and default judgment pursuant to Civil Procedure Rule 60(b)(3), on the ground that the entry of default and default judgment were obtained through plaintiff's counsel's "misrepresentation or other misconduct." Defendant argues that plaintiff's counsel's representation to the trial court that plaintiff had satisfied the service requirements of Civil Procedure Rules 4 and 5 was improper, in that counsel knew he had not properly served defendant with the pretrial discovery request, motion to compel discovery, motion to strike appellant's pleadings, motion for entry of default and subsequent default judgment, and notices of hearings for those motions.

Rule 4 of our Rules of Civil Procedure sets forth the procedure by which service may be achieved upon an individual person. N.C. Gen. Stat. § 1A-1, Rule 4(j)(1) (2005). Pursuant to Rule 4, service upon an individual may be achieved by means of sending the subject document by way of "registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee." N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(c) (2005). Rule 5 of our Rules of Civil Procedure sets forth the manner in which service of orders, subsequent pleadings, discovery, and other notices and papers should be achieved. N.C. Gen. Stat. § 1A-1, Rule 5 (2005). Rule 5(b) specifically

provides that service may be made in the manner provided for by Rule 4, and that

> With respect to such other pleadings and papers, service upon the attorney or upon a party may also be made by delivering a copy to the party or by mailing it to the party at the party's last known address or, if no address is known, by filing it with the clerk of court.

N.C. Gen. Stat. § 1A-1, Rule 5(b) (2005).

At trial, the court record and evidence presented showed that service was attempted on defendant at four separate addresses: 430 W. 4th Street, 1018 E. 5th Street, P.O. Box 2102, and 6307 Highway 17 South. Defendant was personally served at 6307 Highway 17 South. Evidence presented also indicated that defendant owned the business Albritton Trucking Industry, Inc., which had listed as its principal mailing address and registered office with the Secretary of State's Office the address of 430 W. 4th Street. In his Motion and Order for an Extension of Time to File an Answer, defendant listed the address of 1018 E. 5th Street; however, defendant admitted that he did not reside at this address, nor had he lived there in more than three years. In February 2005, defendant contacted the mediator assigned to this case, apparently in response to a letter which the mediator had sent to defendant at the 430 W. 4th Street address. Additional evidence indicated that defendant provided the post office box address to the mediator assigned to this case; however, when service was attempted at this address, it was returned to plaintiff unclaimed by defendant. In November 2005, defendant was personally served with the trial court's Order compelling him to answer plaintiff's first set of interrogatories, and defendant subsequently visited plaintiff's counsel's office and obtained a copy of the discovery request. However, defendant still failed to comply with the trial court's order and never submitted any answer to plaintiff's request for interrogatories.

This Court has held that

> Where a defendant, especially one acting *pro se*, provides a mailing address in a document filed in response to a complaint and serves a copy of that filing on opposing counsel, he or she should be able to rely on receiving later service at that address; by the same token, opposing counsel (or a *pro se* party) may also rely on that address for service of all subsequent process and other communications until a new address is furnished.

Barnett v. King, 134 N.C. App. 348, 351, 517 S.E.2d 397, 400 (1999). However, the instant case is distinguishable from *Barnett*. In *Barnett*, the evidence indicated that plaintiff attempted service upon defendant at one address, and that in a responsive pleading defendant provided another address. The trial court held that plaintiff's failure to mail notice of the hearing to the address provided by defendant caused the notice to be ineffective. *Id.* In the instant case, the evidence indicated that defendant personally used four separate addresses at a variety of times during the pendency of this litigation. Defendant personally provided both the addresses of P.O. Box 2102 and 1018 E. 5th Street in conjunction with this matter, and his business registration with the Office of the Secretary of State lists 430 W. 4th Street. In addition, defendant was personally served with trial court's 7 November 2005 Order at the address of 6307 Highway 17 South in Chocowinity, North Carolina. Plaintiff attempted to serve defendant at three of the four addresses obtained for defendant, including the post office address he provided, however service could not be achieved. Also, at no time during the pendency of this action was any mail that was sent to the 430 W. 4th Street address ever returned to plaintiff. Moreover, the address listed in defendant's initial Motion for Extension of Time, 1018 E. 5th Street, was not defendant's actual physical home address, and in fact he had not resided at that address in more than three years. Thus, although typically a plaintiff should attempt service to an address that has been provided by a defendant, we hold that in the instant case, defendant purposefully sought to evade service, and plaintiff attempted service properly according to our statutory requirements.

Given that defendant had a multitude of addresses that he provided to plaintiff and others involved, and that the information available to plaintiff made the addresses appear to be proper, we hold plaintiff complied with the statutory requirements of Rules 4 and 5 in attempting to serve defendant with the various pleadings, discovery, notice of hearings, and orders. While defendant provided the address of 1018 E. 5th Street as his address, this was not the exclusive place at which service could be attained, moreover, it was not entirely proper that defendant be served here, as this was not his "last known address" given that he had not lived there in more than three years. Thus, there was not a "misrepresentation or other misconduct" as alleged by defendant, and the trial court properly denied defendant's motion to set aside the entry of default and default judgment.

Next, defendant argues the trial court erred in denying his motion to set aside entry of default and default judgment pursuant to Rule 60(b)(4), on the ground that the entry of default and default judgment were void, due to plaintiff's failure to comply with the service requirements of Civil Procedure Rules 4 and 5.

As we have held that plaintiff's attempts at service complied with Rules 4 and 5, we also hold that the orders granting entry of default and default judgment were not void pursuant to Rule 60(b)(4).

[2] Defendant next contends the trial court erred in denying his motion to set aside the entry of default and default judgment pursuant to Rule 60(b)(6), on the ground that plaintiff's failure to comply with the service requirements of Civil Procedure Rules 4 and 5 justified defendant's relief from the judgments.

Rule 60(b)(6) allows a trial court to grant relief from an order for "[a]ny other reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b)(6). "The test for whether a judgment, order or proceeding should be modified or set aside under Rule 60(b)(6) is two pronged: (1) extraordinary circumstances must exist, and (2) there must be a showing that justice demands that relief be granted." *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987). This Court has held that:

> When reviewing a trial court's equitable discretion under Rule 60(b)(6), our Supreme Court has indicated that this Court cannot substitute what it considers to be its own better judgment for a discretionary ruling of a trial court, and that this Court should not disturb a discretionary ruling unless it probably amounted to a substantial miscarriage of justice.

Surles v. Surles, 154 N.C. App. 170, 173 n.1, 571 S.E.2d 676, 678 (2002) (internal citations and quotations omitted). When a trial court's findings of fact are supported by competent evidence in the record, they are binding on appeal. *Royal v. Hartle*, 145 N.C. App. 181, 182, 551 S.E.2d 168, 170 (2001).

Defendant has failed to show that the order of the trial court is "unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley*, 348 N.C. at 547, 501 S.E.2d at 656. Based upon the evidence contained in the record, we hold the trial court's finding that "defendant was given proper notice of the proceedings against him, that he intentionally refused to receive notices that were sent to him, and that he knowingly refused

to respond to interrogatories after being ordered to do so by this Court" to be supported and thus binding on appeal. Thus, the trial court acted properly in denying defendant's motion to set aside the entry of default and default judgment, in that there were not extraordinary circumstances warranting defendant's relief from the judgments.

[3] Defendant also contends the trial court erred in denying his motion to set aside the judgments based upon Rule 60(b)(3), (4), and (5), in that plaintiff's counsel failed to notify defendant of any of the proceedings up to and including the default proceedings, he failed to serve defendant with pleadings in those proceedings, and he failed to comply with the service requirements of Rules 4 and 5. Defendant argues that these actions violated his constitutional rights to due process and notice of the proceedings against him.

As we previously have held that plaintiff complied with the service requirements of Rules 4 and 5, and that the trial court acted properly in denying defendant's various motions to set aside the judgments, we also now hold the trial court did not violate defendant's rights to due process and notice. Defendant purposefully used multiple addresses and left plaintiff not knowing which address was his proper address. Based upon the evidence in the record, there is sufficient evidence to support the trial court's finding that defendant purposefully avoided service. Defendant had actual notice of the action from the beginning, yet he failed to take action beyond filing his motion for an extension of time and his letter in which he denied liability. Even when the evidence showed defendant was served with an order of the trial court compelling him to comply with discovery, and provided a copy of the discovery request, defendant still failed to take any action. Each and every pleading, order, notice of hearing, and discovery request was filed with the Clerk of Court and service was properly attempted upon defendant. Thus, the requirements of Rule 5(b) were met, and defendant's right to due process and notice of the proceedings was not violated.

[4] Next, defendant contends the trial court erred by denying his motions to discharge the liens against his property on the ground that those liens resulted from plaintiff's non-compliance with Rules 4 and 5 of the North Carolina Rules of Civil Procedure, and that the liens resulted from violations of defendant's constitutional rights to due process, including the right to notice of proceedings and a hearing. As stated previously, the trial court properly found that default judg-

ment had been entered against defendant in a correct and proper manner. Thus, we hold there was no basis for disturbing the resulting liens, and the trial court did not err in denying defendant's motion to discharge the liens against his property.

[5] Finally, defendant argues the trial court erred (a) by admitting, over his objection, a printout from the Secretary of State's website, on the ground that the evidence was hearsay evidence, not within any exception to the hearsay rule, and was prejudicial, and (b) by admitting, over his objection, Kim Van Nortwick's affidavit, on the ground that the affidavit constituted hearsay evidence, not within any exception to the hearsay rule, and was prejudicial.

At the hearing on defendant's motion to set aside the entry of default and default judgment, plaintiff attempted to enter into evidence a copy of a page from the Secretary of State's website showing the business corporation information for defendant's business, Albritton Trucking Industry, Inc. The printout from the website is dated 16 December 2003, and lists the status of defendant's corporation as "Current-Active." The corporation's registered office address and principal mailing address are 430 W. 4th Street, Washington, NC 27889, and the registered mailing address is listed as 1018 E. 5th Street, Washington, NC 27889. Defendant objected to this evidence on the basis of relevancy, stating that the evidence showed the address of a corporation, not necessarily the address of defendant. The trial court overruled defendant's objection. On appeal, defendant contends the trial court erred, in that the document was hearsay, in that it was being offered for the truth of the matter asserted, in other words, to prove that defendant used the 430 W. 4th Street address.

During the hearing, and before the introduction of this information from the Secretary of State's website, defendant testified to this precise information, and specifically that he had provided this information to the Secretary of State. Defendant did object to this information, but only on the basis of its relevancy, not on hearsay grounds. "This Court has long held that issues and theories of a case not raised below will not be considered on appeal." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001); *see also Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) (where theory argued on appeal was not raised before the trial court, "the law does not permit parties to swap horses between courts in order to get a better mount" before an appellate court). At trial defendant argued that this information was not relevant to the

issue at hand, however we find the information to be entirely relevant, in that it establishes defendant's use of the 430 W. 4th Street address. On appeal defendant attempts to argue that this information constitutes impermissible hearsay. We will not address defendant's new argument on appeal. Also, it is the well-established rule that the admission of evidence without objection waives any prior or subsequent objection to the admission of evidence of a similar character. *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979); *Moore v. Reynolds*, 63 N.C. App. 160, 162, 303 S.E.2d 839, 840 (1983). Thus, we hold the trial court properly denied defendant's later objection to this information.

[6] At the hearing, following all testimony, plaintiff also attempted to enter into evidence an affidavit from the mediator's secretary, in which she stated that she mailed a letter to defendant's Fourth Street address, it was never returned to them, and that defendant contacted her and provided her with the post office box address. Defendant objected based upon relevancy and hearsay grounds. However, as with the previous information, defendant testified, without objection, that he spoke with the mediator's secretary and that he gave her the post office box address. Thus, defendant's objection to this information was also waived, and the trial court properly denied defendant's objection.

Therefore, we hold plaintiff properly complied with the statutory requirements for service of process. As there is no evidence that the trial court's discretionary denial of defendant's motion is manifestly unsupported by reason, the trial court committed no error in refusing to set aside the orders granting entry of default and default judgment.

Affirmed.

Judges HUNTER and TYSON concur.

CHARLES H. HINNANT AND DOROTHY W. HINNANT, PLAINTIFFS v. RICHARD B. PHILIPS AND SHEILA A. PHILIPS, DEFENDANTS, AND PEDRO MARTINEZ ESPINOSA; CECILIA M. RODRIGUEZ; JOHN T. MATTHEWS, TRUSTEE; AND, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., DEFENDANT/INTERVENORS

No. COA06-1308

(Filed 19 June 2007)

Judgments— docketing—misspelling—standard of care in title searching

A judgment docketed under the name "Philips" instead of "Phillips" provided sufficient notice, actual or constructive, to create a valid lien on the subject property. If a title examiner exercising the standard of care would have found the judgment, then it sufficiently complies with N.C.G.S. § 1-233.

Judge STEELMAN concurring in the result.

Appeal by defendant-intervenors from order entered 30 May 2006 by Judge Albert A. Corbett, Jr., in Johnston County District Court. Heard in the Court of Appeals 12 April 2007.

Narron, O'Hale and Whittington, P.A., by James W. Narron, for plaintiffs-appellees.

Pendergrass Law Firm, PLLC, by James K. Pendergrass, Jr., and Christopher R. Bullock, for defendant-intervenor appellants.

LEVINSON, Judge.

Defendant-intervenors, Pedro Espinosa and Cecilia Rodriguez; John Matthews, Trustee; and Mortgage Electronic Registration Systems, Inc. (MERS), appeal from an order granting the motion of plaintiffs Charles and Dorothy Hinnant for execution on a judgment obtained against Richard and Sheila Phillips (defendants). We affirm.

The factual and procedural history of this case began in 1982 when plaintiffs loaned money to defendants, secured by a promissory note executed by the parties. Defendants failed to make the required payments, and plaintiffs filed a complaint to collect the balance of the loan. Their complaint was captioned *Hinnant v. Phillips*, 87 CVD 1689. Plaintiffs obtained a default judgment on 18 March 1988, which

was docketed and indexed with "Richard Barry Phillips and Sheila Ann Phillips" named as defendants.

In July 1988, after the docketing of the judgment in 87 CVD 1689, defendants bought a parcel of land in Johnston County (the subject property). Approximately ten years later, in 1998, plaintiffs filed a complaint to renew their judgment against defendants. The complaint, 98 CVD 272, was again captioned with the parties' names, but the last name "Phillips" was spelled "Philips" with one "L." In February 1998 plaintiffs obtained judgment in their favor; this judgment and the copy docketed by the Clerk of Court also spelled "Phillips" as "Philips."

In 2005 plaintiffs filed a motion in the cause seeking to collect on the judgment through sale of the subject property. However, by 2005 the property had changed hands several times. Defendants had defaulted on their mortgage, and the lender foreclosed on the property; thereafter, it was conveyed to a financial corporation. The subject property was then conveyed to Espinosa, who executed a promissory note in favor of MERS and its trustee, John Matthews.

In May 2006 the trial court allowed appellants to intervene in the case, to protect their rights in the subject property. At the hearing conducted 8 May 2006, appellants argued that the judgment against plaintiffs was not an effective lien as against a *bona fide* purchaser. Appellants asserted that the claimed lien was invalid because it did not appear in the chain of title in a search for "Phillips" with two L's. Plaintiffs presented expert testimony that the standard of care for a title search includes checking for common spelling variants of a name, and that the approved practice is to enter part of a name (in this case, P-H-I-L) in order to catch minor errors or spelling variations. The trial court ruled in favor of plaintiffs, in an order finding in pertinent part that:

1. Plaintiffs recovered a judgment against defendant Phillips (herein 'Defendants') docketed on March 18, 1988 . . . [the "Original Judgment"].

2. Plaintiffs' brought an action to renew that judgment in this file, number 98 CVD 272, and prevailed in that action[.] . . . [T]he Complaint and . . . other pleadings, including the judgment, misspelled the Defendants' surname as "Philips," [not] "Phillips," as in the earlier action.

3. . . . Plaintiffs' judgment against Defendants . . . ["Judgment at Issue"] was indexed in the Clerk of Court's computer system with the spelling, "Philips[,]" . . . [and] docketed and indexed against, "Richard Barry Philips and Sheila Philips," as opposed to, "Richard Barry Phillips and Sheila Phillips," as was the case with the Original Judgment.

4. . . . [In July 1998] Defendants took title to a certain parcel in Johnston County . . . [(the "subject property")]. Such Deed is recorded in . . . the Johnston County Registry and . . . offered into evidence by the Plaintiffs and correctly spelled the [defendants'] name . . . as Richard Barry Phillips and Sheila A. Phillips.

5. On November 30, 2001, Defendants . . . conveyed the Land to a trustee to secure their Note to Lender by Deed of Trust . . . (herein the "Deed of Trust").

6. The Deed of Trust was foreclosed [and] . . . the substitute trustee under the Deed of Trust . . . conveyed the Land to GMAC Mortgage Corporation.

7. . . . [In March] 2005, GMAC . . . conveyed the Land to . . . Pedro [M.] Espinosa and his wife, Cecilia M. Rodriguez, by deed recorded in [the] . . . Johnston County Registry.

8. . . . Espinosa *et ux* conveyed title to the Land . . . to secure a Note for such purchase by Deed of Trust . . . which Note and Deed of Trust are now owned and held by [MERS]. . . . Such Deed of Trust names . . . John T. Matthews, as Trustee.

9. . . . [The] judgment docket index was put on computer in 1989 and the use of the hard copy of the judgment index book was discontinued February 16, 2004.

10. Plaintiffs called as a witness Rhonda Moore, [who] . . . worked in law offices since 1982 and as title [Page] searcher paralegal since 1985[.] . . . The Court qualified her as an expert witness in matters of title examination in eastern North Carolina, without objection.

11. Ms. Moore . . . explained the protocol used in the AOC computers in the Office of the Clerk of the Superior Court of Johnston County, that only the name entered is pulled up for review on the screen. . . . [T]he exact letters typed

in the screen on the computer are the letters in the index which appear. For example, inputting the letters, "P-H-I-L-I-P-S," into the judgment computer would not reveal to the searcher a judgment against a person having the name, "P-H-I-L-L-I-P-S." Ms. Moore's testimony was that she enters the letters "P-H-I-L" when checking judgments for Phillips or Philips because of the prevalence of each spelling. She testified such is her usual and customary practice[.] . . .

12. Ms. Moore offered an opinion . . . [that the] standard of care for a title examination in eastern North Carolina involving a judgment search for Phillips would be made by inputting "P-H-1-L" in the Clerk of Court computer system. . . .

13. The printed computer index for "P-H-I-L-L-I-P-S" is [18] pages [and has] . . . [2] entries for "Rick Phillips," [3] entries for "Richard Phillips" and [3] entries for "Richard Barry Phillips."

. . . .

16. Plaintiffs' expert witness would have conducted her title examination of the judgment index by typing "P-H-I-L" into the judgment index system in the office of the Clerk of the Superior Court.

. . . .

20. The name, "PHILIP" is a variant spelling of the name, "PHILLIPS," within the doctrine of *idem sonans*.

On these facts, the court concluded, in pertinent part, that:

2. The foreclosure proceeding and the other judgments indexed under the spelling "Phillips" should have attracted the attention of or stimulated further inquiry by a title searcher.

3. The foreclosure proceeding and the judgments indexed under the spelling "Phillips" were sufficient notice to put a careful and prudent examiner upon inquiry; and by such inquiry the Judgment at Issue would have been found.

. . . .

6. The Judgment at Issue was properly docketed and indexed.

7. [Appellants] could have discovered the Judgment at Issue with reasonable care and so had constructive notice of same.

8. The Judgment at Issue attached to and became a lien on the Land upon acquisition of that Land by Defendants.

9. Plaintiffs are entitled to levy execution on the Judgment at Issue and to the extent the same may involve the Land to . . . levy execution on the Land.

The trial court stayed the execution of its order pending resolution of this appeal.

Standard of Review

In a bench trial "in which the superior court sits without a jury, 'the standard of review 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. Findings of fact by the trial court in a non-jury trial . . . are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.' " *Luna v. Division of Soc. Servs.*, 162 N.C. App. 1, 4, 589 S.E.2d 917, 919 (2004) (quoting *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)). In the instant case, appellants do not challenge the trial court's findings of fact, which are therefore presumed correct. The court's legal conclusions regarding the existence of a valid lien are reviewed *de novo*.

Appellants argue that, because judgment against defendants was docketed under a misspelling of defendants' last name, the judgment cannot be a valid lien on the subject property. We disagree.

N.C. Gen. Stat. § 1-233 (2005) sets out requirements for docketing a judgment, and provides in relevant part that:

> Every judgment . . . affecting title to real property, or requiring . . . the payment of money, shall be indexed and recorded by the clerk of said superior court on the judgment docket of the court. The docket entry must contain the file number for the case in which the judgment was entered, [and] the names of the parties[.] . . . The clerk shall keep a cross-index of the whole, with the dates and file numbers thereof[.] . . .

G.S. § 1-233. Under N.C. Gen. Stat. § 1-234 (2005), a judgment docketed in accordance with G.S. § 1-233 creates a lien that is effective against third parties:

> Upon the entry of a judgment under G.S. 1A-1, Rule 58, affecting the title of real property, or directing . . . the payment of money, the clerk of superior court shall index and record the judgment on the judgment docket[.] . . . The judgment lien is effective as against third parties from and after the indexing of the judgment as provided in G.S. 1-233. The judgment is a lien on the real property in the county where the same is docketed[.] . . .

G.S. § 1-234.

Docketing a judgment provides notice of the existence of the lien on the property, and a judgment that is not docketed is ineffective as to third parties:

> [U]nless the judgment is docketed . . . there can be no lien by virtue of the judgment alone. The docketing is required, in order that third persons may have notice of the existence of the judgment lien. . . . In our case no attempt whatever appears to have been made to have the judgment docketed, [and] . . . the judgment is not a lien upon the property, as against this defendant[.]

Holman v. Miller, 103 N.C. 118, 120-21, 9 S.E. 429, 430 (1889).

The issue presented is whether the judgment docketed under the name "Philips" instead of "Phillips" nonetheless provided sufficient notice, actual or constructive, to create a valid lien on the subject property. We conclude that on the facts of this case, the judgment was a lien on the property.

Plaintiffs argue that a judgment docketed and indexed in substantial compliance with the pertinent statutes will establish a lien on the judgment debtor's property, while defendants contend that the statutory requirements must be strictly followed in all respects. The North Carolina Supreme Court addressed this issue in *West v. Jackson*, 198 N.C. 693, 153 S.E. 257 (1930). In *West*, a tract of land was jointly owned by a Jesse and Nora Hinton, who borrowed money to purchase the property, and executed a deed of trust to secure the loan. After Mr. Hinton died, Nora Hinton obtained a loan from plaintiff in her name, also secured by the property. When the first lender tried to foreclose, plaintiff argued that the first deed of trust did not create a valid lien on the property because both the deed and deed of trust were indexed under "Jesse Hinton and wife." The Court framed the issue thusly:

> The statute . . . requires in substance that the indexes of recorded instruments . . . 'shall state in full the names of all the

> parties'[.] . . . [C]onstruction of this statute produces two divergent theories. Upon one hand it is asserted that as indexing and cross-indexing is an essential part of registration . . . and since such indexing is statutory, the statute should be complied with to the exact letter. Upon the other hand, it is insisted that the underlying philosophy of all registration is to give notice, and that hence the ultimate purpose and pervading object of the statute is to produce and supply such notice.

Id. at 694, 153 S.E. at 258. These are essentially the positions taken by the parties in the instant case. The Court then stated:

> Therefore, if the indexing and cross-indexing upon a given state of facts is insufficient to supply the necessary notice, then such indexing ought to fail as against subsequent purchasers or encumbrancers. Nevertheless, it is a universally accepted principle that "constructive notice from the possession of the means of knowledge will have the effect of notice, although the party was actually ignorant, merely because he would not investigate. It is well settled that if anything appears to a party calculated to attract attention or stimulate inquiry, the person is affected with knowledge of all the inquiry would have disclosed."

Id. (quoting *Wynn v. Grant*, 166 N.C. 39, 81 S.E. 949 (1914)) (citation omitted). *West* addresses the indexing of a deed of trust in the office of the register of deeds, rather than the docketing of a judgment. Although these situations are governed by different statutes,[1] the principles enunciated in *West* pertaining to the effectiveness of the lien and placing the record or title examiner on notice are equally applicable to the instant case. "In [*Ely v. Norman*, 175 N.C. 294, 298, 95 S.E. 543, 545 (1918)], the [Supreme Court] quoted with apparent approval from the Supreme Court of Iowa to the effect that an index will hold a subsequent purchaser to notice thereof if enough is disclosed by the index to put a careful or prudent examiner upon inquiry, and if, upon such inquiry, the instrument would have been found." *West*, 198 N.C. 694, 153 S.E. 257. The Court "conceded that the indexing and cross-indexing of the deed of trust in the case at bar is not a strict compliance with the statute" but held that "there was sufficient information upon the index and cross-index to create the duty of making inquiry" and held that the indexing of the deed and deed of

1. N.C. Gen. Stat. § 1-233 (2005) governs docketing of judgments, while N.C. Gen. Stat. § 161-22 (2005) addresses documents filed with the Register of Deeds.

trust was sufficient to create a lien on the property. *Id.* at 694-95, 153 S.E. at 258.

Thus, "for a recordation to be effective as notice there must be a substantial compliance with the indexing statutes. The general rule to be applied in determining the sufficiency of an irregular indexing has been stated by this Court in these terms:

> '[T]he primary purpose of the law requiring the registration and indexing of conveyances is to give notice, and . . . an index will hold a subsequent purchaser or encumbrancer to notice if enough is disclosed by the index to put a careful and prudent examiner upon inquiry, and if upon such inquiry the instrument would be found.' "

Cuthrell v. Camden County, 254 N.C. 181, 184, 118 S.E.2d 601, 603 (1961) (recordation of old age assistance lien on property) (quoting *Dorman v. Goodman*, 213 N.C. 406, 412, 196 S.E. 352, 355 (1938)). Other appellate cases have held that a lien may be valid, despite minor docketing errors. *See*, *e.g.*, *Wilson v. Taylor*, 154 N.C. 211, 218, 70 S.E. 286, 289 (1911) ("A party who may be affected by notice must exercise ordinary care to ascertain the facts, and if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge he would have acquired if he had made the necessary effort to discover the truth.") (citations omitted), and *Valentine v. Britton*, 127 N.C. 57, 58, 37 S.E. 74, 75 (1900) ("We concur with the defendant, as was also held by the Court below, that 'J. Mizell,' or 'Jo. Mizell,' was a sufficient cross-indexing for a judgment against 'Josiah Mizell[.]' ").

The relationship between the standard of care for title examination and the question of the efficacy of the judgment to create a lien is as follows: If a title examiner exercising the standard of care would have found the judgment at issue, then it sufficiently complies with G.S. § 1-233 to create a lien on the property. In the instant case, plaintiffs established by uncontradicted expert testimony that in this case the standard of care for a reasonably prudent title examiner would be to search under part of the last name, such as "P-H-I-L," which would have revealed the judgment at issue. Additionally, even a search under "Phillips" would indicate defendants' involvement in several other proceedings, including a foreclosure; this should have spurred further inquiry. We conclude that plaintiffs substantially complied with G.S. § 1-233, and agree with the trial court's findings and conclusions.

Appellants, however, assert that the statutory requirements for indexing a judgment require "strict compliance" and that any spelling error automatically renders the judgment unenforceable against a third party purchaser. Under the pertinent case law, particularly *West v. Jackson*, *supra*, we have reached a different conclusion. Moreover, the cases cited by appellants are neither binding precedent nor persuasive authority, as none are factually similar. In *Holman v. Miller*, cited by appellants, the court's decision was based on the fact that the judgment in question had not been docketed in a timely manner and not on any defect or spelling error in the docketing. Thus, the Court's discussion of docketing practices dating back to "the reign of Henry VIII" is mere dicta. In *Trust Co. v. Currie*, 190 N.C. 260, 129 S.E. 605 (1925), also cited by appellants, the judgment in question was indexed under a totally different last name: "Quick," rather than "Currie."

Appellants contend that plaintiffs cannot maintain a priority lien against third party *bona fide* purchasers because plaintiffs were to blame for the erroneous indexing of the judgment. However, the issue before us is not identification of the party responsible for the misspelling of Phillips' name. Instead, we must determine whether the error, whatever its source, served to invalidate the judgment lien as to third party purchasers.

We conclude that the judgment of the trial court should be

Affirmed.

Judge BRYANT concurs.

Judge STEELMAN concurs in result only with separate opinion.

STEELMAN, Judge, concurs in the result.

I concur in the result reached by the majority opinion.

The only evidence presented to the trial court as to the appropriate standard of care for the examination of the judgment docket in Johnston County was the testimony of Rhonda Moore. Based upon this testimony the trial court found as a fact that "[t]he standard of care in eastern North Carolina, including Johnston County, for title searches in a case such as this one . . . requires a search of 'P-H-I-L' into the AOC computerized judgment index in the Office of the Clerk

of the Superior Court." On appeal, appellant did not assign error to any of the trial court's findings of fact. This finding is thus binding upon this Court and compels the result in this case.

The trial court's findings of fact were carefully and narrowly drawn, and are limited to the specific evidence presented in this case. Our decision in this case should also be so limited.

BETTY L. GRANT, EXECUTRIX OF THE ESTATE OF TOMMY J. GRANT, PLAINTIFF-APPELLANT v. HIGH POINT REGIONAL HEALTH SYSTEM, DEFENDANT-APPELLEE

No. COA06-1079

(Filed 19 June 2007)

1. Obstruction of Justice— common law—destroying medical records

The trial court erred by dismissing plaintiff's claim for common law obstruction of justice where plaintiff alleged that defendant hospital destroyed medical records, thus keeping plaintiff from obtaining the required Rule 9(j) certification and preventing a medical malpractice claim.

2. Evidence— spoliation—dismissed

The trial court correctly dismissed plaintiff's claim for common law spoliation where the allegations were that defendant hospital destroyed medical records and prevented a medical malpractice claim. The precedent relied upon by defendant arose in the context of wills and has been cited only for the inference to be drawn from the destruction of evidence.

Appeal by Plaintiff from order entered 10 February 2006 by Judge John O. Craig, III in Superior Court, Guilford County. Heard in the Court of Appeals 15 March 2007.

Kennedy, Kennedy, Kennedy & Kennedy, L.L.P., by Harvey L. Kennedy and Harold L. Kennedy, III, for Plaintiff-Appellant.

Sharpless & Stavola, P.A., by Joseph P. Booth, III, for Defendant-Appellee.

McGEE, Judge.

Betty L. Grant (Plaintiff), Executrix of the Estate of Tommy J. Grant (decedent), filed an amended complaint against High Point Regional Health System (Defendant) on 4 June 2004. Plaintiff alleged in the complaint that Defendant owned and operated High Point Regional Hospital (the hospital). Plaintiff further alleged the following: Decedent went to the hospital's emergency room on or around 13 September 2000 complaining of excruciating knee pain. X-rays were taken of decedent's knee. However, "by the time that [decedent's] knee cancer was finally diagnosed by any physician(s), [decedent's] cancer was substantially advanced and his situation was terminal." Decedent died on 17 February 2003.

Patti L. Holt, one of Plaintiff's attorneys, sent a letter to the hospital on 31 August 2003 stating that she represented decedent's estate with respect to a potential medical negligence claim. The letter also requested "emergency room and radiology records and films generated during the period of June 1, 2000 to December 31, 2000." Defendant did not respond to this request. Plaintiff's attorney then spoke by telephone with a hospital employee named "Rose" on 15 September 2003. Rose told Plaintiff's attorney that decedent's x-rays from 13 September 2000 "were present" at the hospital. Rose requested that Plaintiff's attorney send another medical release form because the first release had not been forwarded to Rose. Plaintiff's attorney sent another release. Plaintiff's attorney did not receive decedent's x-rays or records by 23 September 2003, and she called Rose to inquire about the records. Rose told Plaintiff's attorney that she could not find decedent's x-rays.

In the following months, Plaintiff's attorney tried, unsuccessfully, to obtain decedent's x-rays and records from Defendant. On 14 January 2004, Plaintiff's attorney sent Defendant a subpoena to produce decedent's x-rays and records. Defendant responded on 20 January 2004 that the x-rays were "not in [decedent's] folder" and "had not been checked out."

Plaintiff further alleged that

> the failure of the hospital to maintain the x-ray film taken on September 13, 2000 has effectively precluded . . . Plaintiff from being able to successfully prosecute a medical malpractice action against . . . Defendant hospital and others. Furthermore, at this time the missing x-rays have prevented Plaintiff's coun-

> sel from securing the Rule 9(j) certification. That . . . Defendant Hospital was required to keep, maintain and preserve all medical records, including x-rays, for 11 (eleven) years pursuant to N.C.A.C. 10A: N.C.A.C. 13B.3903, and the rules and regulations of the Joint Commission on Accreditation of Healthcare Organizations (JCAHO).

Plaintiff also alleged that Defendant "intentionally and/or recklessly destroyed the x-ray film of . . . [d]ecedent . . . after [Defendant] was placed on notice of a potential medical malpractice claim against . . . Defendant hospital on August 31, 2003." In the alternative, Plaintiff alleged that Defendant was negligent and careless in failing to maintain and preserve the x-rays. Plaintiff alleged Defendant's conduct amounted to spoliation and common law obstruction of justice. Plaintiff also alleged that as a direct and proximate result of Defendant's spoliation and common law obstruction of justice, "Plaintiff has suffered actual damages, including but not limited to all damages she could have recovered from wrongful death and medical negligence—i.e.: medical expenses, funeral expenses, pain and suffering, loss of services, protection, care and assistance, society, companionship, comfort and guidance, kindly offices and advice." Plaintiff sought compensatory and punitive damages.

Defendant filed an answer on 24 June 2004 and a motion to dismiss Plaintiff's complaint on 11 January 2006. The trial court entered an order dismissing Plaintiff's complaint on 10 February 2006. Plaintiff appeals.

The standard of review of an order granting a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) 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*, 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.' " *Holloman v. Harrelson*, 149 N.C. App. 861, 864, 561 S.E.2d 351, 353 (quoting *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987)), *disc. review denied*, 355 N.C. 748, 565 S.E.2d 665 (2002).

I.

[1] Plaintiff argues the trial court erred by dismissing her claim for common law obstruction of justice. In *In re Kivett*, 309 N.C. 635, 309 S.E.2d 442 (1983), our Supreme Court recognized that obstruction of justice is a common law offense in North Carolina. *Id.* at 670, 309 S.E.2d at 462. " 'At common law it is an offense to do any act which prevents, obstructs, impedes or hinders public or legal justice. The common law offense of obstructing public justice may take a variety of forms[.]' " *Id.* (quoting 67 C.J.S. *Obstructing Justice* §§ 1, 2 (1978)). The Supreme Court also recognized that Article 30 of Chapter 14 of the General Statutes, which sets forth specific crimes under the heading of *Obstructing Justice*, does not abrogate the common law offense of obstruction of justice. *Id.* Furthermore, "[t]here is no indication that the legislature intended Article 30 to encompass all aspects of obstruction of justice." *Id.*

Plaintiff argues, and we agree, that *Henry v. Deen*, 310 N.C. 75, 310 S.E.2d 326 (1984), is analogous to the present case. In *Henry*, the plaintiff was an administrator of a decedent's estate who sued two physicians and a physician's assistant for the wrongful death of the decedent and for civil conspiracy. *Id.* at 77, 310 S.E.2d at 328. The plaintiff alleged the following. The decedent experienced severe chest pain and other ailments and went to the emergency room around 30 June or 1 July 1979. *Id.* at 77, 310 S.E.2d at 329. The emergency room physician diagnosed the decedent with pneumonia and prescribed medicine for the decedent. *Id.* However, after reviewing an x-ray report that indicated possible serious cardiac deterioration, the emergency room physician instructed the decedent to see the defendant physician Deen. *Id.* at 78, 310 S.E.2d at 329. The decedent visited Deen's office on 3 July 1979. Deen and his physician's assistant, Hall, urged the decedent to continue taking medicine for pneumonia. *Id.*

The decedent returned for a follow-up visit on 6 July 1979 and Hall, without consulting Deen, told the decedent to continue taking the medicine for pneumonia. *Id.* The plaintiff alleged that the decedent "suffered from arteriosclerosis, coronary atheromatosis and coronary thrombosis, the combination of which, if undiagnosed and untreated, leads inevitably to the death of heart tissue and possible cardiac arrest." *Id.* at 78-79, 310 S.E.2d at 329. The plaintiff also alleged that the decedent's symptoms made a medical diagnosis of heart disease "compelling and obvious." *Id.* at 79, 310 S.E.2d at 329.

The decedent died on 8 July 1979 of a massive myocardial infarction as a result of heart disease. *Id.*

With respect to the claim for civil conspiracy, the plaintiff in *Henry* specifically alleged that Deen and Hall agreed to create, and did create, false and misleading entries in the decedent's medical chart and that "the defendants obliterated another entry in the chart concerning the true facts of the diagnosis and treatment of [the decedent]." *Id.* at 87, 310 S.E.2d at 334. The plaintiff further alleged that Deen and Hall conspired with the defendant physician Niazi to conceal the decedent's actual medical record and to create a false medical record. *Id.* The plaintiff further alleged that Niazi agreed to produce the false document to anyone who inquired about Niazi's participation in the decedent's treatment. *Id.* The plaintiff sought actual damages for wrongful death, and punitive damages for wrongful death and civil conspiracy, from Deen and Hall. *Id.* at 79, 310 S.E.2d at 330. The plaintiff also sought punitive damages for civil conspiracy from Niazi. *Id.*

The defendants in *Henry* moved to dismiss the plaintiff's original complaint, and the plaintiff filed a motion to amend the complaint, along with a proposed amended complaint. *Id.* In the proposed amended complaint, the plaintiff alleged that Hall consulted with Niazi at the decedent's follow-up visit on 6 July 1979 and that, *inter alia*, Niazi attempted to diagnose and advise treatment for the decedent over the telephone. *Id.* at 79-80, 310 S.E.2d at 330. In the proposed amended complaint, the plaintiff also added a claim against Niazi for actual and punitive damages for wrongful death, and a claim against Deen, Hall and Niazi for actual damages as a result of the civil conspiracies. *Id.* at 80, 310 S.E.2d at 330.

The trial court dismissed the plaintiff's claims for civil conspiracy and for punitive damages for wrongful death against Deen, Hall, and Niazi. *Id.* The trial court also dismissed the wrongful death claim against Niazi and denied the plaintiff's motion to amend. *Id.* On appeal, our Court upheld the dismissal of the punitive damages claims against Hall and Deen and also upheld the dismissal of the civil conspiracy claims against the defendants. *Id.* However, our Court reversed the trial court's denial of some of the plaintiff's proposed amendments. *Id.*

Our Supreme Court reversed the decision of our Court and held that the plaintiff's allegations of civil conspiracy, "if found to have occurred, would be acts which obstruct, impede or hinder public or

legal justice and would amount to the common law offense of obstructing public justice." *Id.* at 87, 310 S.E.2d at 334. Therefore, our Supreme Court held that the plaintiff's complaint stated a claim for civil conspiracy and that the plaintiff's amended complaint, if allowed by the trial court on remand, added the required allegation of injury. *Id.*

In the present case, Defendant contends that *Henry* is inapplicable because the cause of action at issue in *Henry* was a civil conspiracy, not obstruction of justice. However, our Supreme Court pointed out in *Henry* that

> [i]n civil actions for recovery for injury caused by acts committed pursuant to a conspiracy, this Court has stated that the combination or conspiracy charged does no more than associate the defendants together and perhaps liberalize the rules of evidence to the extent that under the proper circumstances the acts of one may be admissible against all. The gravamen of the action is the resultant injury, and not the conspiracy itself.

Id. at 86-87, 310 S.E.2d at 334 (internal citations omitted). Our Supreme Court further stated that to prove a civil conspiracy, there must be a wrongful act resulting in injury that is committed pursuant to a conspiracy. *Id.* at 87, 310 S.E.2d at 334. Therefore, in *Henry*, the wrongful acts necessary to prove conspiracy were the acts constituting obstruction of justice. *Id.* Accordingly, as the acts constituting obstruction of justice underlying the civil conspiracy in *Henry* were similar to Defendant's alleged actions in the present case, *Henry* is persuasive.

Plaintiff in the present case alleged, as did the plaintiff in *Henry*, that Defendant destroyed the medical records of decedent. Plaintiff alleged Defendant's actions effectively precluded Plaintiff from obtaining the required Rule 9(j) certification. Plaintiff further alleged that Defendant's actions "obstructed, impeded and hindered public or legal justice[] in that the failure of . . . Defendant . . . to preserve, keep and maintain the x-ray film described above has effectively precluded . . . Plaintiff from being able to successfully prosecute a medical malpractice action against . . . Defendant . . . and others." Plaintiff alleged, therefore, that Defendant's conduct constituted common law obstruction of justice. We hold that such acts by Defendant, if true, "would be acts which obstruct, impede or hinder public or legal justice and would amount to the common law offense of obstructing public justice." *See Henry*, 310 N.C. at 87, 310

S.E.2d at 334. Plaintiff's complaint stated a cause of action for common law obstruction of justice.

Defendant contends that Plaintiff's allegations of proximate causation and damages are too speculative. However, at the Rule 12(b)(6) stage, we look only to whether the allegations in a complaint, taken as true, state a legally cognizable claim. *Harris*, 85 N.C. App. at 670, 355 S.E.2d at 840. In *Henry*, the plaintiff's original complaint did not seek actual damages resulting from the civil conspiracy. *Henry*, 310 N.C. at 79, 310 S.E.2d at 330. However, our Supreme Court held that if the trial court, on remand, allowed the plaintiff's amended complaint, which did allege actual damages arising from the civil conspiracy, Plaintiff's claim was legally sufficient to withstand a motion to dismiss. *Id.* at 90, 310 S.E.2d at 336.

In the present case, Plaintiff sufficiently alleged actual damages in her complaint as follows: "Plaintiff has suffered actual damages, including but not limited to all damages [Plaintiff] could have recovered from wrongful death and medical negligence—i.e.: medical expenses, funeral expenses, pain and suffering, loss of services, protection, care and assistance, society, companionship, comfort and guidance, kindly offices and advice." It is immaterial that the specific actual damages sought by Plaintiff in the present case are different from the specific actual damages sought by the plaintiff in *Henry*.

Defendant further contends that Plaintiff failed to allege that Defendant's actions directly impacted a judicial proceeding brought by Plaintiff. A similar argument was rejected in *Jackson v. Blue Dolphin Communications of N.C.*, 226 F. Supp. 2d 785 (W.D.N.C. 2002), which we find persuasive. In *Jackson*, the plaintiff alleged that the defendants attempted to force her to sign a false affidavit which would have been used in a civil suit later filed by one of the plaintiff's colleagues. *Id.* at 794. When the plaintiff refused to sign the affidavit, the defendants terminated her employment. *Id.* The Court held that the "[p]laintiff's allegations [were] sufficient to show that [the] [d]efendants attempted to impede the legal justice system through the false affidavit." *Id.* The defendants argued that the plaintiff did not have standing "because a suit involving her was not pending at the time of the alleged obstruction of justice." *Id.* However, the Court held there was no requirement that a suit be pending for the plaintiff to have a valid claim for obstruction of justice. *Id.* at 794-95. In so holding, the Court relied on *Burgess v. Busby*, 142 N.C. App. 393, 544 S.E.2d 4, *disc. review improvidently allowed*, 354 N.C. 351, 553

S.E.2d 679, *reh'g denied*, 355 N.C. 224, 559 S.E.2d 554 (2001), where the defendant had retaliated against jurors who had previously found a colleague of the defendant liable for medical malpractice. *Id.* at 794 (citing *Burgess*, 142 N.C. App. at 396-98, 544 S.E.2d at 6-7). However, although the actions of the defendant in *Burgess* occurred after the completion of the first trial, but before the filing of the obstruction of justice claim, the plaintiffs had standing to bring the obstruction of justice claim. *Id.* (citing *Burgess*, 142 N.C. App. at 396-98, 544 S.E.2d at 6-7).

In the present case, Plaintiff alleged that Defendant's actions prevented her from obtaining the required Rule 9(j) certification and from successfully prosecuting a medical negligence action against Defendant and others. Therefore, Defendant's alleged actions directly prevented, obstructed, or impeded public or legal justice by precluding the filing of a civil action.

Defendant also raises concerns that by recognizing a cause of action for common law obstruction of justice in the present case, our Court would be recognizing that a cause of action could be brought against any third party that fails to produce documents or other matter requested by a potential litigant. We are not so concerned. Plaintiff alleged that Defendant's actions "precluded . . . Plaintiff from being able to successfully prosecute a medical malpractice action against . . . Defendant . . . and others." As we have just held, Plaintiff sufficiently alleged that Defendant's conduct prevented, obstructed, or impeded public or legal justice. For all the reasons stated above, we hold the trial court erred by dismissing Plaintiff's claim for common law obstruction of justice. Therefore, we reverse the dismissal of this claim.

II.

[2] Plaintiff also argues the trial court erred by dismissing her claim for common law spoliation. In support of her argument, Plaintiff relies upon *Dulin v. Bailey*, 172 N.C. 608, 90 S.E. 689 (1916). Plaintiff argues that in *Dulin*, our Supreme Court recognized a cause of action for spoliation that is applicable in the present case. We disagree.

In *Dulin*, the plaintiff brought a tort action against the defendants, alleging they conspired and injured the plaintiff by removing from a will a legacy to the plaintiff and others. *Id.* at 608, 90 S.E. at 689. Our Supreme Court stated: "Though this action seems to be of the first impression in this [S]tate, and is doubtless a very unusual

one, there is foundation and reason for the action upon well-settled principles of law, and we are not entirely without precedent." *Id.* at 609, 90 S.E. at 689. The precedents upon which our Supreme Court relied were limited to the context of wills. *Id.* at 609, 90 S.E. at 689-90. However, our Supreme Court held that "[e]ven if there had been no precedent, it would seem that upon the principle of justice that there is 'no wrong without a remedy[,]' the plaintiff is entitled to maintain this action if, as she alleges, the defendants conspired and destroyed the subsequent will in which the legacy was left her." *Id.* at 609, 90 S.E. at 690.

For the reasons that follow, we hold that *Dulin* does not control the present case. First, in the ninety years since it was announced, *Dulin* has never been cited in this State for its holding relating to a tort for spoliation, either in the context of wills or in any other context. Since *Dulin*, the only case law related to spoliation has dealt with the inference arising in ongoing litigation from the intentional destruction of evidence. *See*, *e.g.*, *Red Hill Hosiery Mill*, *Inc. v. MagneTek*, *Inc.*, 138 N.C. App. 70, 78, 530 S.E.2d 321, 328, *disc. review denied*, 353 N.C. 268, 546 S.E.2d 112 (citation omitted) (2000) (stating that "a party's intentional destruction of evidence in its control before it is made available to the adverse party can give rise to an inference that the evidence destroyed would injure its (the party who destroyed the evidence) case. This principle is known as 'spoliation of evidence.' "). Second, the precedent upon which our Supreme Court relied in making its decision in *Dulin* was limited to the context of wills. This demonstrates the limited nature of the Supreme Court's holding. Third, it is clear that any wrong alleged by Plaintiff in the present case is not without a remedy because we have already held that Plaintiff stated a cause of action for common law obstruction of justice. Therefore, we affirm the trial court's dismissal of Plaintiff's claim for common law spoliation.

Reversed and remanded in part; affirmed in part.

Judges ELMORE and STEPHENS concur.

STATE OF NORTH CAROLINA v. FARAH N. MABREY

No. COA06-983

(Filed 19 June 2007)

1. Appeal and Error— preservation of issues—exclusion of evidence—argued on different basis at trial

Defendant did not preserve for appellate review the question of whether a prior assault by the victim was admissible to rebut evidence of good character where she argued relevancy at trial.

2. Evidence— prior assault by victim—exclusion as prejudicial

The trial court did not abuse its discretion by not allowing defendant to testify about a prior assault on defendant by the victim in this case based on the potential prejudicial effect. The trial court's ruling resulted from a process of reasoned calculation, weighing the benefits and costs of the testimony. While the court used the term "certainly outweigh" rather than "substantially outweigh," and the better practice is to use the words of the statute, the record is clear that the court understood and conducted the balancing process required by Rule 403.

Appeal by defendant from judgment entered 4 October 2005 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 28 March 2007.

Attorney General Roy A. Cooper, III, by Special Counsel Caroline Farmer, for the State.

Mary McCullers Reece, for defendant-appellant.

JACKSON, Judge.

Farah N. Mabrey ("defendant") and Benjamin Rice ("Rice") were married for approximately nine years and had three children together. Since their divorce in 2002, defendant and Rice arranged to meet twice per month at 7:00 p.m. in a specific Food Lion parking lot to exchange custody of their children. In early 2004, Rice married his second wife, Karen Rice.

On 7 May 2004, Rice arrived early to the parking lot and parked in the usual location of the custody exchange. At 7:05 p.m., Rice saw defendant enter the parking lot and watched as she drove past Rice and proceeded to the other side of the parking lot. Rice testified that

he was upset by defendant's actions because "[s]he looked right at me and just went right past me. You know, she just didn't park right there where I was at. It's not just because it was inconvenient or anything; it's just she was doing it out of spite." Defendant, meanwhile, claimed she never saw Rice and that she drove to the parking space where they were supposed to meet. However, immediately after the incident, she told the police that Rice "parked on the other side of the shopping center just to be rude."

Rice drove to the other side of the shopping center to meet with defendant and their children. Once there, Rice and defendant began arguing about why defendant had not parked beside Rice. Defendant and Rice also argued over a new pair of eyeglasses for one of their children. Specifically, defendant insisted that Rice owed her $50.00 for the glasses, but Rice stated that he could not pay defendant anything other than his court-mandated child support or else he would be in violation of the court order. Defendant responded by saying, "Well, I'll just take it out your ass." At trial, defendant denied discussing eyeglasses for the children that day.

Rice testified that as he helped the children into his truck, defendant pushed the truck door into the back of Rice's legs. Defendant, who was over seven months pregnant at the time, claimed that she simply put her hands in front of her to stop the door from hitting her after Rice had "swung open the door." She contended it was a reflexive motion to protect herself. Defendant, however, also claimed that the door never hit her. Rice warned her that if she hit him again he would call the police. According to Rice, defendant then pushed him in the back three or four times and repeatedly invited him to "[c]all the cops." As Rice explained, "[S]he did it again and again, and I just went around the truck and I called the cops, and I waited for them to get there." At trial, defendant denied pushing Rice into the truck several times with her hands. Defendant insisted that any physical contact between her and Rice was the result of her trying to protect herself from the possible threat of contact from Rice after Rice "stepped up."

While Rice was calling the police, defendant removed the children from Rice's truck and left with them. Approximately ten minutes later, Officer Marcus A. Bethea ("Officer Bethea") of the Raleigh Police Department arrived at the Food Lion parking lot and informed Rice that defendant was with another police officer at a nearby Exxon gas station. Rice requested that Officer Bethea arrest defendant, but Officer Bethea refused because Rice had no visible injuries.

Rice's wife, whom Rice had called after he called the police, met Rice at the Exxon station and brought a copy of the separation agreement. When Rice's wife arrived, defendant was yelling at Rice, and the police officers "were telling her to be quiet." Defendant admitted to police that she pushed Rice, but stated that she did so only because he pushed her first with his car door. Defendant had no visible injuries. Defendant also stated that Rice "wanted to yell at me and curse at me for no reason, so I just took my kids and left." Conversely, Rice told police officers that

> as always, [defendant] wanted to argue about something. She told me that I owed her $50 for an insurance co-payment for my kids to get glasses. I told her I didn't have any money for her right now and that I didn't want to discuss some silly shit like that. She got upset and began cursing back at me. We both stood here and argued.

After police sorted out the situation, Rice's wife took Rice's two daughters and Rice took his son. The police informed Rice and his wife that they would keep defendant at the Exxon station for a few minutes after Rice and his wife departed the station to help avoid further conflict. As Rice and his wife left the station, defendant "was yelling at the police officers." Officer Bethea testified that throughout the encounter, defendant had been "very upset," had used a "very harsh tone of voice," and had appeared unreasonable and unwilling to resolve the situation. Defendant insisted that she was upset only because of certain remarks and facial expressions, such as "little smirks, like ha-ha, or whatever," that Rice allegedly directed at her at the Exxon station.

When the police finally allowed defendant to leave the station, defendant screeched her tires, "peeling her tires out as she left the parking lot." Defendant denied pulling out of the station so fast that her tires squealed. Shortly thereafter, Officer Bethea responded to another call regarding Rice and defendant, and Officer Bethea was required to facilitate another custody exchange. Officer Bethea noted that defendant's demeanor at this second incident was no different from her demeanor at the Exxon station.

On 7 May 2004, defendant was charged with simple assault, and on 23 November 2004, defendant was convicted in district court. Defendant appealed to superior court, and on 4 October 2005, a jury found defendant guilty as charged. The trial court sentenced defendant to forty-five days in the custody of the Wake County Sheriff, and

the court suspended the sentence and placed defendant on supervised probation for twelve months.

On appeal, defendant challenges the trial court's refusal to permit the introduction of evidence that Rice had assaulted defendant on a previous occasion. Specifically, defendant contends that the evidence was (1) relevant to defendant's claim of self-defense; (2) admissible to rebut evidence of Rice's good character presented during the State's case; and (3) more probative than prejudicial.

[1] As a preliminary matter, we note that defendant has failed to preserve her second assignment of error for appellate review. In this assignment of error, defendant argues that the evidence of the prior assault was admissible to rebut evidence of Rice's good character presented during the State's case. Specifically, defendant contends that the State opened the door to Rice's character, and thus, defendant should have been permitted to testify as to specific acts committed by Rice that would shed a contrary light on Rice's character.

During direct examination of Rice, the following colloquy took place:

> PROSECUTOR: And up until this point did you ever put your hands on the defendant?
>
> RICE: Huh-uh.
>
> PROSECUTOR: Why didn't you if she was pushing you up against your truck?
>
> RICE: That's—I don't do things like that. I mean, that's not my nature.

Defendant did not object to Rice's testimony. Later, when defendant stated during direct examination that Rice had pushed her two years prior, the State objected and the jury was excused from the courtroom. When asked what he intended with the particular line of questioning, defense counsel stated,

> Your Honor, I'm *only wanting to establish the facts that occurred* at the Food Lion. The only line—or the only testimony that I would—or the only questions that I would ask the defendant would be *questions that would be relevant to her mental state at the time of the incident and to the facts at the time of the incident*. . . .
>
> . . . .

> . . . The only type of question that I would have asked would have been, After that, what—*how did that incident affect your mental state at this time*. That would have been the only—that would have been the only type of question that I would have asked and not go into detail as to what happened but *if that incident had any influence on her—her mental state at that time*.
>
> . . . .
>
> . . . Your Honor, I'd just like to say that one incident that is possibly very similar to *this incident could—could possibly affect one's mental state*. It's possibly having a deja-vu type situation where you may be apprehensive about the prior incident no matter how far back it was reoccuring again, especially with the children at hand. . . . *I believe that that particular incident is relevant to show her mental state at that particular time if it was similar to the one prior*.

(Emphases added).

At no point did defendant argue that she was introducing the evidence to rebut the State's evidence of Rice's good character, much less did defendant ever argue that the State opened the door to Rice's character. Defendant, instead, confined her argument to relevancy, insisting that evidence of the assault two years prior was relevant to show defendant's mental state at the time of incident in question. Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure provides that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, *stating the specific grounds for the ruling the party desired* the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(b)(1) (2006) (emphasis added). As defendant did not contend before the trial court that such evidence was admissible as to Rice's character based upon the State's opening the door to his character, this issue has not been preserved for our review. *See State v. Williams*, 355 N.C. 501, 565, 565 S.E.2d 609, 646 (2002) (noting that although defendant objected to certain evidence as inadmissible pursuant to Rule 608 and as inadmissible hearsay, he did not object on those specific grounds at trial, and thus, "defendant did not preserve these specific arguments for appellate review."), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003). Accordingly, defendant has failed to preserve this issue for appellate review.

[2] In her first assignment of error, defendant contends that the evidence that Rice assaulted defendant on a previous occasion was relevant to defendant's claim of self-defense. In her third assignment of error, defendant contends that the probative value of the evidence of the prior assaults was not substantially outweighed by the potential prejudicial effect, and thus, the trial court improperly excluded the evidence pursuant to Rule 403 of the Rules of Evidence. The trial court based its decision to exclude the evidence solely pursuant to Rule 403, and the court did not make any conclusion with respect to whether the evidence of the prior assault was relevant and otherwise admissible. For the following reasons, we hold that the trial court did not err in excluding the evidence pursuant to Rule 403, and accordingly, we decline to reach the issues raised in defendant's first assignment of error.

Relevant evidence, defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," generally is admissible. N.C. Gen. Stat. § 8C-1, Rules 401, 402 (2005). With respect to evidence of prior bad acts, such as the evidence at issue in the instant case, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b).[1]

Pursuant to Rule 403 of the Rules of Evidence, however, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2005). Thus, even assuming *arguendo* that the evidence of Rice pushing defendant two years prior to defendant's trial survives Rules 401 and Rule 404(b), "it still must

1. While defendant cites *Nance v. Fike*, 244 N.C. 368, 373, 93 S.E.2d 443, 446 (1956), for the proposition that "in assault cases, . . . when the defendant pleads and offers evidence of self-defense, he may then offer . . . evidence tending to show the bad general reputation of his alleged assault as a violent and dangerous fighting man," *Nance* expressly dealt with "the bad general reputation" of the victim, which would is governed by Rule 404(a) of the Rules of Evidence. *See* N.C. Gen. Stat. §8C-1, Rule 404(a) (2005). Because defendant attempted to offer evidence of a specific act committed by Rice, as opposed to general evidence of a pertinent character trait of Rice, we note that Rule 404(a) is inapplicable.

withstand the balancing test of Rule 403, pursuant to which 'evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.' " *State v. Locklear*, 180 N.C. App. 115, 122, 636 S.E.2d 284, 289 (2006) (quoting N.C. Gen. Stat. § 8C-1, Rule 403 (2005)). It is well-established that "[a] trial court's rulings under Rule 403 are reviewed for an abuse of discretion. This Court will find an abuse of discretion only where a trial court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Theer*, 181 N.C. App. 349, 359-60, 639 S.E.2d 655, 662-63 (2007) (internal quotation marks and citations omitted).

In making its determination with respect to the Rule 403 balancing test, a trial court must analyze the "similarity and temporal proximity" between the acts. *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). Thus,

> [w]hen the features of the earlier act are dissimilar from those of the offense with which the defendant is currently charged, such evidence lacks probative value. When otherwise similar offenses are distanced by significant stretches of time, commonalities become less striking, and the probative value of the analogy attaches less to the acts than to the character of the actor.

Id.

After hearing and considering arguments by the prosecutor and defense counsel with respect to the evidence of the prior assault, the trial court sustained the State's objection to the testimony, stating,

> Well, as to any similarity between the matter at issue and a matter that the witness stated occurred two years ago, the similarities are not sufficiently strong so as to allow the jury to properly hear that. The witness's testimony is that she instinctively put her hand up to keep the door from coming close to hitting her because of her pregnant condition, and she said that the door didn't even hit her hand. So as a result, that is not similar to a situation two years ago where she says that the prosecuting witness allegedly assaulted her. So I would not find them to be sufficiently similar so as to allow the jury to hear something that remote in time, coupled with the fact that, again, the similarity being at best minimal. Any prejudicial effect would certainly outweigh any probative value. So as a result, I will not allow any questioning as to that two years ago.

The trial court's ruling was the process of reasoned decision, weighing the relative benefits and costs of such testimony. The temporal proximity between the incidents was particularly significant because (1) defendant had known Rice for thirteen years; (2) defendant and Rice had met to exchange custody twice per month for a year and a half; and (3) the incident two years prior was the only other instance of alleged assaultive behavior by Rice. Additionally, the prior assault and incident at issue were not sufficiently similar as to warrant significant probative value. Defendant alleged that Rice pushed defendant two years prior to trial. Here, Rice had not pushed defendant, but rather, opened a car door toward defendant and allegedly "was in [her] face." Because of the minimal probative value of the evidence, the trial court properly concluded that the probative value of defendant's testimony concerning the prior assault was substantially outweighed by the danger of unfair prejudice.

We note, however, that the trial court did not specifically state that the probative value of the evidence "substantially outweighed" the potential prejudicial effect. Rather, the court stated that the "prejudicial effect would certainly outweigh any probative value." Although the better practice would be to employ the words used in the statute, the trial court's use of the phrase "certainly outweigh" is sufficiently close to the phrase "substantially outweigh" to make clear that the court conducted the appropriate balancing test mandated by the Rule. *See State v. Harris*, 149 N.C. App. 398, 405, 562 S.E.2d 547, 551 (2002) ("The trial court in the present case made no specific finding that the probative value of evidence . . . outweighed its prejudicial effect. However, as long as the procedure followed by the trial court demonstrates that a Rule 403 balancing test was conducted, a specific finding is not required."); *see also State v. McAllister*, 132 N.C. App. 300, 302, 511 S.E.2d 660, 662 ("*Despite the language used by the trial court in making the ruling*, it is clear from an examination of the record that the trial court understood the standard to be applied under Rule 609 and that the trial court believed the evidence was not necessary for a fair determination of the issue of guilt or innocence." (emphasis added)), *aff'd*, 351 N.C. 44, 519 S.E.2d 524 (1999) (per curiam). Because the record is clear that the trial court understood and conducted the required balancing pursuant to Rule 403, we find no error in the specific language employed by the trial court.

In sum, it cannot be said that the trial court's ruling was "arbitrary" or "manifestly unsupported by reason." Therefore, the trial court did not abuse its discretion in precluding defendant from testi-

fying as to the prior assault based on the potential prejudicial effect when compared with the probative value of such evidence. Accordingly, defendant's third assignment of error is overruled, and we need not reach defendant's remaining assignment of error.

No Error.

Judges HUNTER and TYSON concur.

RICHARD HENRY CAPPS, PLAINTIFF v. DANIELE ELIZABETH VIRREY, JERRY NEIL LINKER AND NATIONWIDE MUTUAL INSURANCE COMPANY, DEFENDANTS

No. COA06-655

(Filed 19 June 2007)

1. Appeal and Error— appealability—order denying arbitration—substantial right

An order denying arbitration is interlocutory but appealable because it involves a substantial right which may be lost by delay.

2. Arbitration and Mediation— arbitration—contractual right—waiver

Arbitration is a contractual right which may be waived by the conduct of the party seeking enforcement.

3. Arbitration and Mediation— arbitration—waiver—requests for discovery

Plaintiff waived his right to compel arbitration (where the agreement was entered into before 1 January 2004 and the Uniform Arbitration Act applied) by making discovery requests which exceeded the scope of the Act. Parties agree to arbitrate to avoid the costs and delays associated with litigation, specifically discovery.

4. Arbitration and Mediation— waiver—appearance at deposition

Plaintiff did not waive his right to arbitration by participating in a deposition where the deposition was of plaintiff, was noticed by his insurer, and the terms of the policy required plaintiff to submit to examinations under oath.

Appeal by Plaintiff from order entered 14 February 2006 by Judge Richard Doughton in Guilford County Superior Court. Heard in the Court of Appeals 10 January 2007.

Lewis & Daggett Attorneys at Law, P.A., by Marc P. Madonia, for Plaintiff-Appellant.

Teague, Rotenstreich & Stanaland LLP, by Paul A. Daniels, for Defendant-Appellee Nationwide Mutual Insurance Company.

STEPHENS, Judge.

I. FACTUAL AND PROCEDURAL BACKGROUND

By a complaint filed 2 August 2004, Plaintiff alleged that he suffered "severe and permanent injuries to his body" when, on 11 April 2002, a van owned by Defendant Linker ("Linker") and being driven by Defendant Virrey ("Virrey") failed to stop at a red light, striking a car operated by Julia Macleod Walker ("Walker") and causing Walker's car to collide with the car Plaintiff was operating.[1] Plaintiff alleged further that Virrey's negligent operation of the van was the proximate cause of the collision and of Plaintiff's injuries. Plaintiff sought compensatory damages from Virrey and Linker, and, to the extent that Virrey and Linker could not compensate Plaintiff for his injuries, he sought compensation from Defendant Nationwide Mutual Insurance Company ("Nationwide") pursuant to the uninsured motorist ("UM") coverage Nationwide provided him. On the same day that Plaintiff filed his complaint, he served requests for admissions on Virrey, Linker, and Nationwide.

On 9 August 2004, Plaintiff served his first set of interrogatories and requests for production of documents on Virrey, Linker, and Nationwide. Nationwide filed its answer to Plaintiff's complaint on 25 October 2004, by which it admitted that "certain acts" of Virrey proximately caused the accident, but denied the injuries alleged and damages sought by Plaintiff. On 25 January and 15 December 2005, Plaintiff served on Nationwide his second and third requests for production of documents. On 11 January 2006, Nationwide responded to Plaintiff's third request for production of documents and provided to Plaintiff a "full and complete copy of the automobile insurance policy

1. Plaintiff initially filed an insurance claim with North Carolina Farm Bureau Insurance Company ("Farm Bureau"), the company that reportedly provided automobile insurance for Linker. By letter dated 6 May 2002, Farm Bureau informed Plaintiff that it did not provide coverage for Linker's automobile, and thus, would not compensate Plaintiff for his injuries.

written by [Nationwide] providing uninsured motorist coverage for [Plaintiff], in effect as of April 11, 2002."

On 22 November 2005, Plaintiff and Nationwide participated in mediation regarding the extent of Nationwide's liability, but reached an impasse after only two hours.[2] By letter dated 9 December 2005, Plaintiff demanded "arbitration in accordance with the terms of Nationwide's policy" to settle the parties' dispute. Nationwide's attorney rejected Plaintiff's demand. On 17 January 2006, Plaintiff filed a motion to compel arbitration. On 14 February 2006, the Honorable Richard Doughton denied Plaintiff's motion. Plaintiff appeals.

II. INTERLOCUTORY NATURE OF APPEAL

[1] As a preliminary matter, we note that Judge Doughton's order denying Plaintiff's motion to compel arbitration is interlocutory "because it does not determine all of the issues between the parties and directs some further proceeding preliminary to a final judgment." *See Martin v. Vance*, 133 N.C. App. 116, 119, 514 S.E.2d 306, 308 (1999) (citing *Futrelle v. Duke Univ.*, 127 N.C. App. 244, 488 S.E.2d 635, *disc. review denied*, 347 N.C. 398, 494 S.E.2d 412 (1997)). However, this Court has previously determined that an appeal from an order denying arbitration, "although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Prime South Homes, Inc. v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991) (citations omitted). Accordingly, we reach the merits of this appeal.

III. STANDARD OF REVIEW

[2] Plaintiff brings forward two arguments on appeal. Specifically, Plaintiff contends that the trial court erred by concluding as a matter of law that Plaintiff waived his right to arbitration (1) by imposing substantial litigation costs on Nationwide and (2) by participating in discovery not available during arbitration.

Arbitration is a contractual right, and therefore, the right to arbitration may be waived by the conduct of the party seeking to enforce its right. *Miller Bldg. Corp. v. Coastline Assoc. Ltd. Partnership*, 105 N.C. App. 58, 411 S.E.2d 420 (1992). "Due to 'strong public policy in North Carolina favoring arbitration,' courts 'must closely scrutinize any allegation of waiver' of the right to arbitration." *O'Neal Constr.*,

2. Prior to filing his complaint, Plaintiff and Nationwide attempted to negotiate a settlement of their dispute. However, after a year of investigation and negotiation, the parties failed to reach a settlement.

Inc. v. Leonard S. Gibbs Grading, Inc., 121 N.C. App. 577, 580, 468 S.E.2d 248, 250 (1996) (quoting *Cyclone Roofing Co. v. David M. LaFave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984) (citations omitted)). Therefore, doubts over whether a certain issue is appropriate for arbitration should be resolved in a manner which favors arbitration. *Smith v. Young Moving & Storage, Inc.*, 141 N.C. App. 469, 540 S.E.2d 383 (2000), *aff'd per curiam*, 353 N.C. 521, 546 S.E.2d 87 (2001). This is true " 'whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.' " *Cyclone Roofing*, 312 N.C. at 229, 321 S.E.2d at 876 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 785 (1983)).

In order to defeat an attempt to compel arbitration, the opposing party must demonstrate prejudice.

> Our Supreme Court has described the type of prejudice [a party] must demonstrate in order to prevail. "A party may be prejudiced by his adversary's delay in seeking arbitration if (1) it is forced to bear the expense of a long trial, (2) it loses helpful evidence, (3) it takes steps in litigation to its detriment or expends significant amounts of money on the litigation, or (4) its opponent makes use of judicial discovery procedures not available in arbitration."

Smith, 141 N.C. App. at 472-73, 540 S.E.2d at 386 (quoting *Servomation Corp. v. Hickory Constr. Co.*, 316 N.C. 543, 544, 342 S.E.2d 853, 854 (1986)).

> Waiver of a contractual right to arbitration is a question of fact. In this regard, findings of fact, when supported by any evidence, are conclusive on appeal. Conclusions of law, even if stated as factual conclusions, are reviewable. Nevertheless, when there is evidence in the record which supports the trial court's findings of fact, and those findings support its conclusions of law that a party has waived its right to compel arbitration, the decision must be affirmed.

Moose v. Versailles Condo. Ass'n, 171 N.C. App. 377, 382, 614 S.E.2d 418, 422 (2005) (internal quotations and citations omitted).

Because we agree with the trial court that Plaintiff waived his right to arbitration by participating in discovery not available during arbitration, we affirm the order of the trial court.

IV. QUESTIONS PRESENTED

[3] Plaintiff argues the trial court erred in denying his motion to compel on the ground that Plaintiff waived his right to arbitration by engaging in discovery unavailable during arbitration.[3] Specifically, Plaintiff contends that the discovery procedures he utilized "were contemplated by and incorporated into the arbitration agreement between the parties." We disagree.

> Nationwide's policy states:
>
> Unless the insured and we agree otherwise, arbitration will take place in the county and state in which the insured lives. *Arbitration will be subject to the usual rules of procedure and evidence in such county and state.* The arbitrators will resolve the issues. A written decision on which two arbitrators agree will be binding on the insured and us.

(Emphasis added).

Prior to 1 January 2004, the Uniform Arbitration Act applied to all agreements to arbitrate unless (1) the arbitration agreement stipulated that the Uniform Arbitration Act would not apply or (2) the arbitration agreement was between employers and employees, or between their respective representatives, although employers and employees, or their representatives, may stipulate that the Act would apply.[4] N.C. Gen. Stat. § 1-567.2 (2001). In this case, the arbitration agreement was entered into before 1 January 2004; therefore, the Uniform Arbitration Act applies. *See Register v. White*, 358 N.C. 691, 599 S.E.2d 549 (2004) (recognizing that because the Uniform Arbitration Act was in effect at the time the parties entered into the contract, it was applicable to the case).

In *Palmer v. Duke Power Co.*, 129 N.C. App. 488, 491, 499 S.E.2d 801, 803 (1998), this Court recognized that "the North Carolina Rules of Civil Procedure do not apply to arbitrations, unless incorporated

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3. In its brief to this Court, Nationwide argues that "Plaintiff's argument 2B" should be dismissed, pursuant to Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, for Plaintiff's failure to "cite any authority to support his argument." After reviewing Plaintiff's brief, we conclude that since there are sufficient "citations of the authorities" upon which Plaintiff relies in previous sections of Plaintiff's second argument, the brief adequately complies with Rule 28(b)(6). Accordingly, Defendant's argument is overruled.

4. The Uniform Arbitration Act was repealed effective 1 January 2004, and the Revised Uniform Arbitration Act was enacted. N.C. Gen. Stat. §§ 1-567.1 through 1-567.20; N.C. Gen. Stat. §§ 1-569.1 through 1-569.31.

into the arbitration agreement." The unambiguous language in the arbitration agreement at issue here states that "[a]rbitration will be subject to the usual rules of procedure and evidence" in the county and state where the insured lives and where the arbitration will take place. This language clearly refers to the rules and procedures set forth in the Uniform Arbitration Act, not the "usual rules" of civil procedure and evidence. The Uniform Arbitration Act contains its own rules for "discovery." N.C. Gen. Stat. § 1-567.8 (2001). This section provides binding rules and procedure for witnesses, subpoenas, and depositions in arbitration proceedings. *Id.* Although there is a "broad right to discovery" under the Rules of Civil Procedure, discovery in arbitration proceedings is "at the discretion of the arbitrator[.]" *Prime South Homes*, 102 N.C. App. at 260, 401 S.E.2d at 826 (citation omitted).

In his order denying Plaintiff's motion to compel arbitration, Judge Doughton found, *inter alia*, that Plaintiff served on Nationwide a set of interrogatories, a request for admissions, and three requests for production of documents. In his request for admissions, Plaintiff prompted Nationwide to admit certain facts regarding the automobile accident, to admit that the accident proximately caused Plaintiff's injuries, and to admit that Plaintiff was entitled to compensation in excess of $10,000.00. Additionally, in his interrogatories and requests for production of documents, Plaintiff requested, *inter alia*, information and documents regarding those with knowledge of the accident, photographic or video surveillance made of Plaintiff since the accident, all written and recorded statements obtained by Nationwide regarding the accident, and all reports generated as a result of the accident.

Arbitration is a process to privately adjudicate a final and binding settlement of disputed matters quickly and efficiently, without the costs and delays inherent in litigation. *WMS, Inc. v. Weaver*, 166 N.C. App. 352, 602 S.E.2d 706, *disc. review denied*, 359 N.C. 197, 608 S.E.2d 330 (2004). Parties agree to arbitrate in order to avoid the costs and delays associated with litigation, specifically the costs and delays inherently incurred in civil discovery. Applying the Rules of Civil Procedure and Evidence to arbitration negates the very purpose for agreeing to arbitrate. The procedural and evidentiary rules governing judicial proceedings do not apply to arbitrations absent plain and unambiguous language in the arbitration agreement that those rules apply. *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E.2d 793 (1982); *Pinnacle Group, Inc. v. Shrader*, 105 N.C. App. 168, 412

S.E.2d 117 (1992). It is clear that Plaintiff's discovery requests exceeded the scope allowed by the Uniform Arbitration Act. Plaintiff thereby waived his right to compel arbitration.

[4] In further support of his determination that Plaintiff had waived his right to arbitration, Judge Doughton found that "on or about January 7, 2005, without objection, the Plaintiff appeared for deposition noticed by Defendant Nationwide[.]" We do not agree with Nationwide's position that Plaintiff waived his right to arbitration by participating in this deposition. The deposition was of Plaintiff and was noticed by Nationwide. Under the terms of Plaintiff's insurance policy, he was required to "[s]ubmit as often as [Nationwide] reasonably require[d] to examinations under oath and subscribe the same." Had Plaintiff not participated in his deposition, Nationwide could have considered Plaintiff in breach of the contract and not provided coverage for Plaintiff's injuries. Therefore, Plaintiff was required to participate in this deposition, and his appearance for such deposition, in and of itself, is insufficient to constitute a waiver of his arbitration rights.

In sum, we hold that Judge Doughton did not err in concluding that Plaintiff waived his contractual right to arbitration by participating in judicial discovery not available during arbitration. Accordingly, Judge Doughton's order is affirmed. Because we hold that this conclusion is sufficient to affirm the trial court's order, we need not address Plaintiff's argument regarding litigation costs or Nationwide's cross-assignment of error.

For the reasons stated, the order of the trial court denying Plaintiff's motion to compel arbitration is affirmed.

AFFIRMED.

Judges TYSON and STROUD concur.

SANJAY LULLA, PLAINTIFF-APPELLEE v. EFFECTIVE MINDS, LLC, AND MANIKA GULATI, DEFENDANTS-APPELLANTS

No. COA06-1059

(Filed 19 June 2007)

1. Appeal and Error— appealability—personal jurisdiction

An immediate appeal from an adverse ruling on jurisdiction over the person is interlocutory but expressly provided for by N.C.G.S. § 1-277(b).

2. Jurisdiction— personal—insufficient minimum contacts

The trial court erred by concluding that defendants had the minimum contacts necessary to sustain personal jurisdiction where there was a contract between a resident of North Carolina, defendant Effective Minds, and a company located in North Carolina. The contract provided that it would be governed by Delaware law, and nothing reveals where it was entered into. Nothing specified that work was to be performed in North Carolina, and an affidavit indicated that the personnel involved in the project did not originate in North Carolina and that the work was performed in other states.

Appeal by Defendants from order entered 19 May 2006 by Judge Kenneth C. Titus in Superior Court, Wake County. Heard in the Court of Appeals 15 March 2007.

Adams, Portnoy & Berggren, PLLC, by Douglas E. Portnoy, for Plaintiff-Appellee.

Maupin Taylor, P.A., by Camden R. Webb and Robert W. Shaw, for Defendants-Appellants.

McGEE, Judge.

Sanjay Lulla (Plaintiff) filed a complaint against Effective Minds, LLC (Effective Minds) and Manika Gulati (Gulati) (collectively Defendants) on 7 February 2006, alleging breach of contract and unjust enrichment. Defendants moved to dismiss for lack of personal jurisdiction pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2). The trial court denied the motion on 19 May 2006. Defendants appeal.

In his complaint, Plaintiff alleged the following: Plaintiff was a citizen and resident of Wake County, North Carolina. Effective Minds

was organized in Delaware and had its principal office in New York, New York. Gulati was a resident of Manhattan, New York. Gulati formed Effective Minds on 4 April 2003 and was its sole shareholder, director, and officer. As of February 2004, Gulati was a contract employee at a company called Cadbury Adams. Cadbury Adams informed Gulati of its need for a vendor to "migrate," or relocate, one of its systems from New Jersey to Texas by April 2004 (the migration project).

Plaintiff also alleged that Gulati contacted him on 11 February 2004 and asked Plaintiff to become her partner. Gulati told Plaintiff that, because of Gulati's employment with Cadbury Adams, she could not submit a bid on the migration project. However, she would hire Plaintiff as an employee of Effective Minds so that Effective Minds could bid on the migration project, as well as future projects. As part of this arrangement, Gulati offered to pay Plaintiff fifty percent of any profit realized by Effective Minds. Plaintiff and Gulati agreed that Effective Minds could not perform the work necessary to complete the migration project, so they would need to hire a subcontractor with the necessary skills. Some time later in February 2004, Plaintiff received the specifications of the migration project from Gulati. Plaintiff then located a subcontractor, Strategic Technologies, Inc. (STI) based in Cary, North Carolina to perform the work.

Plaintiff further alleged that on 4 March 2004, while acting as chief executive officer of Effective Minds, he entered into an agreement with STI. In the agreement, STI agreed to perform the migration project, and Effective Minds agreed to pay STI for the work. Effective Minds submitted a bid to Cadbury Adams for the migration project and was awarded the contract. Between 8 March and 16 April 2004, STI, under Plaintiff's supervision, performed the work required to complete the migration project. Cadbury Adams paid Effective Minds more than $400,000.00 and Effective Minds realized a profit of $120,000.00. Plaintiff made demand on Defendants for $60,000.00. Gulati refused to pay Plaintiff. Pursuant to their purported contractual agreement, Plaintiff alleged he was entitled to recover $60,000.00. Plaintiff also alleged an unjust enrichment claim as an alternative claim for relief.

In response, Defendants filed a motion to dismiss the complaint on 27 March 2006 for lack of personal jurisdiction. Defendants asserted that neither Effective Minds nor Gulati had sufficient minimum contacts with the State of North Carolina to form the basis for personal jurisdiction under N.C. Gen. Stat. § 1-75.4, or the due proc-

ess clause of the Fourteenth Amendment to the United States Constitution. In the alternative, Defendants moved to stay the proceedings pursuant to N.C. Gen. Stat. § 1-75.12, contending that North Carolina was not a convenient forum for litigation of the dispute. In support of the motion to dismiss, Defendants attached Gulati's sworn affidavit. In her affidavit, Gulati stated she had no contacts with North Carolina. She also stated that the sole office of Effective Minds was in New York, and that Effective Minds had never conducted business in North Carolina. Further, Gulati denied that Plaintiff was a partner at Effective Minds and denied having any agreement with Plaintiff regarding the migration project. She stated that the migration project was run entirely from the New York office of Effective Minds, with some travel to New Jersey, and some services performed in Texas. Defendants admitted that Effective Minds had transacted some business with STI, but contended that the business was transacted outside of North Carolina, and that the contract workers who performed those services did not originate in North Carolina, nor did they perform the services in North Carolina. Defendants also admitted that Effective Minds transacted some business with Dynpro, a business based in North Carolina, but stated that all such business was transacted outside North Carolina. Defendants denied purposefully directing commercial activities toward North Carolina or engaging in continuous and systematic contacts with North Carolina.

Also attached to Defendants' motion to dismiss was a copy of the subcontractor agreement between Effective Minds and STI. The subcontractor agreement was signed by Plaintiff, as chief executive officer for Effective Minds, and was dated 4 March 2004. The agreement provided that it was to be governed by Delaware law.

In an order filed 19 May 2006, the trial court denied Defendants' motion to dismiss or stay the proceedings. The trial court found as fact that "Plaintiff was solicited to perform services in North Carolina including entering into an agreement with a North Carolina company on behalf of Defendants." The trial court further found that "the contacts that Defendants had with North Carolina [were] sufficient to establish personal jurisdiction over Defendants." The trial court then concluded that Plaintiff had shown that N.C. Gen. Stat. § 1-75.4(5) permitted the exercise of personal jurisdiction over Defendants, and that Plaintiff had shown sufficient minimum contacts to meet the requirements of due process. The trial court also concluded that Wake County was a convenient forum to litigate the dispute. Defendants appeal.

[1] Initially, we note that although this appeal is interlocutory, N.C. Gen. Stat. § 1-277(b) (2005) provides for "immediate appeal from an adverse ruling as to the jurisdiction of the court over the person[.]" Therefore, this appeal is properly before us.

[2] It is well-established that whether a court may exercise personal jurisdiction over a nonresident defendant involves a two-step inquiry. *See, e.g., Corbin Russwin, Inc. v. Alexander's Hdwe., Inc.*, 147 N.C. App. 722, 724, 556 S.E.2d 592, 595 (2001). First, N.C. Gen. Stat. § 1-75.4, North Carolina's "long arm" statute must confer personal jurisdiction over a defendant. *Id.* Second, the exercise of personal jurisdiction over a defendant must not violate the defendant's due process rights. *Id.* "To comport with due process, the defendant must have minimum contacts in the forum state." *Id.* The United States Supreme Court has held that minimum contacts must be such that the exercise of personal jurisdiction "does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L. Ed. 278, 283 (1940)).

> North Carolina's long arm statute
>
> is liberally construed to find personal jurisdiction over nonresident defendants to the full extent allowed by due process. Accordingly, when evaluating the existence of personal jurisdiction pursuant to [this statute], the question of statutory authorization collapses into the question of whether [the defendant] has the minimum contacts with North Carolina necessary to meet the requirements of due process.

Jaeger v. Applied Analytical Indus. Deutschland GMBH, 159 N.C. App. 167, 171, 582 S.E.2d 640, 644 (2003) (internal citations and quotations omitted) (second alteration in original). Our Supreme Court has stated that the "relationship between the defendant and the forum must be 'such that [the nonresident defendant] should reasonably anticipate being haled into court there.' " *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 365-66, 348 S.E.2d 782, 786 (1986) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501 (1980)).

In the present case, the trial court found that "the contacts that Defendants had with North Carolina [were] sufficient to establish personal jurisdiction over Defendants." The trial court concluded that Plaintiff had shown the minimum contacts necessary to meet the

requirements of due process. However, we disagree as to both Effective Minds and Gulati. "While a trial court's findings of fact are binding if supported by sufficient evidence, its conclusions of law are reviewable *de novo* on appeal." *Starco, Inc. v. AMG Bonding and Ins. Services*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996). In a situation where a defendant submits evidence to counter the allegations in a plaintiff's complaint, those allegations can no longer be taken as true and the plaintiff can no longer rest on the allegations. *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615-16, 532 S.E.2d 215, 218, *disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000). In such a case,

> [i]n order to determine whether there is evidence to support an exercise of personal jurisdiction, the [trial] court then considers (1) any allegations in the complaint that are not controverted by the defendant's affidavit and (2) all facts in the affidavit (which are uncontroverted because of the plaintiff's failure to offer evidence).

Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc., 169 N.C. App. 690, 693-94, 611 S.E.2d 179, 182-83 (2005).

To determine whether sufficient minimum contacts exist between a defendant and North Carolina requires individual consideration of the specific facts of each case. *First Union Nat'l Bank of Del. v. Bankers Wholesale Mortgage, LLC*, 153 N.C. App. 248, 253, 570 S.E.2d 217, 221 (2002). In making this determination, several factors should be considered:

> (1) the quantity of contacts between [the] defendants and North Carolina; (2) the nature and quality of such contacts; (3) the source and connection of [the] plaintiff's cause of action to any such contacts; (4) the interest of North Carolina in having this case tried here; and (5) convenience to the parties.

Id. Also relevant is "(1) whether [the] defendants purposefully availed themselves of the privilege of conducting activities in North Carolina, (2) whether [the] defendants could reasonably anticipate being brought into court in North Carolina, and (3) the existence of any choice-of-law provision contained in the parties' agreement." *Id.*

"[A] single contract can provide the basis for the exercise of jurisdiction over a nonresident defendant[.]" *Globe, Inc. v. Spellman*, 45 N.C. App. 618, 624, 263 S.E.2d 859, 863, *disc. review denied*, 300 N.C.

373, 267 S.E.2d 677 (1980). "The mere act, however, of entering into a contract with a resident of a forum state will not provide sufficient minimum contacts with that forum." *Tutterrow v. Leach*, 107 N.C. App. 703, 708, 421 S.E.2d 816, 820 (1992). Nonresident defendants must engage in acts by which they "purposefully avail[] [themselves] of the privilege of conducting activities within the forum State" to support a finding of minimum contacts. *Globe*, 45 N.C. App. at 624, 263 S.E.2d at 863. In *Globe*, we affirmed the trial court's conclusion that an exercise of personal jurisdiction would violate due process. We noted

> that the contract was entered into outside of North Carolina; that the contract [was] governed by the law of another state; that there [was] no provision in the contract requiring [the] defendant to perform services within North Carolina; that [the] defendant [had] performed all services under the contract outside of North Carolina; and that for the life of the contract [the] defendant [had] not been in [North Carolina] for any purpose.

Id. at 624-25, 263 S.E.2d at 863. Our Court concluded that the defendant's connection to North Carolina was "far too attenuated, under the standards implicit in the Due Process Clause of the Constitution, to justify imposing upon [the defendant] the 'burden and inconvenience' of defense in North Carolina." *Id.* at 625, 263 S.E.2d at 864 (quoting *Kulko v. California Superior Court*, 436 U.S. 84, 91, 56 L. Ed. 2d 132, 141, *reh'g denied*, 438 U.S. 908, 57 L. Ed. 2d 1150 (1978)).

Applying these principles to the present case, we conclude that finding personal jurisdiction as to either Defendant would violate due process. Although the document attached to Defendants' motion to dismiss appears to reflect an agreement between STI, a resident of North Carolina, and Effective Minds, this alone will not necessarily support a finding that Effective Minds or Gulati had minimum contacts with North Carolina. *See Tutterrow*, 107 N.C. App. at 708, 263 S.E.2d at 820. Further, the contract provided that it would be governed by Delaware law. The contract does not reveal where it was entered into nor does any other evidence in the record. Nothing in the contract specified that any work performed under the contract was to be performed in North Carolina. In fact, according to Gulati's affidavit, the STI personnel involved in the project did not originate from North Carolina and the work performed was completed in New Jersey and Texas, not in North Carolina. Gulati's affidavit also stated she had never been to North Carolina. Therefore, as in *Globe*, we cannot con-

clude that Effective Minds had the requisite contacts with North Carolina to support the exercise of personal jurisdiction over it.

We come to the same conclusion with regard to Gulati. The record is devoid of any action taken by Gulati in her individual capacity which would permit our courts to exercise personal jurisdiction over her. A "plaintiff may not assert [personal] jurisdiction over a corporate agent without some affirmative act committed in [the corporate agent's] individual official capacity." *Godwin v. Walls*, 118 N.C. App. 341, 348, 455 S.E.2d 473, 479 (1995). Indeed, in his brief, Plaintiff does not make any argument as to Gulati in her individual capacity.

Based on the foregoing, we conclude the trial court erred by concluding that Defendants had the minimum contacts necessary to sustain the exercise of personal jurisdiction over them. We therefore reverse the trial court's order and remand for entry of an order dismissing Plaintiff's complaint. As a result of our disposition of the personal jurisdiction issue, we need not address Defendants' remaining assignments of error.

Reversed and remanded.

Judges ELMORE and STEPHENS concur.

STATE OF NORTH CAROLINA v. WILLIAM LEWIS WALL

No. COA06-1011

(Filed 19 June 2007)

Constitutional Law— prior waiver of counsel—failure to comply with requirements—defendant's assertion insufficient standing alone

Defendant's assertion that the trial court did not comply with the requirements of N.C.G.S. § 15A-1242 in executing defendant's waivers of counsel was not sufficient to rebut the presumption of validity of prior waivers where the assertion stood alone.

Appeal by defendant from judgments entered 15 March 2006 by Judge Kimberly S. Taylor in Richmond County Superior Court. Heard in the Court of Appeals 21 May 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Sharon Patrick-Wilson, for the State.

Susan J. Hall for defendant-appellant.

STEELMAN, Judge.

When the defendant's own assertion is the sole evidence of record that the trial court did not comply with the requirements of N.C. Gen. Stat. § 15A-1242 in executing defendant's waivers of counsel, this standing alone is insufficient to rebut the presumption of validity of prior waivers under *State v. Kinlock*, 152 N.C. App. 84, 566 S.E.2d 738 (2002).

William Lewis Wall ("defendant") was charged with misdemeanor disorderly conduct and communicating threats on 4 March 2005. Defendant executed a written waiver of counsel on 24 March 2005, before District Court Judge Joseph Williams, and waived his right to assigned counsel. On 9 June 2005, Attorney Eddgett-Meacham made a limited appearance in district court and defendant was found guilty on both counts. The trial court sentenced defendant to thirty days, suspended the sentence, and placed defendant on unsupervised probation for twenty-four months. Defendant appealed to the superior court for a trial *de novo*.

On 13 February 2006, defendant executed a second written waiver form, before Superior Court Judge Mark A. Klass, and waived his "right to all assistance of counsel which includes my right to assigned counsel[.]" Defendant's case came on before Judge Kimberly Taylor on 13 March 2006. After a colloquy, defendant proceeded to trial *pro se*. A jury found defendant guilty of disorderly conduct and communicating threats. Judge Taylor sentenced defendant to 120 days in the Department of Correction for the conviction of communicating threats. For the disorderly conduct conviction, Judge Taylor sentenced defendant to sixty days at the expiration of the communicating threat sentence. Both sentences were suspended and defendant was placed on supervised probation. Defendant gave oral notice of appeal, and then requested that his sentences be activated. Judge Taylor held that the matter would be held open until the next day.

Defendant was brought back before Judge Taylor, who asked defendant whether he wanted to appeal his convictions, given his request that the sentences be activated. Defendant informed the trial court that he wanted to appeal his case and that he wanted an attorney for his appeal. Defendant then stated that neither Judge Taylor

nor Judge Klass informed him of the "possible jail sentence . . . the charges would carry." Defendant appeals.

In defendant's sole argument on appeal, he contends the trial court erred in allowing him to represent himself without establishing that his waiver of counsel was knowing, voluntary, and intelligent as required by N.C. Gen. Stat. § 15A-1242. Defendant specifically argues that the trial court did not make an inquiry to satisfy itself that defendant comprehended "the range of permissible punishments" as required by subsection (3).

N.C. Gen. Stat. § 15A-1242 provides:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2005).

"The provisions of N.C. Gen. Stat. § 15A-1242 are mandatory where the defendant requests to proceed *pro se.* The execution of a written waiver is no substitute for compliance by the trial court with the statute." *State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002) (citations omitted). When a claim is made relating to the adequacy of the foregoing statutory inquiry, "the critical issue is whether the statutorily required information has been communicated in such a manner that defendant's decision to represent himself is knowing and voluntary." *State v. Carter*, 338 N.C. 569, 583, 451 S.E.2d 157, 164 (1994). The inquiry detailed in N.C. Gen. Stat. § 15A-1242 has been deemed sufficient to meet the constitutional standards in determining "whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel." *State v. Thomas*, 331 N.C. 671, 674, 417 S.E.2d 473, 476 (1992).

Where the inquiry required by N.C. Gen. Stat. § 15A-1242 has been made during a preliminary proceeding by a different judge, it is not

necessary for the trial judge to repeat the statutory inquiry. *Kinlock*, 152 N.C. App. at 89, 566 S.E.2d at 741 (citations omitted). "A thorough inquiry into the three substantive elements of the statute, conducted at a preliminary stage of a proceeding, meets the requirements of N.C.G.S. § 15A-1242 even if it is conducted by a judge other than the judge who presides at the subsequent trial." *Id.* Furthermore, there is a presumption of regularity accorded the official acts of public officers, such that "[w]hen a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, unless the rest of the record indicates otherwise." *Id.*, 152 N.C. App. at 89-90, 566 S.E.2d at 741 (citations and quotations omitted).

Following his waiver of counsel and conviction in district court, defendant appealed to the superior court, where he again executed a waiver of all counsel. The written waiver contained a certification by Judge Klass and an acknowledgment by defendant, that he:

> [was] fully informed in open court of the charges against [him], the nature of and the statutory punishment for each charge, and the nature of the proceedings against [him] and [his] right to have counsel assigned by the court and [his] right to have the assistance of counsel to represent [him] in this action; that [he] comprehend[ed] the nature of the charges and proceedings and the range of punishments; that [he] understood and appreciated the consequences of [his] decision and that [he] . . . voluntarily, knowingly and intelligently elected in open court to be tried . . . without the assistance of counsel[.]

On 13 March 2006, the cases were called for trial before Judge Taylor, who had the following discussion with defendant about representation:

> THE COURT: I'll note for the record that Mr. Wall is pleading not guilty. I assume that's correct, Mr. Wall?
>
> THE DEFENDANT: That's correct.
>
> THE COURT: He had been previously advised about his rights to counsel, and apparently has signed a waiver of assistance of all counsel on February 13 of 2006 before Judge Mark Klass. That continues to be your wish, Mr. Wall, that you represent yourself?
>
> THE DEFENDANT: I'd rather have—Excuse my voice, Your Honor. My voice is kind of gone. I'd rather have an attorney to

represent me, but there's no attorney here that would represent me, that I would like to have represent me. They don't represent me to the full of their abilities. So I would like nothing more than to have an attorney to represent me in my case—but represent me. That's what I wanted. And I want—You know, that's what I want. But I can't get that. That's the reason why my not having—me representing myself. That is the full reason as to that. I had an attorney on a case—on this same case. And he didn't represent me. Me and him was going back and forth, you know, during the duration of this case, you know. So I just ended up telling the Judge—you know, I had to release him because he wasn't representing me. He wasn't letting me know what was going on, he wasn't telling me nothing. He wasn't, you know, letting me know what's—He wasn't even telling me nothing about nothing. I didn't know nothing about nothing until the day of court, date of trial. I didn't know nothing. And now—

THE COURT: Let me stop you for a minute, Mr. Wall. All I really wanted to talk about right now is your right to counsel. You have previously come into court back in February and told the Judge then that you wanted to represent yourself; is that correct?

THE DEFENDANT: That's correct.

THE COURT: All right. And though you say that you want representation of counsel, you said that you don't feel any of the attorneys would represent you adequately?

THE DEFENDANT: Yes, ma'am.

THE COURT: So today you still want to represent yourself; is that correct?

THE DEFENDANT: In light of what I just said, yes, ma'am.

THE COURT: All right, sir. I just wanted to make sure that was still your position in the case. I would note for the record that Mr. Wall is present in court, and he has confirmed that he wishes to represent himself in these matters.

Here, the record indicates that defendant executed written waivers of counsel on 13 February 2006 and on 24 March 2005. At trial, Judge Taylor questioned the defendant about whether he still wished to represent himself. This inquiry was not intended to be a full counsel inquiry as provided in N.C. Gen. Stat. § 15A-1242, but rather

to confirm defendant's prior waiver of counsel to make sure defendant had not changed his mind about wanting counsel. The above-cited colloquy between Judge Taylor and defendant in no way invalidated defendant's prior waiver of counsel on 24 March 2005 and 13 February 2006. The result of the colloquy was that defendant confirmed to the court that he wished to proceed *pro se* in these cases.

The record on appeal in this matter contains no transcript of the proceedings of the earlier two waivers. The only evidence before this Court that a thorough and proper counsel inquiry was made is defendant's statement in the record, following his conviction, that Judge Taylor and Judge Klass failed to advise him of the "possible jail sentence . . . the charges would carry." Defendant's statement in no manner challenges the validity of his waiver of counsel before Judge Williams. We hold that defendant's assertion alone is insufficient to rebut the presumption of validity of the waivers under *Kinlock*, and that defendant's waivers of counsel before Judges Klass and Williams were knowing, intelligent and voluntary.

AFFIRMED.

Chief Judge MARTIN and Judge STEPHENS concur.

IVAN HAYES PLAINTIFF v. RANDY ALAN PETERS, M.D., SALEM GASTROENTEROLOGY ASSOCIATES, P.A., AND FORSYTH MEMORIAL HOSPITAL, INC., DEFENDANT

No. COA06-1157

(Filed 19 June 2007)

1. Medical Malpractice— stroke during surgery—res ipsa loquitur—12(b)(6) dismissal

The trial court did not err by granting defendants' motions to dismiss a medical malpractice action under N.C.G.S. § 1A-1, Rule 12(b)(6) because plaintiff relied on res ipsa loquitur to support his claim that his stroke during a procedure was the result of negligence. The average juror would not be able to infer negligence based on common knowledge or experience, and air emboli are not a foreign object or injury outside the scope of the surgical field.

2. Medical Malpractice— action based on res ipsa loquitur— Rule 9(i) certification—not required

The certification requirements of N.C.G.S. § 1A-1, Rule 9(j) were not implicated in a medical malpractice case where plaintiff asserted only a res ipsa loquitur claim. The constitutionality of Rule 9(j) was not properly before the court in this case.

Appeal by plaintiff from judgment entered 12 May 2006 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 29 March 2007.

Hatfield, Mountcastle, Deal, Van Zandt & Mann, L.L.P., by John P. Van Zandt, III, and Marc Hunter Eppley, for plaintiff-appellant.

Wilson & Coffey, L.L.P., by Linda L. Helms, for defendant-appellees Randy Alan Peters, M.D., and Salem Gastroenterology Associates, P.A.

Horton and Gsteiger, P.L.L.C., by Elizabeth Horton, for defendant-appellee Forsyth Memorial Hospital, Inc.

STEELMAN, Judge.

Plaintiff's complaint did not sufficiently state a claim for medical malpractice under the common law doctrine of *res ipsa loquitur*, thus the trial court properly dismissed it pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

In January of 2004, Ivan Hayes ("plaintiff") reported difficulty swallowing to his primary care physician. Plaintiff was referred to Dr. Randy Alan Peters ("Dr. Peters"), a specialist in Gastroenterology. On 23 January 2004, plaintiff was placed under general anesthesia for an esophagastroduodenoscopy ("procedure") ordered by Dr. Peters. About twenty minutes into the procedure, plaintiff became unresponsive and emergency procedures were implemented. An emergency CT scan revealed air emboli in plaintiff's central nervous system. A right hemispheric stroke resulted, leaving plaintiff physically and mentally debilitated.

On 12 December 2005, plaintiff filed a complaint for medical malpractice under the common law doctrine of *res ipsa loquitur* against defendants Dr. Peters, Salem Gastroenterology Associates, P.A., and Forsyth Memorial Hospital, Inc. On 24 January 2005, an amended

complaint was filed to correct the name of the hospital defendant. On 28 February 2006, defendant Forsyth Memorial Hospital, Inc., moved to dismiss plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rules 9(j) & 12(b)(6). On 15 March 2006, defendants Dr. Peters and Salem Gastroenterology Associates, P.A., also moved to dismiss plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rules 9(j) & 12(b)(6). On 17 April 2006, Judge Spivey heard the motions to dismiss. On 11 May 2006, Judge Spivey granted each of the motions to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Plaintiff appeals.

[1] In his first and second arguments, plaintiff contends that the trial court erroneously granted defendants' motions to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) because the complaint properly alleged a claim for medical malpractice under the common law doctrine of *res ipsa loquitur*. We disagree.

The grant of a motion to dismiss is reviewed *de novo* on appeal. *Lea v. Grier*, 156 N.C. App. 503, 507, 577 S.E.2d 411, 414 (2003). A motion to dismiss based on N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) should be granted when the plaintiff has failed "to state a claim upon which relief can be granted." N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2004). "[D]espite the liberal nature of the concept of notice pleading, a complaint must nonetheless state enough to give the substantive elements of at least some legally recognized claim or it is subject to dismissal under Rule 12(b)(6)." *Stanback v. Stanback*, 297 N.C. 181, 204, 254 S.E.2d 611, 626 (1979) (citing *Sutton v. Duke*, 277 N.C. 94, 104, 176 S.E.2d 161, 167 (1970)).

The common law doctrine of *res ipsa loquitur* has been described by this Court:

> *Res ipsa loquitur* is a doctrine addressed to those situations where the facts or circumstances accompanying an injury by their very nature raise a presumption of negligence on the part of defendant. It is applicable when no proof of the cause of an injury is available, the instrument involved in the injury is in the exclusive control of defendant, and the injury is of a type that would not normally occur in the absence of negligence.

Bowlin v. Duke University, 108 N.C. App. 145, 149, 423 S.E.2d 320, 322 (1992). In order for the doctrine to apply, an average juror must be able to infer, through his common knowledge and experience and without the assistance of expert testimony, whether negligence

occurred. *Diehl v. Koffer*, 140 N.C. App. 375, 378-79, 536 S.E.2d 359, 362 (2000).

Res ipsa loquitur has been limited in medical malpractice cases because most medical treatment involves inherent risk and is of a scientific nature. *Schaffner v. Cumberland County Hospital System, Inc.*, 77 N.C. App. 689, 692, 336 S.E.2d 116, 118 (1985). This Court has encouraged "trial courts to remain vigilant and cautious about providing *res ipsa loquitur* as an option for liability in medical malpractice cases other than in those cases where it has been expressly approved." *Howie v. Walsh*, 168 N.C. App. 694, 699, 609 S.E.2d 249, 252 (2005); *see, e.g.*, *Grigg v. Lester*, 102 N.C. App. 332, 335, 401 S.E.2d 657, 659 (1991) (noting that the doctrine of *res ipsa loquitur* is approved in two limited circumstances: (1) injuries resulting from surgical instruments or other foreign objects left in the body following surgery; and (2) injuries to a part of the patient's anatomy outside of the surgical field).

In the instant case, plaintiff relies on *res ipsa loquitur* to support his claim that his stroke was the result of negligence on the part of defendants. Taking the allegations in plaintiff's complaint as true, we do not believe the average juror would, based on his common knowledge or experience, be able to infer whether plaintiff's injury resulted from a negligent act. In addition, we do not find air emboli to be either a foreign object or injury outside of the scope of the surgical field to bring plaintiff's claim within the categories this Court has approved for the application of *res ipsa loquitur*. *See Grigg*, at 335, 401 S.E.2d at 659. Expert testimony would be necessary for the average juror to determine whether a stroke was an injury that would not normally occur in the absence of negligence. *Cf. Bowlin*, at 149-50, 423 S.E.2d at 323 (holding that the plaintiff's *res ipsa loquitur* claim failed because a layman would have no basis for concluding that the defendant was negligent in the plaintiff's bone marrow harvest procedure); *Grigg*, at 335, 401 S.E.2d at 659 (finding no error in the trial court's refusal to instruct the jury on *res ipsa loquitur* when the doctrine did not apply to the injury sustained). This assignment of error is without merit.

[2] In his third argument, plaintiff contends that N.C. Gen. Stat. § 1A-1, Rule 9(j), is unconstitutional. We decline to address plaintiff's argument.

"The certification requirements of Rule 9(j) apply only to medical malpractice cases where the plaintiff seeks to prove that the defend-

ant's conduct breached the requisite standard of care—not to *res ipsa loquitur* claims." *Anderson v. Assimos*, 356 N.C. 415, 417, 572 S.E.2d 101, 103 (2002); *see also* N.C.G.S. § 1A-1, Rule 9(j) (2001).

In the instant case, plaintiff asserted only a *res ipsa loquitur* claim in his complaint. As to this claim, the certification requirements of N.C. Gen. Stat. § 1A-1, Rule 9(j) were not implicated. *See Anderson*, at 417, 572 S.E.2d at 103. Thus, the question of the constitutionality of N.C. Gen. Stat. § 1A-1, Rule 9(j) is not properly before us in this case. *See State ex rel. Edmisten v. Fayetteville Street Christian School*, 299 N.C. 351, 359, 261 S.E.2d 908, 914 (1980). Accordingly, we decline to address plaintiff's third argument.

AFFIRMED.

Judges HUNTER and LEVINSON concur.

IN RE: D.K.H., A MINOR JUVENILE

No. COA07-33

(Filed 19 June 2007)

Child Abuse and Neglect— appealability—order ceasing reunification efforts

An appeal from an order in a child neglect case ceasing reunification efforts with the father was dismissed because none of the required circumstances of N.C.G.S. § 7B-1001(a)(5)(a)-(c) were met. However, the dismissal was without prejudice because the father properly preserved his right to appeal at a later time in conjunction with an order terminating parental rights.

Appeal by respondent father from order entered 6 November 2006 by Judge Mitchell L. McLean in Alleghany County District Court. Heard in the Court of Appeals 4 June 2007.

No brief for petitioner-appellee Alleghany County Department of Social Services.

Tracie M. Jordan, guardian ad litem attorney advocate for the minor child.

Richard Croutharmel, attorney for respondent-appellant father.

MARTIN, Chief Judge.

On 24 October 2005, the Alleghany County Department of Social Services ("DSS") filed a juvenile petition alleging that the minor child, D.K.H., was neglected. On 22 November 2005, DSS was granted non-secure custody of D.K.H., and she was placed in foster care. On 23 February 2006, the trial court adjudicated D.K.H. as neglected based on consent of both respondent mother and respondent father. In its adjudication order, the trial court ceased reunification efforts with the mother but continued reunification efforts with the father. The order further provided that D.K.H. could be placed with the father upon his compliance with an "Out-of-Home Agreement" to be prepared by DSS.

Following two subsequent review hearings on 27 June and 22 August 2006, the trial court entered orders maintaining the legal and physical custody of D.K.H. with DSS and otherwise maintaining the status quo of the case. On 3 October 2006, the trial court conducted a permanency planning hearing. Following the hearing, the trial court ceased reunification efforts with the father and ordered DSS to pursue a permanent plan of termination of parental rights and adoption. On 10 October 2006, the father gave notice of his intent to appeal the trial court's order ceasing reunification efforts. The trial court filed its permanency planning order on 6 November 2006, and on 8 November 2006, the father filed a notice of appeal.

In his appeal, the father asserts that the trial court erroneously ceased reunification efforts and failed to provide for further visitation with D.K.H. However, we do not reach the merits of this appeal because an order ceasing reunification efforts is not one of the juvenile matters that may be appealed pursuant to N.C.G.S. § 7B-1001. This statute provides as follows:

> (a) In a juvenile matter under this Subchapter, appeal of a final order of the court in a juvenile matter shall be made directly to the Court of Appeals. Only the following juvenile matters may be appealed:
>
> (1) Any order finding absence of jurisdiction.
>
> (2) Any order, including the involuntary dismissal of a petition, which in effect determines the action and prevents a judgment from which appeal might be taken.
>
> (3) Any initial order of disposition and the adjudication order upon which it is based.

(4) Any order, other than a nonsecure custody order, that changes legal custody of a juvenile.

(5) An order entered under G.S. 7B-507(c) with rights to appeal properly preserved as provided in that subsection, as follows:

a. The Court of Appeals shall review the order to cease reunification together with an appeal of the termination of parental rights order if all of the following apply:

1. A motion or petition to terminate the parent's rights is heard and granted.

2. The order terminating parental rights is appealed in a proper and timely manner.

3. The order to cease reunification is assigned as an error in the record on appeal of the termination of parental rights.

b. A party who is a parent shall have the right to appeal the order if no termination of parental rights petition or motion is filed within 180 days of the order.

c. A party who is a custodian or guardian shall have the right to immediately appeal the order.

(6) Any order that terminates parental rights or denies a petition or motion to terminate parental rights.

N.C. Gen. Stat. § 7B-1001(a) (2005). The amendment to this statute became effective 1 October 2005 for all petitions or actions filed on or after that date. *See S.L.* 2005-398, § 10 (14 September 2005). As the juvenile petition in this case was filed 24 October 2005, the right of appeal is governed by the new version of the statute.

This statute permits an appeal of a trial court's order ceasing reunification in only three circumstances: 1) where appealed in conjunction with a proper appeal of an order terminating parental rights; 2) where a termination petition is not filed within 180 days of the order ceasing reunification; 3) or where the appealing party is a custodian or guardian of the minor child. N.C. Gen. Stat. § 7B-1001(a)(5)(a)-(c) (2005). None of these circumstances exist in the case before us. Consequently, the father's appeal must be dismissed. However, as it appears that the father properly preserved his right to appeal the trial court's order ceasing reunification efforts by giving timely written notice as required by N.C.G.S. § 7B-507(c),

we dismiss without prejudice to the father's right to refile his appeal at a later time as permitted by N.C.G.S. § 7B-1001(a)(5).

Dismissed without prejudice.

Judges HUNTER and BRYANT concur.

SCOTTISH RE LIFE CORPORATION, MOVANT-APPELLEE v. TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY, RESPONDENT-APPELLANT

No. COA06-1278

(Filed 3 July 2007)

1. Appeal and Error— appealability—provisional order pending arbitration—substantial right

A substantial right was affected and an appeal was addressed on its merits where the trial court issued an arbitration order in a dispute between two insurance companies, then issued an order for provisional remedies pending arbitration.

2. Arbitration and Mediation— provisional remedies pending arbitration—not preempted by FAA

Although the contracts between the parties affect interstate commerce and contain mandatory arbitration clauses so that the Federal Arbitration Act (FAA) applies to the dispute between the parties, the FAA did not preempt application by the trial court of the state law provisional remedies of the Revised Uniform Arbitration Act (RUAA) because the provisional remedies of the RUAA do not undermine the objectives of the FAA.

3. Arbitration and Mediation— provisional remedies pending arbitration—not ruling on arbitrable dispute

The trial court's grant of provisional remedies under the RUAA pending arbitration of the contract dispute between a reinsured and the reinsurer's successor was not an improper ruling on the merits of the arbitrable dispute where the court's order stated that it is temporary in nature, modifiable at the arbitrators' discretion, and without prejudice to and has no bearing on the parties' respective positions before the arbitration panel as to provisional relief or the merits.

4. Arbitration and Mediation— provisional remedies pending arbitration—good cause

Good cause existed for the trial court to grant provisional relief pending arbitration of the dispute between a reinsured and the reinsurer's successor based upon the difficulties in finding and convening an appropriate arbitration panel and the danger of dissipation of the assets at stake in the dispute.

Judge WYNN concurring.

Judge GEER concurring in the result.

Appeal by respondent from order entered 31 May 2006 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 April 2007.

Nelson Mullins Riley & Scarborough, LLP, by Joseph W. Eason, Reed J. Hollander, and Fred M. Wood, Jr., for movant-appellee.

Kennedy Covington Lobdell & Hickman, LLP, by Cory Hohnbaum and Amy Pritchard Williams, for respondent-appellant.

Sidley Austin LLP, by William M. Sneed and Sarah H. Newman, for respondent-appellant.

ELMORE, Judge.

Scottish Re Life Corporation (appellee) entered into reinsurance contracts with Annuity and Life Reassurance Ltd. (ALR). The contracts required ALR to maintain significant assets in a trust for appellee's benefit. In 2005, Transamerica Occidental Life Insurance Company (appellant) assumed all of ALR's obligations to appellee by executing a novation agreement. As part of the novation agreement, appellee agreed to release its interest in the trust to appellant. After the release of the funds, appellee discovered that appellant was not licensed or accredited by the State of New York. As this affected appellee's financial status and ability to do business in New York, appellee demanded that appellant provide some form of security that would allow appellee to qualify for reserve credit. Appellant responded that it had not agreed to assume certain liabilities and that in agreeing to the novation agreement it had relied upon representations appellee made regarding billing, which it had subsequently determined were false. Appellant therefore stated that it was entitled to rescind the novation agreement.

Although appellant offered to arbitrate in the event that the parties were unable to come to a satisfactory resolution through less formal means, appellee did not initially institute arbitration proceedings. Instead, appellee filed a motion to compel arbitration on 8 February 2006. It subsequently amended its motion on 15 February 2006, and on 23 February 2006, appellee filed a motion for provisional and/or injunctive relief. The trial court heard both motions on 16 March 2006. The trial court, with the agreement of both parties, issued an order directing arbitration. The trial court then issued an order for provisional remedies, entered 31 May 2006. The order required appellant to either repudiate its claim of rescission or return the assets it had received as part of the novation agreement to a qualifying trust for appellee's benefit. Limits were placed on the withdrawal of those funds, and appellee was required to post a bond of $250,000.00. Moreover, the trial court explicitly stated that its order of provisional relief was "without prejudice to any or all additional provisional remedies, if any, that [the trial court] or the arbitration panel . . . determines is appropriate, and [was] further without prejudice to the authority of that arbitration panel . . . to modify, supplement or vacate the provisional relief ordered . . . ." It is from this order that appellant appeals.[1]

[1] As a preliminary matter, we note that appellee argues strenuously for the dismissal of this case. As this Court has stated, "A preliminary injunction is an interlocutory order. . . . An appeal of an interlocutory order will not lie to an appellate court unless the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Barnes v. St. Rose Church of Christ*, 160 N.C. App. 590, 591, 586 S.E.2d 548, 549-50 (2003) (quotations and citations omitted). Accordingly, to properly hear this appeal, we must find that the relief the trial court granted appellee jeopardizes appellant's substantial rights. "A two-part test has emerged to decide if an immediate appeal of an interlocutory order is warranted: the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." *Id.* at 591-92, 586 S.E.2d at 550 (citations and quotations omitted). Given the large amount of money at issue in this case, the fact that the trial court

1. Both parties accuse the other of arguing the merits of the underlying dispute to the trial court and to this Court. Both parties then proceed to do exactly that. For the purposes of this appeal, the underlying dispute is only marginally relevant. We therefore decline to delve deeper into the facts. Instead, we will focus on the trial court's order for provisional remedies, from which this appeal was taken.

impinged appellant's right to the use and control of those assets, and the unavoidable and lengthy delays, acknowledged by both parties, preceding actual arbitration of the matter, we hold that appellee must be granted its appeal to preserve a substantial right. We therefore address this appeal on its merits while confining our decision to do so to the facts of this particular case.

[2] Appellant first contends that the trial court erred in failing to hold that this dispute is governed by federal and not state law. Appellant argues that because the contracts between the parties affect interstate commerce and contain mandatory arbitration clauses, the dispute is governed by the Federal Arbitration Act (FAA) and not the Revised Uniform Arbitration Act (RUAA). While appellant is correct in its assertion that the FAA applies, it is incorrect in its assumption that the RUAA is therefore entirely preempted. Accordingly, this contention is without merit.

The United States Supreme Court has held that "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 477, 103 L. Ed. 2d 488, 499 (1989) (citation omitted).[2] Because state law is preempted only "to the extent that it actually conflicts with federal law," we must therefore determine whether application of the RUAA "would undermine the goals and policies of the FAA." *Id.* at 477-78, 103 L. Ed. 2d at 499.

"The [FAA] was designed to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate, and place such agreements upon the same footing as other contracts." *Id.* at 474, 103 L. Ed. 2d at 497. The trial court's application of the provisional remedies of the RUAA do not undermine this purpose. To the contrary, the RUAA itself is the successor statute of a legislative attempt "to insure the enforceability of agreements to arbitrate in the face of oftentimes hostile state law." *See* National Conference of Commissioners on Uniform State Law, Uniform Arbitration Act (2000), prefatory note, available at http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm (last visited 10 May 2007). Likewise, the clause under which the trial

2. We note appellant's contention that *Volt* has been limited to its facts. Nevertheless, the basic preemption principles enunciated by the United States Supreme Court in *Volt* remain instructive. Moreover, the "goals and policies of the FAA" remain consistent regardless of whether they are considered in the context of a choice of law provision, as in *Volt*, or in the broader context of the availability of provisional remedies, as in the current case. Although we note that the *Volt* decision dealt specifically with an arbitration provision in which the parties agreed to be bound by state principles, we nevertheless find its reasoning on the preemption issue controlling.

court granted appellee provisional relief "allows courts to grant provisional remedies in certain circumstances *to protect the integrity of the arbitration process.*" *Id.* (emphasis added). Moreover, by its own terms the trial court's order is subject to modification, supplementation, or vacation by the arbitrator. Appellant's contention that the FAA preempts the RUAA in this case is incorrect.

[3] Appellant next argues that the trial court erred by ruling on the merits of the arbitrable dispute. Appellant contends that although appellee's motion for provisional relief was "cast in terms of preserving the status quo pending arbitration," in reality it "sought nothing of the kind." Instead, appellant argues, the motion sought specific performance of a contractual provision. Appellant further accuses appellee of inviting the trial court to "wade into the substantive dispute," and the trial court of "readily accept[ing] the invitation." This argument is unpersuasive. By its plain terms, the trial court's order does not address the merits of the underlying dispute. It instead explicitly states that it is temporary in nature, that it is modifiable at the arbitrators' discretion, and that it "is without prejudice to and has no bearing on, the parties' respective positions before the arbitration panel as to provisional relief or the merits."

[4] Appellant also argues that the trial court erred by granting provisional relief because appellee established none of the required elements for such relief. Throughout its argument, appellant relies extensively and exclusively on federal law.[3] However, as we have noted, the RUAA applies in this case. That statute states:

> Before an arbitrator is appointed and is authorized and able to act, the court, upon motion of a party to an arbitration proceeding and for good cause shown, may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action.

N.C. Gen. Stat. § 1-569.8(a) (2005). Accordingly, so long as appellee showed "good cause," the trial court could order provisional remedies to the same degree possible in a state court action.

In this case, there was good cause shown. At oral arguments, both parties acknowledged the difficulties in finding and convening an appropriate arbitration panel for these types of disputes. Given these

3. Indeed, in over seven pages of text, appellant cites to only one North Carolina case, *Redlee/Scs, Inc. v. Pieper*, 153 N.C. App. 421, 426, 571 S.E.2d 8, 13 (2002), and that only as an example of an employee's improper solicitation claim.

difficulties and the danger of the dissipation of the assets at stake, there was good cause for the trial court to grant provisional relief.

Moreover, the remedy granted would have been available to the trial court were this controversy "the subject of a civil action." As this Court has recently stated,

> [I]n order to justify continuing [an injunction] until the final hearing, ordinarily it must be made to appear (1) that there is probable cause the plaintiff will be able to establish the asserted right, and (2) that there is a reasonable apprehension of irreparable loss unless the temporary order of injunction remains in force, or that in the opinion of the court such injunctive relief appears to be reasonably necessary to protect the plaintiff's rights until the controversy can be determined.

Harris v. Pinewood Dev. Corp., 176 N.C. App. 704, 710, 627 S.E.2d 639, 643-44 (2006) (quoting *Edmonds v. Hall*, 236 N.C. 153, 156, 72 S.E.2d 221, 223 (1952)). Here, were the underlying controversy before the trial court, it is clear that if appellant's claim of rescission were granted the trial court would likewise order restitution. *See Mashburn v. First Investors Corp.*, 111 N.C. App. 398, 402, 432 S.E.2d 869, 871 (1993) (quoting *Brannock v. Fletcher*, 271 N.C. 65, 74, 155 S.E.2d 532, 542 (1967) for the proposition that "[r]escission is not merely a termination of contractual obligation[s, but rather an] abrogation or undoing of it from the beginning.") Appellee would therefore have been entitled to the reestablishment of a trust for its benefit were rescission granted. Moreover, had the trial court not granted its relief, there was a "reasonable apprehension of irreparable loss." If the assets were not held in trust pending resolution of the dispute, there was a danger that rescission would be granted but that the assets would be unavailable for restitution. Accordingly, the trial court appropriately granted the provisional relief as empowered under N.C. Gen. Stat. § 1-569.8(a) (2005).

Furthermore, even if we were persuaded by appellant's demand that this Court apply solely federal law, the outcome would not change. As the Fourth Circuit has stated,

> [W]here a dispute is subject to mandatory arbitration under the Federal Arbitration Act, a district court has the discretion to grant a preliminary injunction to preserve the status quo pending the arbitration of the parties' dispute if the enjoined conduct would render that process a "hollow formality." The arbitration process would be a hollow formality where "the arbitral award

> when rendered could not return the parties substantially to the *status quo ante*."

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley, 756 F.2d 1048, 1053-54 (4th Cir. 1985) (quoting *Lever Brothers Co. v. International Chemical Workers Union, Local 217*, 554 F.2d 115, 123 (4th Cir. 1976)). Here, for the arbitrators' decision to have any weight, it was necessary that the assets at issue be preserved. The relief granted by the trial court ensured that the arbitration panel would be able to act effectively and with all available remedies.

The order of the trial court is therefore affirmed.

Affirmed.

Judge WYNN concurs by separate opinion.

Judge GEER concurs in result only by separate opinion.

WYNN, Judge, concurring.

I concur with the decision to address the merits of this matter. To dismiss this appeal as interlocutory would effectively render this matter moot, since the trial court provided only a provisional remedy until the arbitration panel is convened. As the trial court stated, "[t]his Order and this provisional relief is without prejudice to . . . the authority of that arbitration panel, once appointed and able to act, *to modify, supplement or vacate the provisional relief ordered here by this Court*." (Emphasis added).

GEER, Judge, concurring in the result.

Transamerica Occidental Life Insurance Company ("Transamerica") has appealed an order awarding provisional relief pending the parties' arbitration. *See* N.C. Gen. Stat. § 1-569.8(a) (2005) ("Before an arbitrator is appointed and is authorized and able to act, the court, upon motion of a party to an arbitration proceeding and for good cause shown, may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action."). I note that a "provisional remedy" is:

> A temporary remedy awarded before judgment and pending the action's disposition, such as a temporary restraining order, a pre-

> liminary injunction, a prejudgment receivership, or an attachment. Such a remedy is intended to maintain the status quo by protecting a person's safety or preserving property.

Black's Law Dictionary 1320 (8th ed. 2004).

The order granting a provisional remedy in this case, like any preliminary injunction, is an interlocutory order and, generally, such orders are not entitled to immediate review. After reviewing the parties' arguments and the pertinent case law, I can perceive no basis for treating this appeal any differently than any other appeal from a preliminary injunction. This appeal is simply about a temporary loss of control over money. Because I believe Transamerica has failed to establish a basis for this Court's asserting jurisdiction over this appeal, I would dismiss the appeal. Consequently, I must respectfully concur in the result only.

Our state constitution provides that "[t]he Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe." N.C. Const. art. IV, § 12(2). Thus, in the absence of a statutory right to appeal to this Court, we have no jurisdiction. *See In re Halifax Paper Co.*, 259 N.C. 589, 592, 131 S.E.2d 441, 444 (1963) ("There is no inherent or inalienable right of appeal from an inferior court to a superior court or from a superior court to the [appellate courts].").

Because the arbitration agreement in this case is governed by the Federal Arbitration Act ("FAA"), it is necessary to consider whether North Carolina's law regarding appeals is preempted by the FAA. I have found no case law specifically addressing whether an interlocutory appeal would be permitted *under the FAA* from a decision granting a preliminary injunction, or any other provisional remedy, pending an arbitration.

The FAA allows an appeal from "a final decision with respect to an arbitration that is subject to this title." 9 U.S.C. § 16(a)(3) (2007). In *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89, 148 L. Ed. 2d 373, 382, 121 S. Ct. 513, 521 (2000), the Supreme Court held that an order compelling arbitration and dismissing all other claims before the district court was "final" within the meaning of 9 U.S.C. § 16(a)(3) and, therefore, immediately appealable. This decision could be read as permitting an appeal from an order granting provisional remedies pending arbitration. On the other hand, federal courts entering injunctions pending arbitration, similar to the order entered in this case, have not relied upon 9 U.S.C. § 16(a)(3) for jurisdiction, but

rather have cited 28 U.S.C. § 1292(a)(1) (2007), which provides that federal courts of appeal have jurisdiction over appeals from interlocutory orders granting, continuing, modifying, refusing, or dissolving injunctions and from orders refusing to dissolve or modify injunctions. *See, e.g., Ortho Pharm. Corp. v. Amgen, Inc.*, 887 F.2d 460, 463 n.2 (3d Cir. 1989); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1050 (4th Cir. 1985).

I do not believe, however, that there is any need to resolve the question of the appealability of the order under the FAA, because I would hold that the FAA does not preempt state law governing appeals relating to arbitrations. This view is consistent with the holdings of other jurisdictions.

The Maryland Court of Appeals has addressed this specific issue in the leading case of *Wells v. Chevy Chase Bank, F.S.B.*, 363 Md. 232, 768 A.2d 620 (2001). The Court first noted: "Most state courts . . . hold that their own procedural rules govern appeals, unless those rules undermine the goals and principles of the FAA, and then those courts find that their procedural rules do not impermissibly undermine the objectives of the FAA." *Id.* at 246, 768 S.E.2d at 627. After reviewing the case law from other jurisdictions, the court held that Maryland's "general appeals statute does not focus on, or discriminate against, arbitration. Accordingly, we hold that the Maryland procedural rule, recognizing an order compelling arbitration to be a final and appealable judgment, is not preempted by the FAA." *Id.* at 250, 768 A.2d at 629.

In *Toler's Cove Homeowners Ass'n v. Trident Constr. Co.*, 355 S.C. 605, 586 S.E.2d 581 (2003), the South Carolina Supreme Court similarly concluded that state procedural rules on the appealability of arbitration orders were not preempted by the FAA. The court pointed out that "the FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration"; further "[t]here is no federal policy favoring arbitration under a certain set of procedural rules and the federal policy is simply to ensure the enforceability of private agreements to arbitrate." *Id.* at 611, 586 S.E.2d at 584 (citing *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477, 103 L. Ed. 2d 488, 499, 109 S. Ct. 1248, 1255 (1989)). South Carolina has construed its arbitration code to preclude immediate appeal from any orders not specified in the appeal provisions of that code, including orders compelling arbitration. The South Carolina Supreme Court observed that, by following this appellate rule, "the arbitration agree-

ment is being enforced by the court's order compelling arbitration which coincides with the FAA's policy in favor of arbitration of disputes." *Id.* Accordingly, the court held that South Carolina's procedural rule on appealability of arbitration orders controlled rather than the FAA rule. *Id.*

I would follow the reasoning in *Wells* and *Toler's Cove*. North Carolina's statutes applicable to civil appeals generally do not single out or discriminate against arbitration cases. Further, I do not believe that deferring any appeal of the order at issue in this case until the conclusion of the arbitration proceedings would be inconsistent with the policy of promoting arbitration or would "undercut the enforceability of arbitration agreements." *Southland Corp. v. Keating*, 465 U.S. 1, 16, 79 L. Ed. 2d 1, 15, 104 S. Ct. 852, 861 (1984) (holding that "[i]n creating [in the FAA] a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements").

N.C. Gen. Stat. § 7A-27 (2005) provides an appeal of right to this Court from a "final judgment of a superior court," N.C. Gen. Stat. § 7A-27(b), and from any interlocutory order that:

> (1) Affects a substantial right, or
>
> (2) In effect determines the action and prevents a judgment from which appeal might be taken, or
>
> (3) Discontinues the action, or
>
> (4) Grants or refuses a new trial . . . .

N.C. Gen. Stat. § 7A-27(d). N.C. Gen. Stat. § 1-277(a) (2005) similarly provides for appeal from "every judicial order" that "affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial."

Transamerica first contends that the order below falls under § 7A-27(d)(2) as one that "[i]n effect determines the action and prevents a judgment from which appeal might be taken . . . ." Transamerica's argument rests on a flawed premise: that the North Carolina court proceedings were terminated with the order compelling arbitration and that review of the provisional remedies order will not be available at a later date. According to Transamerica, because the arbitration agreement is governed by the FAA, any action

to confirm, modify, or vacate the ultimate arbitration award would be "an independent action" filed in federal court, and the issues raised by the order currently on appeal could not be asserted.

Transamerica cites 9 U.S.C. §§ 9-11 (2007) as support for its argument that any further review would be in federal court. The United States Supreme Court has, however, confirmed that these statutes are merely "venue provisions," applicable if an action is filed in federal court. *Cortez Byrd Chips Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 195, 146 L. Ed. 2d 171, 176, 120 S. Ct. 1331, 1334 (2000).

The provisions do not vest exclusive jurisdiction in the federal courts over arbitration awards entered under the FAA. As the Supreme Court has also stressed, "[w]hile the Federal Arbitration Act creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal question jurisdiction under 28 USC § 1331 . . . or otherwise." *Southland Corp.*, 465 U.S. at 15 n.9, 79 L. Ed. 2d at 15 n.9, 104 S. Ct. at 861 n.9. Thus, prior to seeking confirmation, modification, or vacation of any arbitration award in federal court, Transamerica would be required to establish a basis for federal jurisdiction, such as diversity. *See Warren Bros. Co. v. Cmty. Bldg. Corp. of Atlanta, Inc.*, 386 F. Supp. 656, 658-59 (M.D.N.C. 1974) ("The Federal Arbitration Act does not provide an independent basis for federal jurisdiction since it does not confer federal question jurisdiction upon federal courts. Therefore, before a federal court can apply the Act, it must already have jurisdiction over the subject matter through another source such as diversity of citizenship or federal question." (internal citations omitted)). Thus, necessarily, "[t]he Federal Arbitration Act clearly vests concurrent subject matter jurisdiction in both the state and federal courts." *Nat'l Home Ins. Co. v. Shangri-La Dev. Co.*, 857 S.W.2d 460, 464 (Mo. Ct. App.), *cert. dismissed*, 510 U.S. 1032, 126 L. Ed. 2d 639, 114 S. Ct. 653 (1993).[4]

In short, the parties can, following the arbitration, proceed in state court with subsequent review in this Court. Indeed, the North

4. Indeed, most federal courts have held that if a defendant fails to remove a motion to compel arbitration to federal court, any removal motion filed following a subsequent state court motion to confirm or vacate the arbitration award is untimely. 14C Charles A. Wright, Arthur R. Miller and Edward H. Cooper, *Federal Practice & Procedure* § 3732, at 347-48 (2007). *See also Williams v. Beyer*, 455 F. Supp. 482, 484-85 (D.N.H. 1978) (holding that when plaintiff filed a petition for arbitration in state court, resulting in order compelling arbitration, defendant's petition for removal to federal court was untimely filed when filed following plaintiff's motion for confirmation of arbitration award).

Carolina appellate courts have specifically held that even after a motion to compel arbitration has been granted, "the judicial doors [remain] ajar" for further proceedings following arbitration. *Henderson v. Herman*, 104 N.C. App. 482, 485, 409 S.E.2d 739, 741 (1991), *disc. review denied*, 330 N.C. 851, 413 S.E.2d 551 (1992). This Court has held that even though the arbitration act "requires that certain disputes be removed from direct judicial supervision, the court that compels arbitration does not lose jurisdiction." *Id.* at 486, 409 S.E.2d at 741. Instead, our arbitration act

> create[s] a process whereby the existence of an agreement to arbitrate requires a court to compel arbitration on one party's motion and then requires the court to step back and take a "hands-off" attitude during the arbitration proceeding. The trial court then reenters the dispute arena to confirm, modify, deny or vacate the arbiter's award. At no time does the trial court lose jurisdiction.

Id. See also Adams v. Nelsen, 313 N.C. 442, 446 n.3, 329 S.E.2d 322, 324 n.3 (1985) (holding that agreement to arbitrate does not cut off a party's access to the courts and that the court that compels arbitration does not lose jurisdiction).

Thus, the trial court in this case maintains jurisdiction over the proceedings even after the arbitration has been concluded. Transamerica's assertion that "[t]here is nothing left to litigate in the Superior Court" is contrary to North Carolina law. Further, Transamerica has cited nothing that would preclude it—if it chose to do so—from also raising the issue of the preliminary injunction upon review of any order addressing the arbitration award, just as any preliminary injunction could be reviewed upon entry of a final judgment.[5]

I would, therefore, hold that Transamerica has failed to establish that it would be unable to obtain review of the preliminary injunction following conclusion of the arbitration proceedings. Transamerica may still, however, be entitled to an immediate appeal if Transamerica demonstrates that the order deprives it of a substan-

5. Transamerica cites *Advest, Inc. v. McCarthy*, 914 F.2d 6 (1st Cir. 1990) as support for its contention that it could not obtain review of the injunction at the completion of this case. *Advest*, however, merely stands for the unremarkable principle that courts have "a very limited power to review arbitration awards." *Id.* at 8. Nothing in *Advest*, which solely concerned a challenge to the arbitrator's actual award, addresses the ability of a court to review a judicial determination entered prior to the arbitration proceedings.

tial right that will be lost without appeal prior to a final judgment on the arbitration award. *Clark v. Craven Reg'l Med. Auth.*, 326 N.C. 15, 23, 387 S.E.2d 168, 173 (1990) (requiring such showing in connection with appeal from preliminary injunction). "Whether a substantial right will be prejudiced by delaying appeal must be determined on a case by case basis." *Collins v. Talley*, 135 N.C. App. 758, 760, 522 S.E.2d 794, 796 (1999). Transamerica bears the burden of establishing the existence of a substantial right. *CB&I Constructors, Inc. v. Town of Wake Forest*, 157 N.C. App. 545, 549, 579 S.E.2d 502, 504 (2003).

The majority opinion points to the amount of money—$30 million—that the order requires to be deposited in a trust. Similarly, Transamerica argues that a substantial right is affected because they cannot use or control this money so long as the order remains in effect. I note that Scottish Re Life Corporation ("Scottish Re") was required to post a $250,000.00 bond to protect Transamerica from any damages resulting from the provisional relief. Transamerica has made no argument that this bond is inadequate.

Further, Transamerica never moved for a stay of the order in the trial court or in this Court, even though the parties all knew that it would take a substantial amount of time to name the arbitrators. This omission runs counter to any contention that Transamerica is so harmed by the order that it affects a substantial right if not reviewed immediately. Significantly, Transamerica may well obtain relief from the arbitrators before any ruling by this Court since, upon the designation of the arbitrators, Transamerica will be free to ask those arbitrators that the order be discontinued.

Finally, if Transamerica obtains an arbitration award that is "substantially favorable" to it, the company will then be entitled to seek recovery on the bond and to recover damages that would not have occurred but for the preliminary injunction. *See Indus. Innovators, Inc. v. Myrick-White, Inc.*, 99 N.C. App. 42, 51, 392 S.E.2d 425, 431, *disc. review denied*, 327 N.C. 483, 397 S.E.2d 219 (1990).[6] Transamerica has made no attempt to explain why that relief is insufficient to protect its interests.

6. In *Industrial Innovators*, the plaintiff obtained an order referring the dispute to arbitration, and a preliminary injunction barring the defendants from disclosing certain information to competitors, conditioned on the posting of a bond. *Id.* at 43-44, 392 S.E.2d at 427. The arbitration award was favorable to the defendants, a superior court judge entered an order confirming that award, and the defendants filed a motion for damages for wrongful injunction, seeking recovery under the plaintiff's bond. Another superior court judge entered an order, from which the plaintiff appealed, awarding the defendants the amount of the plaintiff's bond. *Id.* at 47-48, 392 S.E.2d at 429-30.

Under similar circumstances, this Court has consistently held that the appellant made an insufficient showing of a substantial right. Thus, in *Rivenbark v. Southmark Corp.*, 77 N.C. App. 225, 227, 334 S.E.2d 451, 452 (1985), *disc. review denied*, 315 N.C. 391, 338 S.E.2d 880 (1986), this Court declined to review an order allowing the defendants to collect rent from a disputed piece of property pending the litigation and ordering the plaintiff to pay the sums already collected into court. In *Little v. Stogner*, 140 N.C. App. 380, 383, 536 S.E.2d 334, 336 (2000), *disc. review denied*, 353 N.C. 377, 547 S.E.2d 813 (2001), the defendant challenged the trial court's preliminary injunction barring it from foreclosing on a piece of property. The Court pointed out that the defendant's power to foreclose had merely been delayed until the resolution of the litigation, and the defendant's right was adequately protected by the trial court's requirement that the plaintiffs post a significant bond. *Id.*

Similarly, in *Dixon v. Dixon*, 62 N.C. App. 744, 745, 303 S.E.2d 606, 607 (1983), the defendant appealed from a preliminary injunction requiring the return of certain property and precluding the parties from transferring any other personal property. In holding that the defendant was not entitled to an immediate appeal, the Court noted that the injunction was intended to maintain the status quo and that the defendant had not shown that recourse on the bond posted by the plaintiff as security for the injunction was inadequate. *Id. See also Stancil v. Stancil*, 94 N.C. App. 760, 763-64, 381 S.E.2d 720, 722-23 (1989) (declining to review interlocutory order requiring posting of $150,000.00 bond when "[t]he obvious purpose of the pretrial order was to preserve the status quo in a hotly contested action between two brothers, each of whom accuses the other of converting corporate assets," and when, if the appealing brother ultimately prevailed, bond would be cancelled).

Finally, in *Shuping v. NCNB Nat'l Bank of N.C.*, 93 N.C. App. 338, 377 S.E.2d 802 (1989), the defendant sought to appeal from an injunction barring the bank from disposing of or encumbering shares in a corporation until a final hearing could be had on the complaint. Although the bank argued that a substantial right was affected because it was improperly restrained from disposing of the stock, the Court noted that this argument "begs rather than addresses the appealability question." *Id.* at 340, 377 S.E.2d at 803. The Court observed that the bank's arguments went to the merits of the appeal rather than establishing that a "right which the law regards as substantial will be lost if the order remains in effect until the trial court

determines whether the appellant is legally bound to sell the stock to plaintiff, as he alleges." *Id. See also Barnes v. St. Rose Church of Christ*, 160 N.C. App. 590, 592, 586 S.E.2d 548, 550 (2003) (holding that defendants could not appeal from a preliminary injunction appointing a receiver for the church when defendants failed to show that this order would result in any harm to defendants).

The same is true here. In attempting to distinguish the foregoing cases, Transamerica argues the merits of its contentions regarding the propriety of the trial court's order—i.e., whether it maintains the status quo. Transamerica does not focus on the appealability issue or explain how it will be prejudiced—given the $250,000.00 bond—if required to wait to appeal until after the arbitration is complete. Accordingly, under North Carolina law, I see no basis for concluding that Transamerica has met its burden of demonstrating the existence of a substantial right that will be lost in the absence of immediate review.

In sum, I would hold that North Carolina law regarding the right to appeal is controlling in this case. Further, since I believe that Transamerica has failed to demonstrate an entitlement to an immediate appeal from the order below, I would dismiss the appeal as interlocutory.

STATE OF NORTH CAROLINA v. JAMES ALLEN MEAD

No. COA06-1116

(Filed 3 July 2007)

1. Sentencing— modification—clerk's comment on omission-correction in session, after defendant recalled to courtroom

The trial court did not err by changing defendant's sentences from concurrent to consecutive where the judge did not mention the issue when imposing the sentence, the clerk pointed this out after defendant had left the courtroom, and the judge recalled the defendant and announced the change.

2. Appeal and Error— plain error analysis—not applicable to hearing concerning juror

Plain error review did not apply to a hearing with a juror conducted outside defendant's presence. Plain error analysis applies only to instructions to the jury and to evidentiary matters.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendant from judgments entered 8 March 2006 by Judge James L. Baker, Jr., in Superior Court, Avery County. Heard in the Court of Appeals 8 May 2007.

Attorney General Roy Cooper, by Assistant Attorney General Philip A. Lehman, for the State.

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

WYNN, Judge.

To disturb a sentence imposed by a trial court, a defendant must show an "abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play."[1] Here, Defendant contends the trial court's decision to make his sentences consecutive was based upon the improper comments of the clerk of court. Because the clerk of court merely gave the trial court notice as to an omission in the details of the sentence imposed, we find no prejudicial error.

On 8 March 2006, Defendant James Allen Mead was found guilty and convicted of second-degree rape and second-degree sexual offense. Because Defendant has not challenged the evidence nor sequence of events presented by the State at his trial, we do not recount those facts here, as they are irrelevant to the questions before us.

At the conclusion of all evidence at Defendant's trial, and after the trial court had conducted the jury charge conference, the trial court informed the parties that a juror had "indicate[d] that she feels like that [sic] she had been approached in the case in some inappropriate manner that she believes she needs to bring to [the trial court's] attention." The trial court then offered the parties three possible ways

1. *State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962).

of handling the situation: (1) have the bailiff speak to the juror and report back to the trial court; (2) bring the juror into open court, separate from the other jurors, to speak to the trial court; or (3) bring the juror into chambers with defense counsel, the prosecutor, and a court reporter, and discuss the situation there. The defense counsel and the prosecutor agreed to proceed with the third option.

Thereafter, the judge conducted an inquiry of the juror on the record, with defense counsel and the prosecutor present, but Defendant was not in chambers. The juror reported that she had been approached in her driveway that morning by a bail bondsman, who had said he knew the case that she was hearing and that she "need[ed] to help [him]." She stated that her only response to the man had been that she could not discuss the case. When asked by the trial court, the juror maintained that the conversation would not affect her ability to be fair or to weigh the evidence in the case; she also averred that she was not worried that the outcome of the case might affect her relationship with the bail bondsman, who was a friend of her family.

After returning to open court, the trial court summarized the issue and asked the prosecutor and defense counsel for their thoughts; both asked that she be excused and an alternate seated. The trial court then made a number of findings of fact for the record and concluded by excusing the juror.

Following the jury's return of verdicts of guilty on the charges of second-degree rape and second-degree sexual offense, the trial court proceeded with sentencing Defendant. After hearing from the prosecutor and defense counsel as to Defendant's prior record and mitigating factors, the trial court stated that he planned to "sentence [Defendant] from the presumptive range[]" and noted the "serious charges" against Defendant, as well as that "[t]he evidence was quite strong" and "it didn't take very long for a jury to return a verdict of guilty." He then informed Defendant that he was "going to impose a significant sentence against [Defendant], which is what the law calls for."

After restating the technical details related to Defendant's conviction for second-degree rape, the trial court sentenced him to a minimum term of one hundred months and a maximum term of one hundred twenty-nine months in prison, with credit for time served. The trial court then recounted the relevant details for the second-degree sexual offense conviction and likewise sentenced Defendant

to a minimum term of one hundred months and a maximum term of one hundred twenty-nine months in prison, with credit for time served. He made no mention at that time of whether the two sentences were to run concurrently or consecutively. The trial court concluded by saying, "The Defendant will be in custody and that will complete the matter unless there are questions." Defendant then left the courtroom.

However, following Defendant's departure from the courtroom, the trial court addressed the clerk and defense counsel, stating:

> . . . that was a consecutive sentence. I want to make sure that was on the record with the defendant present. The clerk advised me that I did not say that was consecutive, and that was my intention. I need him in the courtroom when I say that to clarify that when you can get him.

The court then proceeded with other matters for an unspecified length of time, before Defendant was brought back into the courtroom from the hallway. At that point, the trial court reiterated:

> The record will reflect that the defendant has been brought back into the courtroom. He is in the courtroom with his defense counsel. The Court just wanted the record to reflect that the Court did impose two 100 to 129 month sentences to the defendant for the two charges from which the verdicts were returned as guilty.
>
> It was the Court's intention that the sentences were to be served as consecutive sentences and not concurrent sentences. I did not state that and I was advised by the clerk. I have brought the defendant back in so that could be stated publicly in the Defendant's presence.
>
> Two sentences 100 months minimum, 129 months maximum, those are to be served consecutively. That will complete sentence. The defendant is [to] be returned to custody. Thank you.

Defendant now appeals.

I.

[1] The primary issue on appeal is whether the trial court erred by changing Defendant's sentences from running concurrently to consecutively, after a comment by the clerk. We find no prejudicial error.

Trial courts have "considerable leeway and discretion in governing the conduct of a sentencing proceeding[.]" *State v. Smith*, 352 N.C. 531, 557, 532 S.E.2d 773, 790 (2000), *cert. denied*, 532 U.S. 949, 149 L. Ed. 2d 360 (2001). Indeed, "[a] judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962). Generally, "[a] defendant is prejudiced . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached[.]" N.C. Gen. Stat. § 15A-1443(a) (2005).

Defendant contends that the trial court violated North Carolina General Statute § 15-1334(b), which reads in pertinent part: "No person other than the defendant, his counsel, the prosecutor, and one making a presentence report may comment to the court on sentencing unless called as a witness by the defendant, the prosecutor, or the court." N.C. Gen. Stat. § 15-1334(b) (2005). Defendant asserts that the clerk's question to the trial court, drawing his attention to the fact that he had failed to specify if the sentences imposed were to run consecutively or concurrently, would be an impermissible "comment" under the language of this statute because the clerk was not called as a witness. According to Defendant, this alleged violation of North Carolina General Statute § 15-1334(b) would constitute an abuse of discretion, which prejudiced him by leading to a sentence double that which was initially imposed. *See* N.C. Gen. Stat. § 15-1354(a) (2005) ("If not specified or not required by statute to run consecutively, sentences shall run concurrently.").

Even assuming *arguendo* that allowing the clerk's question as to whether the sentences were to run concurrently or consecutively was error, we conclude that such error would not be prejudicial. According to the record, at the outset of the sentencing hearing, the trial court emphasized the "serious charges" against Defendant and informed him that he planned to "impose a significant sentence." Those statements support the trial court's later assertions that it was his "intention" to impose consecutive, not concurrent, sentences.

Moreover, "during a session of the court a judgment is *in fieri* and the court has authority in its sound discretion, prior to expiration of the session, to modify, amend or set aside the judgment." *State v. Edmonds*, 19 N.C. App. 105, 106, 198 S.E.2d 27, 27 (1973); *see also*

State v. Dorton, —— N.C. App. ——, ——, 641 S.E.2d 357, 362 (2007) (finding no error when trial court modified its original sentence two days later, in order to correct the defendant's prior record level and accordingly sentence him to a longer term of imprisonment); *State v. Quick*, 106 N.C. App. 548, 561, 418 S.E.2d 291, 299 ("Until the expiration of the term, the orders and judgment of a court are *in fieri*, and the judge has the discretion to make modifications in them as he may deem to be appropriate for the administration of justice."), *disc. review denied*, 332 N.C. 670, 424 S.E.2d 415 (1992).

Here, the clerk of court prompted the trial judge's awareness of his omission. As a result, the trial judge immediately called Defendant back into the courtroom to correct the mistake and impose the sentence he intended from the outset. The record shows that the clerk of court did not change the trial judge's mind. Indeed, following the clerk's question, the trial court merely effectuated his original intention to impose consecutive sentences. As such, Defendant can show no prejudice from the clerk's "comment."[2] *See also State v. Jackson*, 119 N.C. App. 285, 288-89, 458 S.E.2d 235, 238 (1995) (finding no plain error where a victim's attorney addressed the court at sentencing without being called as a witness, because statement that the defendant deserved a jail sentence did not contribute to the defendant receiving the sentence he did, in light of his past history and serious nature of charges).

We conclude that Defendant has failed to show an "abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *Pope*, 257 N.C. at 335, 126 S.E.2d at 133. Accordingly, we leave the trial court's imposition of consecutive sentences undisturbed.

II.

[2] Finally, we note that Defendant attempts to argue that the trial court committed plain error by conducting the hearing of a juror outside of Defendant's presence. We, however, do not reach this

2. We note, too, that the record reflects that the trial court was merely "advised" by the clerk that he had omitted to specify the nature of the sentences imposed; there is no suggestion that the clerk made a substantive "comment" on the sentence, such as whether its duration was inadequate or overly harsh, or any other subjective opinion. Any advice offered by the clerk was related to clarifying the trial court's intentions, not to influencing the sentence he imposed. This type of minor clerical question hardly seems to fall within the General Assembly's intended scope of the language of N.C. Gen. Stat. § 15A-1334(b).

argument because this issue is not reviewable under the plain error standard. Under well-established North Carolina law, "plain error analysis applies only to instructions to the jury and evidentiary matters." *State v. Cummings*, 352 N.C. 600, 613, 536 S.E.2d 36, 47 (2000) (citations and quotation omitted), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001); *see also State v. Atkins*, 349 N.C. 62, 81, 505 S.E.2d 97, 109-10 (1998) (refusing to apply the plain error doctrine to a trial court's failure to give an instruction during jury *voir dire* that was not requested), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999).

Here, Defendant seeks plain error review because he did not object at trial to the hearing with the juror being conducted outside his presence. However, the hearing was not evidentiary in nature, nor was it related to jury instructions. As such, the plain error doctrine does not apply to this assignment of error, which is accordingly dismissed.

No prejudicial error in part; dismissed in part.

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

Judge CALABRIA concurs.

TYSON, Judge, concurring in part, dissenting in part.

I concur with the majority's conclusion not to review defendant's plain error assignment. I disagree with the majority's holding that the trial court did not commit prejudicial error in doubling the length of defendant's imprisonment by changing defendant's sentences from concurrent to consecutive terms. I vote to vacate defendant's sentence and remand for resentencing. I respectfully dissent.

I. Background

On 7 March 2005, defendant was indicted on one count of second degree rape and two counts of second degree sexual offense. The charges were tried before a jury between the 6th and 8th of March 2006.

On 8 March 2006, the jury found defendant to be guilty of one count of second degree rape and one count of second degree sexual offense (digital penetration into the victim's genital opening). The

jury returned a verdict of not guilty of a second count of second degree sexual offense by digital penetration. The trial court proceeded to the sentencing hearing.

In order to understand the full circumstances of defendant's sentencing not set out in the majority's opinion, the transcript shows the following exchange:

> The Court: . . . . I am going to impose the sentence as follows:
>
> Madam Clerk there will be two sentences. The first will be in the file of 04-CRS-50891. This is in the charge of Second Degree Rape.
>
> . . . .
>
> The Defendant is to serve a minimum term of 100 months and maximum term of 129 months in custody of the North Carolina Department of Correction. He is to be given credit for his time spent in confinement.
>
> . . . .
>
> The second judgment, Madam Clerk, will be in the second case in which the Jury has returned a verdict of guilty. This is 05-CRS-324, the charge of Second Degree Sex Offense, digital penetration into the victim's genital opening.
>
> . . . .
>
> The Defendant is to serve a minimum term of 100 months and a maximum term of 129 months in the custody of the North Carolina Department of Correction. No credit is given for time spent in confinement all of the prior credit having been awarded in the first case.
>
> . . . .
>
> The Defendant *will be in custody and that will complete the matter unless there are questions.*
>
> [The District Attorney]: No, Your Honor.
>
> (Defendant left the courtroom).
>
> The Court: Madam Clerk, [defense counsel] that was (sic) consecutive sentence. I want to make sure that was on the record with the defendant present. *The clerk advised me that I did not say that was consecutive*, and that was my intention. I need him in the courtroom when I say that to clarify that when you can

> get him. Will it take a few minutes for the Defendant to be brought back?
>
> (Court proceeded with other matters)
>
> [The District Attorney]: Your Honor, [defendant] I understand is out in the hallway.
>
> (Defendant brought back into the courtroom)
>
> The Court: That is fine. [Defense counsel], if you will go over to this side of the courtroom, it is not necessary that he be brought back around into the area where he was standing as long as he is present in the courtroom. I did want to make sure there was no misunderstanding.
>
> The record will reflect that the defendant has been brought back into the courtroom. He is in the courtroom with his defense counsel. The Court just wanted the record to reflect that the Court did impose two 100 to 129 month sentences to the defendant for the two charges from which the verdicts were returned as guilty.
>
> It was the Court's intention that the sentences were to be served as consecutive sentences and not concurrent sentences. *I did not state that and I was advised by the clerk*. I have brought the defendant back in so that could be stated publicly in the Defendant's presence.
>
> Two sentences 100 months minimum, 129 months maximum, those are to be served consecutively. That will complete the sentence. The defendant is to be returned to custody. Thank you.

(Emphasis supplied).

The trial court entered judgments accordingly and sentenced defendant to two consecutive sentences between 100 minimum to 129 maximum months with credit given for time served on the first judgment.

II. Sentencing

Defendant argues the trial court erred by increasing his sentence from concurrent to consecutive terms after the clerk of court's prompting and advice. Defendant alleges the trial court permitted the clerk of court to comment on his sentence when the clerk had not been called as a witness and this procedure violated N.C. Gen. Stat. § 15A-1334(b). I agree.

The trial court "has considerable leeway and discretion in governing the conduct of a sentencing proceeding[.]" *State v. Smith*, 352 N.C. 531, 557, 532 S.E.2d 773, 790 (2000), *cert. denied*, 532 U.S. 949, 149 L. Ed. 2d 360 (2001). "A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962).

Defendant argues the trial court's ruling and sentence violated N.C. Gen. Stat. § 15A-1334(b). This statute states in part, "No person other than the defendant, his counsel, the prosecutor, and one making a presentence report may comment to the court on sentencing unless called as a witness by the defendant, the prosecutor, or the court." N.C. Gen. Stat. § 15A-1334(b). Defendant contends the statute was violated when the clerk commented to the trial court on his sentence and the trial court's alteration of his sentence was prejudicial to him because it "cost the Defendant 100 to 129 months of liberty."

Here, the trial court did not specify, during sentencing, whether defendant's sentences were to run consecutively or concurrently. After the sentence was pronounced and defendant was taken into custody, that "complete[d] the matter," and "defendant left the courtroom."

"Unless otherwise specified by the court, all sentences of imprisonment run concurrently with any other sentences of imprisonment." N.C. Gen. Stat. § 15A-1340.15(a) (2005); *see* N.C. Gen. Stat. § 15A-1354(a) (2005) ("If not specified or not required by statute to run consecutively, sentences shall run concurrently."). The sentencing proceeding ended at this point. Defendant's sentences were concurrent by operation of law. Defendant was taken into custody, removed from the courtroom, and the trial court proceeded to other business.

The trial court then stated, "Madam Clerk, [defense counsel] that was (sic) consecutive sentence. I want to make sure that was on the record with the defendant present. *The clerk advised me that I did not say that was consecutive*, and that was my intention." (Emphasis supplied). The trial court ordered defendant to be returned to the courtroom.

After defendant was returned to the courtroom, the trial court stated, "It was the Court's intention that the sentences were to be

served as consecutive sentences and not concurrent sentences. *I did not state that and I was advised by the clerk.*" (Emphasis supplied). This revelation by the trial court was a recognition of judicial error, not a clerical error. *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (reiterating that a clerical error is an error resulting from a minor mistake or inadvertance). While our courts have held that a trial court may amend the record to correct clerical mistakes, it cannot amend the record to correct a judicial error. *State v. Taylor*, 156 N.C. App. 172, 176, 576 S.E.2d 114, 117 (2003).

The transcript plainly shows in multiple places the clerk of court "advised" the trial court on sentencing without being called "as a witness by the defendant, the prosecutor, or the court." N.C. Gen. Stat. § 15A-1334(b). As a result, defendant was re-sentenced from concurrent to consecutive terms, in effect doubling his sentence. The clerk of court clearly "comment[ed] to the court on sentencing" in violation of N.C. Gen. Stat. § 15A-1334(b). By later imposing a consecutive sentence after comment from a non-witness, rather than the concurrent sentence originally imposed, defendant's incarceration was increased by 100 minimum to 129 maximum months. This was "procedural conduct prejudicial to defendant" and requires his sentence to be vacated. *Pope*, 257 N.C. at 335, 126 S.E.2d at 133.

The trial court initially failed to specify that the sentence entered in this case was consecutive, by law, the sentence was concurrent. N.C. Gen. Stat. § 15A-1340.15(a); N.C. Gen. Stat. § 15A-1354(a). Having announced the decision in open court and placing defendant into custody, the trial court "complete[d] the matter," and it could not reopen the matter and double defendant's sentence. *See Berman v. United States*, 302 U.S. 211, 212, 82 L. Ed. 204, 204 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment.").

III. Conclusion

After defendant's sentencing was completed, he was remanded into custody, and removed from the courtroom. Contrary to the majority's holding, the trial court committed prejudicial error by changing defendant's sentence from concurrent to consecutive terms after the trial court stated on numerous occasions it was "advised" by the clerk of court who was not called "as a witness by the defendant, the prosecutor, or the court." N.C. Gen. Stat.§ 15A-1334(b) ("No person other than the defendant, his counsel, the prosecutor, and one making a presentence report may comment to the court on

sentencing unless called as a witness by the defendant, the prosecutor, or the court.").

I vote to vacate defendant's sentence and remand to the trial court with instructions to enter judgment ordering his sentences to run concurrently with credit for time served prior to sentencing, as originally ordered. I respectfully dissent.

WILLIE SPAULDING, PLAINTIFF v. HONEYWELL INTERNATIONAL, INC. FORMERLY KNOWN AS ALLIEDSIGNAL, INC., HOLTRACHEM MANUFACTURING COMPANY LLC, HOLTRACHEM GP, INC., BRUCE DAVIS, AND HERB ROSKIND, DEFENDANTS

No. COA06-1221

(Filed 3 July 2007)

1. Corporations— LLC member—no derivative liability

The trial court properly granted summary judgment for defendant Honeywell on claims arising from exposure to toxic chemicals at a chemical plant. Defendant did not have derivative liability for the acts of the LLC of which it was a member; N.C.G.S. § 57C-3-30(a) is clear that mere participation in the business affairs of a limited liability company by a member is insufficient standing alone to hold the member independently liable for harm caused by the LLC.

2. Workers' Compensation— exclusivity provisions—liability of LLC member-duty owed by LLC

Defendant Honeywell was protected by the exclusivity provisions of the Workers' Compensation Act in an action for exposure to toxic chemicals at a manufacturing plant owned by an LLC of which it was a member. Honeywell neither promised nor assumed an independent duty to plaintiff; the LLC, not Honeywell, owed a nondelegable duty to provide a safe workplace.

3. Employer and Employee— workplace safety—LLC member—no independent duty

Defendant Honeywell, who was not plaintiff's employer, did not owe plaintiff an independent duty to provide for workplace safety through Honeywell's alleged liability under environmental statutes.

Appeal by plaintiff from orders entered 23 September 2005 and 4 May 2006 by Judge John R. Jolly, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 4 June 2007.

Hartzell & Whiteman, L.L.P., by J. Jerome Hartzell; Law Office of Thomas N. Barefoot, P.A., by Thomas N. Barefoot; and Twiggs, Beskind, Strickland & Rabenau, P.A., by Howard Twiggs and Donald H. Beskind, for plaintiff-appellant.

Smith Moore LLP, by J. Donald Cowan, Jr., and Jeri L. Whitfield; and King & Spalding LLP, by J. Kevin Buster, Richard A. Schneider, and Michael R. Powers, for defendant-appellee Honeywell International, Inc.

No brief filed for defendants-appellees HoltraChem Manufacturing Company LLC, HoltraChem GP, Inc., Bruce Davis, and Herb Roskind.

TYSON, Judge.

Willie Spaulding ("plaintiff") appeals from order entered granting Honeywell International, Inc. ("Honeywell"), formerly known as AlliedSignal, Inc. ("AlliedSignal"), HoltraChem Manufacturing Company LLC ("HMC LLC"), HoltraChem GP, Inc. ("HoltraChem"), Bruce Davis ("Davis"), and Herb Roskind's ("Roskind") (collectively, "defendants") motions for summary judgment. Plaintiff also appeals from order entered, which concluded the reports and related materials prepared by Environmental & Safety Services, Inc. ("ESS") are privileged. We affirm.

I. Background

In 1962, Honeywell, formerly known as AlliedSignal, built the Acme Plant ("the plant") in Riegelwood, North Carolina to produce "chlor-alkali" chemical products for the paper industry and other customers. Honeywell owned and operated the plant from 1962 until 1979.

On 14 December 1979, Honeywell sold the plant to Linden Chemicals and Plastics, Inc. ("Linden"). As part of the terms of sale, Linden executed a promissory note to Honeywell. Linden subsequently changed its corporate name to Hanlin GP, Inc. ("Hanlin").

In 1989, Hanlin failed to make timely payments under the terms of the promissory note to Honeywell. Honeywell agreed to give Hanlin credit on its indebtedness for any environmental remediation and

projects Hanlin funded that reduced Honeywell's future liability under environmental laws. Hanlin eventually declared bankruptcy, but continued to operate the plant as a debtor-in-possession.

In 1992, HoltraChem, a distributor of chemicals including chlor-alkali products, approached Honeywell about forming a business entity to purchase the plant and proposed an agreement to Honeywell. If Honeywell agreed to indemnify HoltraChem against past environmental liabilities for which Honeywell was responsible, the two companies would form a new company to operate and share profits from the plant. Honeywell agreed to the transaction.

A. Formation of HMC LLC

In 1993, the North Carolina General Assembly enacted the North Carolina Limited Liability Act, N.C. Gen. Stat. 57C-1-01, *et seq*. On 23 November 1993, Honeywell and HoltraChem formed HMC LLC as a manager-managed limited liability company. HoltraChem, Honeywell, and Hanlin were the named members of HMC LLC. Davis served as HMC LLC's manager. In 1994, Hanlin sold the plant to HMC LLC in a transaction approved by the bankruptcy court.

On 7 April 1994, the members entered into an operating agreement which granted the members certain rights to participate in the management of HMC LLC with respect to budgetary and other matters. As manager, Davis was vested with "full and complete" authority to manage HMC LLC's day-to-day affairs, including the plant. HMC LLC operated the plant as the sole employer from 1994 until the plant closed in 2000.

Plaintiff worked at the plant from 1987 to 2000. Plaintiff and sixty-four other former employees of the plant alleged they were injured in the workplace due to exposures to mercury, chlorine gas, and other hazardous materials.

B. Present Claims

On 17 January 2002, plaintiff instituted this action and asserted claims for: (1) civil conspiracy; (2) employer liability; (3) aiding and abetting; (4) duty to control; (5) negligent undertaking; (6) ultra-hazardous activity; and (7) fellow employee liability. In September 2004, all defendants moved for summary judgment. On 23 September 2005, defendants' motions for summary judgment were granted against all plaintiffs on all claims.

Each of the sixty-five plaintiffs timely noticed appeal to this Court. This Court determined that briefing and argument should take

place only for plaintiff's appeal. The remaining sixty-four appeals were stayed pending the outcome of this appeal.

II. Issues

Plaintiff asserted forty-nine assignments of error in the record on appeal, but only argues in his brief the trial court erred by: (1) granting Honeywell's motion for summary judgment and (2) declaring the ESS reports and related materials to be privileged. Plaintiff abandoned his remaining assignments of error. "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) (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 defendants' unargued assignments of error.").

III. Summary Judgment

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 non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist.
>
> Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial. To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (internal citations and quotations omit-

ted), *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). "If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

B. Analysis

Plaintiff abandoned his appeal from the order granting summary judgment for all defendants except Honeywell. Plaintiff argues the trial court erred by entering summary judgment in favor of Honeywell and asserts under the 1994 Operating Agreement: (1) Honeywell, as a member of HMC LLC, can be held derivatively liable for acts of the limited liability company; (2) based upon Honeywell's independent duty, our Supreme Court's holding in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), does not shield Honeywell from its duty; and (3) Honeywell assumed an independent duty of workplace safety in the HMC LLC operating agreement.

1. Derivative Liability of Member

[1] Plaintiff argues Honeywell has derivative liability for HMC LLC's acts because of its status as a member of that limited liability company. We disagree.

N.C. Gen. Stat. 57C-3-30(a) (2005) provides as follows:

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

(Emphasis supplied).

This statutory provision expressly limits the liability of a member "for the obligations of a [LLC]" and provides that "participating, in whatever capacity in the management or control of the business," does not impose liability on a member for the acts of the limited liability company and prohibits the court from imposing derivative liability on Honeywell for the acts of HMC LLC. *Id.*

Plaintiff concedes in his brief:

> This interpretation of section 57C-3-30(a) is borne out by the language of the section, which refers to a member's liability for "the obligations of a limited liability company." The language referring to "obligations of" an LLC *negates* the derivative liability that the member would, if treated like a partner, inherit *through* the LLC.

(Emphasis supplied). In *Page v. Roscoe, LLC*, this Court affirmed the trial court's ruling that the plaintiff could not state a claim against a member of a limited liability company because the plaintiff had not "allege[d] any acts on the part of [the member] individually, which are not related to his status as a member of a North Carolina limited liability company[.]" 128 N.C. App. 678, 686-88, 497 S.E.2d 422, 428 (1998).

Whether Honeywell participated or failed to participate in the management of HMC LLC does not allow plaintiff to hold Honeywell derivatively or individually liable for the acts of HMC LLC. N.C. Gen. Stat. § 57C-3-30(a) is clear, that in the absence of an independent duty, mere participation in the business affairs of a limited liability company by a member is insufficient, standing alone and without a showing of some additional affirmative conduct, to hold the member independently liable for harm caused by the LLC.

Plaintiff abandoned all his claims against his employer HMC LLC on appeal. No direct liability of HMC LLC exists to impose derivatively upon Honeywell. *See Spivey v. Lowery*, 116 N.C. App. 124, 126, 446 S.E.2d 835, 837 (Because the plaintiff released the tort-feasor, the plaintiff may not assert a claim against the defendant because of the derivative nature of that defendant's liability.), *disc. rev. denied*, 338 N.C. 312, 452 S.E.2d 312 (1994). This assignment of error is overruled.

2. *Woodson* Claims

[2] Honeywell argues if it is deemed to be plaintiff's employer then it is entitled to protection under North Carolina's Workers' Compensation Act. Plaintiff asserts the exclusivity provisions of the Workers' Compensation Act do not apply to Honeywell.

Plaintiff neither contends that Honeywell and HMC LLC are one and the same entity, nor that one company is the alter ego of the other. Rather, plaintiff argues that Honeywell is liable because of its *own and direct* responsibility to maintain workplace safety. The question of whether Honeywell is protected by the exclusivity provi-

sions of and remedies available in the Workers' Compensation Act or civilly liable to plaintiff is governed by whether plaintiff can demonstrate Honeywell promised or assumed an independent duty to him. *See Hamby v. Profile Products, L.L.C.*, 179 N.C. App. 151, 632 S.E.2d 804, *disc. rev. allowed*, 360 N.C. 646, 638 S.E.2d 466 (2006).

3. Independent Duty Under the Operating Agreement

Plaintiff argues Honeywell voluntarily undertook an independent duty to ensure worker safety at the plant in the 1994 Operating Agreement and the trial court erred by entering summary judgment for all defendants. Plaintiff asserts, "Honeywell had the duty of ensuring . . . plant worker safety" under the 1994 Operating Agreement, and "Honeywell . . . failed to perform any such duty." We disagree.

In North Carolina, *the employer* owes a non-delegable duty to provide a safe workplace to its employees. *See* N.C. Gen. Stat. § 95-129 (1) and (2) (2005) ("Each employer shall furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to his employees . . . [and] shall comply with occupational safety and health standards or regulations[.]"); *see also Brooks v. BCF Piping*, 109 N.C. App. 26, 33, 426 S.E.2d 282, 286 (1993) (The duty imposed under the North Carolina Occupational Safety and Health Act "is nondelegable."). Here, it is undisputed that plaintiff's employer was HMC LLC. Under the statute and case law, HMC LLC, not Honeywell, owed a nondelegable duty to provide plaintiff with a safe workplace. *Id.*

In the analagous context of a parent-subsidiary relationship, the United States District Court for the Middle District of North Carolina has stated, quoting *Muniz v. National Can Corp.*, 737 F.2d 145, 148 (1st Cir. 1984):

> An employer has a nondelegable duty to provide for the safety of its employees in the work environment. The parent-shareholder is not responsible for the working conditions of its subsidiary's employees merely on the basis of [the] parent-subsidiary relationship. *A parent corporation may be liable for unsafe conditions at a subsidiary only if it assumes a duty to act by affirmatively undertaking to provide a safe working environment at the subsidiary. Such an undertaking may be express, as by contract between the parent and the subsidiary, or it may be implicit in the conduct of the parent . . . .*

> Because *an employer* has a nondelegable duty to provide safe working conditions for its employees, *we do not lightly assume that a parent corporation has agreed to accept this responsibility*. Neither mere concern with nor minimal contact about safety matters creates a duty to ensure a safe working environment for the employees of a subsidiary corporation. To establish such a duty, the subsidiary's employee must show some proof of a positive undertaking by the parent corporation.

Richmond v. Indalex Inc., 308 F. Supp. 2d 648, 662-63 (M.D.N.C. 2004) (emphasis supplied).

Here, plaintiff asserts Honeywell assumed control over environmental and worker safety at the plant in HMC LLC's 1994 Operating Agreement. Plaintiff, quoting the operating agreement, argues Honeywell: (1) took control over HMC LLC's budget with respect to "environmental matters pertaining to the [Honeywell] Former Sites;" (2) agreed to indemnify and hold harmless HMC LLC, its manager, and HoltraChem "from and against any and all Environmental Costs;" and (3) agreed it "shall, and shall be solely and exclusively entitled to, direct and control, subject to consultation with the Manager, any and all activities and expenditures undertaken in response to an Environmental Event."

Nowhere in the 1994 Operating Agreement does Honeywell "affirmatively undertak[e] to provide a safe working environment" for HMC LLC's employees. *Id.* The agreement states:

> [T]he business and affairs of HMC [LLC] shall be managed by the Manager . . . the Manager shall have full and complete authority, power and discretion to manage the business, affairs, and properties of HMC [LLC], to make all decisions regarding those matters and to perform any and all other acts or activities customary or incident in the management of HMC [LLC's] business[.]"

The 1994 Operating Agreement was entered into "by and among" the members of HMC LLC, *i.e.* Honeywell, HoltraChem, and Hanlin, for the "management, operation and financing of" HMC LLC.

Plaintiff contends HMC LLC's operating agreement created an independent duty on the part of Honeywell to HMC LLC's employees. This Court recently addressed a similar argument by a plaintiff in *Babb v. Bynum & Murphrey, PLLC*,:

> Next, plaintiffs' contend that the firm's operating agreement created a duty on the part of defendant. North Carolina recog-

nizes the right of a third-party beneficiary to sue for breach of a contract executed for his benefit. In order to assert rights as a third-party beneficiary under the operating agreement, plaintiffs must show they were an intended beneficiary of the contract. We have stated that plaintiffs must show:

> (1) that a contract exists between two persons or entities; (2) that the contract is valid and enforceable; and (3) *that the contract was executed for the direct, and not incidental, benefit of the [third party]*. A person is a direct beneficiary of the contract if the contracting parties intended to confer a legally enforceable benefit on that person. *It is not enough that the contract, in fact, benefits the [third party], if, when the contract was made, the contracting parties did not intend it to benefit the [third party] directly*. In determining the intent of the contracting parties, the court should consider the circumstances surrounding the transaction as well as the actual language of the contract. *When a third person seeks enforcement of a contract made between other parties, the contract must be construed strictly against the party seeking enforcement.*
>
> Here, the operating agreement states [a] member shall be liable for all acts or neglect for any professional negligence for which he or she is directly responsible. The operating agreement also requires the company to comply with the Rules of Professional Conduct. *We believe the intent of the parties regarding these provisions was not to directly benefit plaintiffs, rather it was to directly benefit the law firm and its members. As some evidence of our belief, neither plaintiffs nor anyone else is designated as a beneficiary of the operating agreement. Moreover, there is no argument in plaintiffs' brief to suggest that the agreement was entered into to directly benefit plaintiffs. Therefore, plaintiffs, at most, are mere incidental beneficiaries under these provisions.* Accordingly, we disagree with plaintiffs.

182 N.C. App. 750, ——, 643 S.E.2d 55, 57-58 (2007) (emphasis supplied) (internal citations and quotations omitted).

Here, as in *Babb*, plaintiff has failed to argue the 1994 Operating Agreement was entered into to directly benefit him or other HMC LLC employees. Neither plaintiff nor anyone else, other than the signatories, were designated to be beneficiaries of the operating agreement. *Id.* The 1994 Operating Agreement was entered into "by and among" the members of HMC LLC wherein they allocated environmental

events, risks, and liabilities among themselves. Plaintiff was neither a direct nor intended beneficiary of this agreement. Also, Honeywell's agreement to be responsible for budgetary expenditures in response to an environmental event is insufficient, as a matter of law, to impose an independent duty upon Honeywell to plaintiff. *Richmond*, 308 F. Supp. 2d at 662-64; *see* N.C. Gen. Stat. § 57C-3-30(a).

Nowhere in the 1994 Operating Agreement does Honeywell "affirmatively undertak[e] to provide a safe working environment" for HMC LLC's employees. *Richmond*, 308 F. Supp. 2d at 662-63. Plaintiff has failed to show he was an intended or direct beneficiary of the 1994 Operating Agreement. *Babb*, 182 N.C. App. at ——, 643 S.E.2d at 57-58. This assignment of error is overruled.

4. Independent Duty under Environmental Statutes

[3] Plaintiff also argues Honeywell owed him an independent duty to provide for workplace safety due to Honeywell's alleged violations of or liability to remediate conditions at the plant under environmental statutes. We disagree.

> A federal court has addressed this argument and held that: While these statutes certainly provide for private causes of action, those causes of action are limited to recovery of response costs under CERCLA and to enforce compliance under RCRA. *See* 42 U.S.C. §§ 9613(h), 9607(a); 42 U.S.C. § 6792(a). *Therefore, there is no private cause of action under either CERCLA or RCRA to recover damages for personal injuries suffered as a result of violations of those statutes.*

Polcha v. AT & T Nassau Metals Corp., 837 F. Supp. 94, 96 (M.D. Penn. 1993) (emphasis supplied). Plaintiff's alleged breach of environmental statutes did not create an independent duty of workplace safety to plaintiff. Plaintiff was never employed by Honeywell. Plaintiff's employer, HMC LLC, not Honeywell owed him a nondelegable duty to provide its employees with a safe workplace. This assignment of error is overruled.

IV. Privileged Materials

Plaintiff argues the trial court erred by declaring the ESS reports and related materials to be privileged. The trial court stated it considered the ESS reports and related materials in granting defendants' motions for summary judgment. Plaintiff admits "the summary judgment ruling [was] not affected by the issue of whether the ESS

reports are privileged." In light of our holding to affirm the trial court's order granting Honeywell's motion for summary judgment, it is unnecessary for us to reach this assignment of error.

V. Conclusion

Plaintiff has abandoned all claims he asserted against all defendants on appeal except Honeywell. The trial court properly granted Honeywell's motion for summary judgment on plaintiff's claims. In light of our holding to affirm the trial court's order granting Honeywell's motion for summary judgment, it is unnecessary for us to reach plaintiff's assignment of error regarding the trial court's ruling on the ESS reports and related materials. The trial court's judgment is affirmed.

Affirmed.

Chief Judge MARTIN and Judge McCULLOUGH concur.

BRIAN L. BLANKENSHIP, THOMAS J. DIMMOCK, AND FRANK D. JOHNSON, PLAINTIFFS V. GARY BARTLETT, AS EXECUTIVE DIRECTOR OF THE STATE BOARD OF ELECTIONS, ROY COOPER, AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, AND NORTH CAROLINA STATE BOARD OF ELECTIONS, DEFENDANTS

No. COA06-1012

(Filed 3 July 2007)

1. Elections— judicial—one man, one vote not applicable

The principle of one man, one vote is not constitutionally required in the election of judges because judges serve the people rather than represent them.

2. Evidence— hearsay—AOC preclearance documents—public record not excluded

The trial court erred in a judicial districting case by admitting an exhibit from the AOC Director only on a limited basis. Public records and reports are not excluded by the hearsay rule; this document was prepared pursuant to the AOC Director's statutory duty to obtain preclearance of districts from the United States Department of Justice under the Voting Rights Act and was admissible under N.C.G.S. § 8C-1, Rule 803(8).

3. Elections— judicial districts—not arbitrary

The trial court erred by concluding that the General Assembly had acted arbitrarily and capriciously when it established Superior Court districts for Wake County. The concerns addressed by the General Assembly were compelling state interests, and the facts in the record reasonably justify the General Assembly's action.

Appeal by defendants from judgment and order entered 8 February 2006 by Judge Donald L. Smith in Superior Court, Wake County. Heard in the Court of Appeals 19 March 2007.

Akins, Hunt & Fearon, P.C., by Donald G. Hunt, Jr., for plaintiffs-appellees.

Attorney General Roy Cooper, by Special Deputy Attorneys General Alexander McC. Peters, Susan K. Nichols, and Karen E. Long, for defendants-appellants.

WYNN, Judge.

In *Stephenson v. Barlett*, our Supreme Court held that the North Carolina Constitution guarantees that "the right to vote on equal terms is a fundamental right" in the context of representative positions.[1] Here, Plaintiffs contend that the holding in *Stephenson* extends beyond representative positions to include the election of judges. Because the principle of "one person, one vote" is constitutionally required only in the context of elections for representative positions,[2] we conclude that the rule does not apply to the election of judges, who "do not represent people, they serve people."[3] Accordingly, we reverse the judgment of the trial court.

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1. 355 N.C. 354, 378, 562 S.E.2d 377, 393 (2002) (citation and quotation omitted), *reh'g denied*, 357 N.C. 470, 587 S.E.2d 342 (2003). Likewise, the federal Constitution "imposes one ground rule for the development of arrangements of local government: a requirement that units *with general governmental powers over an entire geographic area* not be apportioned among single-member districts of substantially unequal population." *Avery v. Midland County*, 390 U.S. 474, 485-86, 20 L. Ed. 2d 45, 54 (1968) (emphasis added).

2. *See Holshouser v. Scott*, 335 F.Supp. 928, 932 (M.D.N.C. 1971) ("We hold that the 'one man, one vote' rule does not apply to the state judiciary, and therefore a mere showing of a disparity among the voters or in the population figures of the district would not be sufficient to strike down this election procedure and these statutes."), *aff'd mem.*, 409 U.S. 807, 34 L. Ed. 2d 68 (1972).

3. *Id.* at 932 (quoting *Buchanan v. Rhodes*, 249 F.Supp. 860, 865 (N.D. Ohio), *appeal dismissed*, 385 U.S. 3, 17 L. Ed. 2d 3 (1966)).

On 6 December 2005, Plaintiffs Brian Blankenship, Thomas J. Dimmock, and Frank D. Johnson, who are citizens, taxpayers, and registered voters in Wake County, filed this lawsuit against the North Carolina State Board of Elections and Attorney General to challenge the constitutionality of the Superior Court districts in Wake County, as established by North Carolina General Statute § 7A-41 (2004). Plaintiffs argue that the current judicial districting plan for Wake County violates the Equal Protection Clause of the North Carolina State Constitution because the districts are disproportionate in terms of population.

Section 7A-41 divides Wake County into four judicial districts: 10-A, 10-B, 10-C, and 10-D. Under the statute and according to the 2000 U.S. Census, the six resident Superior Court Judges allotted to Wake County are elected as follows: Two in District 10-A, with 64,398 residents; two in 10-B, with 281,493 residents; one in District 10-C, with 158,812 residents; and one in 10-D, with 123,143 residents. Plaintiffs contend that the disproportionate size of the districts and number of judges elected, particularly of District 10-A, unconstitutionally dilute the voting power of each individual Wake County resident. In their initial complaint, Plaintiffs sought, *inter alia*, a declaratory judgment that the judicial districts are unconstitutional and an injunction enjoining and restraining Defendants from holding any election for the office of Superior Court Judge in Wake County.

On 9 December 2005, then Chief Justice I. Beverly Lake of the North Carolina Supreme Court designated this matter as "exceptional" pursuant to Rule 2.1 of the General Rules of Practice and assigned an Emergency Superior Court Judge to hear the case. After expedited discovery and motions, the trial court entered a judgment and order on 8 February 2006, concluding that the Wake County judicial districts are unconstitutional as drawn and granting declaratory judgment and a permanent injunction to Plaintiffs. The trial court stayed the judgment and order pending appeal.

Defendants timely appealed, arguing that the trial court erred by (I) concluding that the Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution requires population proportionality in the establishment of Superior Court districts; (II) not treating documents submitted by the Administrative Office of the Courts to the United States Department of Justice to obtain preclearance of 1993 N.C. Session Laws 321 as a record of regularly conducted activity or a public record or report; and (III) concluding that the General Assembly acted arbitrarily and capriciously when it

established the Superior Court divisions for Wake County. We agree with all of Defendants' arguments.

I.

[1] Defendants first argue that the trial court erred by concluding that the Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution requires population proportionality in the establishment of Superior Court districts. Defendants contend that the principle of "one person, one vote" does not apply to judicial elections under either the United States Constitution or our North Carolina State Constitution. We agree, noting that this is a question of first impression to our State's appellate courts.[4]

The Equal Protection Clause, first placed in our State Constitution in 1971, declares that "[n]o person shall be denied the equal protection of the laws[.]" N.C. Const. art. I, § 19. The United States Supreme Court has held that the cognate Equal Protection Clause of the Fourteenth Amendment to the federal constitution requires that the principle of "one person, one vote" govern legislative districting and apportionment. *See Reynolds v. Sims*, 377 U.S. 533, 565-66, 12 L. Ed. 2d 506, 529 (1964) ("Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators."). Our state Supreme Court has likewise concluded that "the right to vote on equal terms is a fundamental right" guaranteed by the Equal Protection Clause. *See Stephenson v. Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 393 (2002) (citations omitted) (case brought by citizens and registered voters to challenge legislative redistricting plans approved by the North Carolina General Assembly), *reh'g denied*, 357 N.C. 470, 587 S.E.2d 342 (2003).

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4. In their brief, Plaintiffs assert that "[t]he only significant difference between this case and *Stephenson* [*v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002)] is that the *Stephenson* plaintiffs, in addition to their equal protection challenge, also alleged that the General Assembly's districting plan violated the 'Whole County Provisions' found in [North Carolina Constitution] Article II, § 3(1)-(2) and 5(1)-(2)."

Stephenson, however, involved districts and elections for a different type of office altogether, namely, for legislative positions, such that some voters "may not enjoy the same representational influence or 'clout' " as others. 355 N.C. at 377, 562 S.E.2d at 393. Given that judicial elections do not implicate the same concerns, nor the same statute and constitutional section, we conclude that *Stephenson*, while relevant, is not controlling precedent, and this is indeed a question of first impression.

Nevertheless, federal courts including the United States Supreme Court have drawn a distinction between the requirement of "one person, one vote" in elections for representative positions and those for judicial positions:

> [E]ven assuming some disparity in voting power, the one man-one vote doctrine, applicable as it now is to selection of legislative and executive officials, does not extend to the judiciary. Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency. Moreover there is no way to harmonize selection of these officials on a pure population standard with the diversity in type and number of cases which will arise in various localities, or with the varying abilities of judges and prosecutors to dispatch the business of the courts. An effort to apply a population standard to the judiciary would, in the end, fall of its own weight.

Holshouser v. Scott, 335 F. Supp. 928, 931 (M.D.N.C. 1971) (quoting *Stokes v. Fortson*, 234 F. Supp. 575 (N.D. Ga. 1964)), *aff'd mem.*, 409 U.S. 807, 34 L. Ed. 2d 68 (1972). Significantly, in *Holshouser*, the Middle District Court of North Carolina could "find no case where the Supreme Court, a Circuit Court, or a District Court has applied the 'one man, one vote' principle or rule to the judiciary." *Id.* at 930. Indeed, in *Wells v. Edwards*, the United States Supreme Court affirmed a district court's rejection of a claim based on the "one person, one vote" principle applied to the election of Louisiana Supreme Court justices. *See* 347 F. Supp. 453 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095, 34 L. Ed. 2d 679 (1973).[5]

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5. Plaintiffs assert that "the Fourth Circuit Court of Appeals largely adopted the *Wells* dissent as law in the context of electing North Carolina superior court judges." The relevant language from the Fourth Circuit states that the court "would be compelled to conclude that the election of superior court judges in North Carolina implicates the goal of equal protection and issues of fair and effective representation." *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 953 (4th Cir. 1993), *cert. denied*, 510 U.S. 828, 126 L. Ed. 2d 60 (1993).

Nonetheless, we observe that the Fourth Circuit also stated it was bound by the *Wells* decision, and the rejection of the notion that the Equal Protection Clause is not implicated in judicial elections was based on the question of impermissible vote dilution, not on the principle of "one person, one vote"; as such, any position on the necessity of population proportionality was dicta. *See id.* at 954; *see also Voter Information Project, Inc. v. City of Baton Rouge*, 612 F.2d 208, 210-12 (5th Cir. 1980) (recognizing distinction between claims grounded in one-person, one-vote and those based on vote dilution in a challenge to method of electing judges).

Of course, we recognize that when "construing and applying our [state] laws and the Constitution of North Carolina, [North Carolina appellate courts are] not bound by the decisions of federal courts, including the Supreme Court of the United States." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449-50, 385 S.E.2d 473, 479 (1989). Still, in our discretion, "we may conclude that the reasoning of such decisions is persuasive." *Id.* at 450, 385 S.E.2d at 479. Indeed, as this Court has previously noted, "[a]lthough decisions of the Supreme Court of the United States construing federal constitutional provisions are not binding on our courts in interpreting cognate provisions in the North Carolina Constitution, they are, nonetheless, highly persuasive." *Stam v. State*, 47 N.C. App. 209, 214, 267 S.E.2d 335, 340 (1980) (citation omitted), *aff'd in part and rev'd on other grounds in part*, 302 N.C. 357, 275 S.E.2d 439 (1981).

When "interpreting our Constitution—as in interpreting a statute—where the meaning is clear from the words used, we will not search for a meaning elsewhere." *Preston*, 325 N.C. at 449, 385 S.E.2d at 478-79 (citation omitted). Additionally, we emphasize that "[a]ll power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." *Id.* at 448-49, 385 S.E.2d at 478 (citing *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961)).

In *Preston*, our Supreme Court construed a state statute related to the election, districts, and terms of office for various Superior Court judgeships. 325 N.C. at 443, 385 S.E.2d at 475. Discussing the constitutionality of postponing the election dates for certain judgeships, the Court noted that our state Constitution specified the timeline for legislative and executive elections, but used more general "from time to time" language for judicial elections. *Id.* at 454, 385 S.E.2d at 481. The Court concluded that "[t]he distinction between those [legislative and executive] provisions of our Constitution and the provisions before us in this case concerning judges must have been intentional and further evidences a constitutional intent for flexibility in setting the times for holding judicial elections." *Id.* We find that reasoning to be applicable to the instant case.

Here, North Carolina General Statute § 7A-41, establishing the Superior Court judicial districts in North Carolina, as well as the number of judges assigned to each district, was passed into law pursuant to Article IV, Section 9 of the North Carolina Constitution. According to that Section, "[t]he General Assembly shall, from time to

time, divide the State into a *convenient number* of Superior Court judicial districts and shall provide for the election of one or more Superior Court Judges for each district." N.C. Const. art. IV, § 9(1) (emphasis added).

By contrast, the constitutional provisions governing the election of state senators and representatives require that those officials "shall represent, as nearly as may be, an equal number of inhabitants." N.C. Const. art. II, §§ 3(1), 5(1). That population proportionality requirement was added through an amendment in 1968, proposed by the General Assembly and approved by voters to conform with the judicial rulings on "one person, one vote." *See* John L. Sanders, Director of the Institute of Government, University of North Carolina at Chapel Hill, *Our Constitutions: A Historical Perspective*, at http://statelibrary.dcr.state.nc.us/nc/stgovt/preconst.htm#1971. None of this language—not the requirement for proportionality for state legislative elections, nor the lack thereof with respect to state judicial elections—was changed in the 1971 North Carolina Constitution, which was adopted by voters after comprehensive review and revision. *Id.*

Accordingly, we find that the distinction between these constitutional provisions "must have been intentional" and "evidences a constitutional intent" not to require population proportionality in state judicial elections. *See Preston*, 325 N.C. at 454, 385 S.E.2d at 481. We therefore hold that the trial court erred by concluding otherwise.

II.

[2] Next, Defendants contend that the trial court erred by not treating documents submitted by the Administrative Office of the Courts (AOC) to the United States Department of Justice (USDOJ) to obtain pre-clearance of 1993 N.C. Session Laws 321 as a record of regularly conducted activity or a public record or report. We agree.

At the beginning of the trial, Plaintiffs' counsel sought to strike the affidavit of Paul Reinhartsen, AOC Research Specialist for Legal Services, including the attached Exhibit A, which was a copy of the documentation submitted to and received from the USDOJ with regard to preclearance for the proposed state law adding a judgeship to District 10-A. Plaintiffs' counsel argued that Exhibit A included hearsay and information about which the author, AOC Director James C. Drennan, had no personal knowledge. Counsel for the State Board of Elections responded that Exhibit A was a "public record, prepared

by public officials and pursuant to their statutory obligation[,]" and was therefore "an exception to the hearsay rule." After a lengthy discussion with both parties as to the nature and contents of the exhibit, the trial court reiterated that he would "let it in, but [he would] be very careful, . . . to make sure [he] base[d] no findings on anything contained in [the AOC exhibit] that is hearsay or is made without personal knowledge."

North Carolina Rule of Evidence 803(8) provides that "Public Records and Reports" are not excluded by the hearsay rule. N.C. Gen. Stat. § 8C-1, Rule 803(8) (2005). Such records are defined, *inter alia*, as "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . matters observed pursuant to duty imposed by law as to which matters there was a duty to report, . . . unless the sources of information or other circumstances indicate lack of trustworthiness." *Id.*

Here, Exhibit A was prepared by the Director of the AOC, pursuant to his statutory duty to gain preclearance from the USDOJ under the Voting Rights Act. *See* N.C. Gen. Stat. § 120-30.9C (2005) ("The [AOC] shall submit to the Attorney General of the United States . . . all acts of the General Assembly that amend, delete, add to, modify or repeal any provision of Chapter 7A of the General Statutes of North Carolina which constitutes a 'change affecting voting' under Section 5 of the Voting Rights Act of 1965."). Exhibit A falls within this language; it was a copy of the documentation sent by the AOC to the USDOJ pursuant to its statutory duty under N.C. Gen. Stat. § 120-30.9C.

We hold that the trial court should have considered Exhibit A in its entirety, as the hearsay rule did not apply to its contents. Accordingly, the trial court erred by admitting the exhibit on only a limited basis.

III.

[3] Finally, Defendants argue that the trial court committed error by concluding that the General Assembly acted arbitrarily and capriciously when it established the Superior Court districts for Wake County. We agree.

In light of the AOC affidavit and Exhibit A discussed above, it is evident that the General Assembly consulted with the AOC prior to enacting the statute that established a new judgeship in District 10-A. Exhibit A contains analysis as to population and caseload

of judicial districts, as well as the AOC Director's recommendations for where to create new judgeships. Although the record also contains concerns expressed with respect to an additional judgeship for Wake County, and indications that the General Assembly did not engage in wide consultations, basing their decision on the recommendation of the AOC Director was not "arbitrary and capricious." Rather, passage of the statute creating the new judgeship in District 10-A followed investigation and analysis and, as such, was the result of logical reasoning.

According to the United States Supreme Court:

> The constitutional safeguard [of the Equal Protection Clause of the Fourteenth Amendment] is offended only if [a law's] classification [of groups of citizens] rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside [as arbitrary or capricious] if any state of facts reasonably may be conceived to justify it.

McGowan v. Maryland, 366 U.S. 420, 425-26, 6 L. Ed. 2d 393, 399 (1961); *see also Town of Beech Mountain v. County of Watauga*, 324 N.C. 409, 378 S.E.2d 780, *cert. denied*, 493 U.S. 954, 107 L. Ed. 2d 351 (1989); *Jones v. Weyerhaeuser Co.*, 141 N.C. App. 482, 539 S.E.2d 380 (2000), *appeal dismissed and disc. rev. denied*, 353 N.C. 525, 549 S.E.2d 858 (2001).

The concerns addressed by the General Assembly's enactment of N.C. Gen. Stat. § 7A-41, creating the new judgeship in District 10-A, included heavy caseloads and maintaining minority districts, as well as compliance with federal law and the Voting Rights Act. Such issues are compelling state interests, and the state of facts presented by the record reasonably justify the General Assembly's action to address those interests.

We conclude that the creation of the Wake County Superior Court judicial districts was not arbitrary and capricious, nor was it "clearly, positively, and unmistakably" unconstitutional sufficient to strike down the statute. *Jacobs v. City of Asheville*, 137 N.C. App. 441, 443, 528 S.E.2d 905, 907 (2000) (quotation and citation omitted); *see also Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) ("[A statute] will not be declared invalid unless its un-

constitutionality be determined beyond reasonable doubt." (quotation and citation omitted)).

Reversed and vacated.

Chief Judge MARTIN and Judge GEER concur.

STATE OF NORTH CAROLINA v. JOSEPH LAMAR STOKLEY

No. COA06-1222

(Filed 3 July 2007)

1. Search and Seizure— search warrant—probable cause

There was probable cause to support a search warrant that was based on the activities of a confidential informant where defendant did not challenge the factual accuracy of the statements in the affidavit, and the affidavit was easily sufficient to establish probable cause for issuance of a warrant to search defendant's house for narcotics.

2. Evidence— identity of confidential informant—pretrial motion to disclose-showing of need not met

The trial court did not err by denying defendant's pretrial motion to identify a confidential informant where defendant was charged with possession offenses, not with selling drugs to the confidential informant, and the evidence was uncontradicted that the confidential informant's only role was to make a controlled buy as part of the initial police investigation.

3. Evidence— identity of confidential informant—trial testimony—pretrial motion to disclose not renewed

The trial court did not err by denying defendant's motion to reveal the identity of a confidential informant based on trial testimony and the argument that the informant could have offered testimony helpful to his defense. Defendant failed to renew his pretrial motion for disclosure of the confidential informant's identity and never asked the trial court to reconsider its pretrial ruling in light of the trial evidence.

Appeal by defendant from judgments entered 11 January 2006 by Judge W. Russell Duke, Jr., in Pasquotank County Superior Court. Heard in the Court of Appeals 12 April 2007.

Attorney General Roy Cooper, by Robert T. Hargett, Special Deputy Attorney General, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III, and Charles K. McCotter, Jr., for defendant-appellant.

LEVINSON, Judge.

Joseph Lamar Stokley (defendant) was tried by a jury beginning 6 January 2006, on charges of trafficking in cocaine by possession, possession with intent to sell and deliver cocaine, and intentionally maintaining a dwelling for keeping and selling controlled substances. He was found guilty as charged, and now appeals from judgments entered upon his convictions. We find no error.

The State's trial evidence tended to show, in pertinent part, the following: Sergeant Gary Bray of the Elizabeth City Police Department testified that in 2005 he was in charge of the city's drug investigation unit. In May 2005 he received complaints about an excessive amount of foot traffic on Glade Street in Elizabeth City. When Sgt. Bray noticed a lot of traffic around the house at 112 Glade Street, he investigated and learned that defendant lived there and that the utility bills were in his name. On 10 May 2005 Sgt. Bray opened an investigation into possible drug sales at 112 Glade Street. He used a confidential informant (CI) to make a controlled purchase of a small amount of cocaine from defendant. After the controlled buy, Sgt. Bray began surveillance of 112 Glade Street. He testified that on at least ten different occasions he watched the residence from a hidden location, and that on "all occasions I would see Mr. Stokley" at home, usually on the front porch of the house. Sgt. Bray observed "a ton of foot traffic," including ten to twelve "individuals that [he] previously knew from arrests for narcotics violations." He also saw defendant engaging in at least five "hand-to-hand transactions" wherein a person would approach defendant's house but stay just long enough for a brief conversation and the exchange of items between the two.

On 20 May 2005 Sgt. Bray applied for and was issued a search warrant for defendant's house. He executed the search warrant that evening, with the assistance of Elizabeth City Police Department's SWAT team. Members of the SWAT team entered the house first "to secure the residence." Thereafter, Sgt. Bray went inside to search for

drugs. When Sgt. Bray entered defendant's house, he saw three other people inside in addition to defendant: a man named Gerald Patterson, known to Sgt. Bray as a drug user; and a teenage girl and a younger boy. The younger people and Patterson were escorted outside. The defendant was "in the kitchen area" when Sgt. Bray went inside. After identifying himself and explaining to defendant why he was there, Sgt. Bray and the other officers conducted a "detailed search of the residence." In the living room they found marijuana and a crack pipe under the sofa. Patterson admitted that the pipe was his. There was a bag of marijuana on the kitchen counter and a set of scales in the pantry. On top of the refrigerator they found what was later determined to be 5.6 grams of cocaine in a child's plastic Easter egg, and another 28.2 grams of cocaine in a bag under a cheerleading pompom.

Currituck County Deputy Randy Jones testified that in May 2005 he was commander of the Elizabeth City Police Department's SWAT team, and had taken part in the search of defendant's house. His testimony generally corroborated that of Sgt. Bray regarding the individuals in the house when the search warrant was executed, their locations in the house, Patterson's reputation as a drug user, and the drugs found in the house. When Jones entered the house the defendant was in the kitchen doorway, and the refrigerator was within arm's reach.

Defendant's evidence, as pertinent to the issues on appeal, is summarized as follows: The defendant testified that he lived at 112 Glade Street, that he was the only adult living there, and that he was at home on the afternoon of 20 May 2005. After socializing with friends in the back yard, defendant came inside and went upstairs to take a shower and change clothes. While he was upstairs, Gerald Patterson began shouting to him that an individual named Luke Stallings had come into the house. Defendant knew Gerald Patterson, his first cousin, as both a drug user and drug dealer. When defendant came downstairs, he saw law enforcement officers entering the house. He denied selling drugs or knowing that drugs were in the house.

On cross-examination, defendant testified that he had seen Gerald Patterson in possession of drugs, and that he had given Patterson money to buy him a bag of marijuana. He admitted to previous convictions for possession with intent to sell cocaine and taking indecent liberties with a minor. He had ten to fifteen adult visitors a day, but denied selling drugs to anyone.

The jury found defendant guilty of the charged offenses, and the trial court sentenced defendant to consecutive prison terms of thirty-five to forty-two months for trafficking in cocaine by possession; ten to twelve months for possession with intent to sell and deliver cocaine, and 120 days for the misdemeanor of maintaining a dwelling for keeping and selling controlled substances. From these judgments defendant appeals.

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[1] Defendant argues first that the trial court erred by denying his motion to suppress evidence seized pursuant to the search warrant obtained by Agent Bray. Defendant contends that the search warrant was not supported by probable cause, in violation of his rights under the U.S. and N.C. Constitutions. We disagree.

Agent Bray applied for a search warrant on 20 May 2005. In support of his application, Gray gave a sworn statement as follows:

> On 5/10/2005, Agent Gary Bray, hereafter referred to as Affiant, met with a reliable and confidential informant, hereafter referred to as CI, regardless of race or sex. CI stated that CI had bought crack cocaine from Joseph Stokley at 112 Glade Street. CI stated that CI had bought crack cocaine from Joseph Stokley on several occasions in the last few months. CI stated that CI would go to the residence at 112 Glade Street and ask for a "Twenty" and that Joseph Stokley would give CI a piece of crack cocaine for $20.00 in US Currency. CI stated that sometimes Joseph Stokley would have the crack cocaine on him and that sometimes Joseph Stokley would have to go back into the residence and bring it out.
>
> Within the last 3 days, Affiant supplied CI with funds to purchase crack cocaine from Joseph Stokley at 112 Glade Street. CI was searched and found to have no contraband. Affiant observed CI go to 112 Glade Street and enter the residence. A few minutes later, Affiant observed CI leave the residence and then met with CI. CI turned over to Affiant a piece of off white rock like substance, which tested positive for cocaine. CI was searched and found to have no contraband. CI stated that CI went to 112 Glade Street and knocked on the door and Joseph Stokley came to the door. CI stated that CI went into the living room area and asked for a "Twenty". CI stated that Joseph Stokley pulled a piece of off white rock like substance from his pants pocket and handed the object to the CI. CI stated that CI then gave Joseph Stokley $20.00

> US Currency and then left the residence. Affiant maintained visual contact with CI until CI met with Affiant.
>
> Affiant checked the Tax records and found the residence to be owned by Joseph Stokley. A check of the Elizabeth Public Utilities found the electricity to be in the name of Joseph Stokley.
>
> Affiant conducted surveillance on the residence at least 5 times in the last 10 days. Affiant witnessed a large amount of foot traffic entering the residence and leaving after a short period of time. Affiant also observed a black male that Affiant identified as Joseph Stokley sitting on the porch of 112 Glade Street make several hand to hand transactions that Affiant believes to be illegal narcotic sales.
>
> Affiant has known CI for 6 months and has always known CI to be truthful and reliable. CI has given Affiant [information] that has led to the arrests of at least 30 persons for controlled substance violations. CI is familiar with crack cocaine and how it is used and purchased.
>
> Affiant has been employed with the Elizabeth City Police Department for 5 years and has been involved with over 15 drug operations that have led to the arrest of at least 100 persons for controlled substance violations. Affiant has at least 250 hours of training in drug identificatio[n]/investigation from the North Carolina Justice Academy and Wilson Technical Institute.

Defendant does not challenge the factual accuracy of the statements in the affidavit, and supports his contention that the search warrant was not based on probable cause with the conclusory statement that the "failure of the affidavit to establish reasonable grounds to believe that the crime was occurring on the premises to be searched invalidates the warrant issued thereon." We disagree.

"Probable cause to search exists if a person of ordinary caution would be justified in believing that what is sought will be found in the place to be searched. . . . [A]ppellate court review of a magistrate's probable cause decision . . . is limited to whether 'the evidence as a whole provided a substantial basis for a finding of probable cause[.]' " *State v. Barnhardt*, 92 N.C. App. 94, 96, 97, 373 S.E.2d 461, 462 (1988) (quoting *State v. Arrington*, 311 N.C. 633, 640, 319 S.E.2d 254, 258 (1984)).

In the instant case, the affidavit states that: (1) a CI had bought cocaine from defendant, at defendant's house, several times; (2) Gray

knew and trusted the CI, who had provided reliable information in the past; (3) after meeting with Gray, the CI made a controlled buy of cocaine from defendant, at defendant's house; and (4) during Gray's surveillance of defendant's house, he saw many people visiting the house for a short time and witnessed several hand-to-hand transactions between defendant and visitors to his house. We easily conclude that this affidavit is sufficient to establish probable cause for the issuance of a search warrant. This assignment of error is overruled.

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[2] Defendant argues next that the trial court erred by denying his motion seeking the identity of the CI. We disagree.

A criminal defendant's right to disclosure of the identity of a confidential informant is addressed in N.C. Gen. Stat. § 15A-978 (2005), which states in pertinent part that:

> (b) In any proceeding on a motion to suppress evidence pursuant to this section in which the truthfulness of the testimony presented to establish probable cause is contested and the testimony includes a report of information furnished by an informant whose identity is not disclosed in the testimony, the defendant is entitled to be informed of the informant's identity unless:
>
> (1) The evidence sought to be suppressed was seized by authority of a search warrant[.] . . . The provisions of subdivisions (b)(1) and (b)(2) do not apply to situations in which disclosure of an informant's identity is required by controlling constitutional decisions.

G.S. § 15A-978(b).

"In *Roviaro v. United States*, 353 U.S. 53, 1 L. Ed. 2d 639, (1957), the United States Supreme Court held it was error not to order the Government to reveal the name of an informant when it was alleged that the informant actually took part in the drug transaction for which the defendant was being tried. The Supreme Court recognized the State has the right to withhold the identity of persons who furnish information to law enforcement officers, but said this privilege is limited by the fundamental requirements of fairness." *State v. Leazer*, 337 N.C. 454, 459, 446 S.E.2d 54, 57 (1994). *Roviaro* held that "no fixed rule with respect to disclosure is justifiable. . . . Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime

charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Roviaro*, 353 U.S. at 62, 1 L. Ed. 2d at 646.

"The privilege of nondisclosure, however, ordinarily applies where the informant is neither a participant in the offense, nor helps arrange its commission, but is a mere tipster who only supplies a lead to law enforcement officers." *State v. Grainger*, 60 N.C. App. 188, 190, 298 S.E.2d 203, 204 (1982) (citations omitted). Moreover, "[b]efore the courts should even begin the balancing of competing interests which *Roviaro* envisions, a defendant who requests that the identity of a confidential informant be revealed must make a sufficient showing that the particular circumstances of his case mandate such disclosure." *State v. Watson*, 303 N.C. 533, 537, 279 S.E.2d 580, 582 (1981). This Court has held:

> Upon a motion by defendant that the identity of a confidential informant be revealed, the trial court should first hold a hearing outside the presence of the jury to consider the question. Defendant must present evidence supporting the necessity of having the identity of the confidential informant revealed, following which the State may present evidence in opposition to defendant's motion. Upon reviewing the evidence and arguments by defendant and the State, the trial court may then either grant or deny defendant's motion, making the necessary findings of fact and conclusions of law in support of its decision.

State v. Moctezuma, 141 N.C. App. 90, 97, 539 S.E.2d 52, 57 (2000).

In the instant case, defendant was charged with possession offenses, and not with selling drugs to the CI, as was the case in *Roviaro*. The evidence was uncontradicted that the CI's only role was to make a controlled buy of cocaine as part of the initial police investigation into drug sales at defendant's address. The controlled buy took place several days before the issuance of the search warrant, and no evidence was presented suggesting that the CI was present when the police searched defendant's house. At the pretrial hearing on defendant's motion for disclosure of the CI's identity, defendant asserted that there were reasonable grounds to believe that the CI was an "accomplice" to the charged offenses. However, defendant presented no evidence in support of this allegation. On this record, we conclude that defendant failed to meet his burden of showing a need for the CI's identity and that the trial court did not err by denying defendant's pretrial motion.

[3] On appeal, defendant argues that the CI could have offered testimony helpful to his defense, citing his own testimony that he didn't know drugs were in his house and that several people had access to his house. Defendant contends that the CI might have testified that it was not defendant who sold him drugs during the controlled buy.

Such testimony would have contradicted Sgt. Bray's testimony that the CI said he bought drugs from defendant. Defendant neither objected to the introduction of the officer's testimony about the controlled buy or any of the statements made to him by the CI, nor asked for an instruction limiting the jury's consideration of the statements by the CI. All of the evidence related to the controlled buy, then, could have helped the State establish that defendant had knowledge of contraband inside the residence. *See State v. Dyson*, 165 N.C. App. 648, 652, 599 S.E.2d 73, 76 (2004) ("[W]hen admitted without objection, otherwise inadmissible hearsay may be considered with all the other evidence and given such evidentiary value as it may possess."); *see also State v. Featherson*, 145 N.C. App. 134, 137, 548 S.E.2d 828, 831 (2001) (prior inconsistent statements admitted without objection properly considered substantive evidence).

Here, defendant failed to renew his pretrial motion for disclosure of the CI's identity, and never asked the trial court to reconsider its pretrial ruling in light of the trial evidence. At the time of the pretrial motion to compel disclosure of the CI, the trial court was presented with a forecast of evidence that did not include the possibility that hearsay statements made by the CI might be probative of any material fact associated with the offenses for which he stood accused. This assignment of error is overruled.

We have considered defendant's remaining arguments on appeal and conclude that they are without merit. We further conclude that defendant had a fair trial, free of prejudicial error.

No error.

Judges BRYANT and STEELMAN concur.

STATE OF NORTH CAROLINA v. ALVARO D. VALDEZ HERNENDEZ

No. COA06-979

(Filed 3 July 2007)

1. Appeal and Error— preservation of issues—excluded evidence

Defendant properly preserved for appellate review the question of whether the trial court erred by refusing to allow certain testimony where the trial court granted the State's motion in liminine and defendant requested at trial voir dire examination of the challenged witnesses and made offers of proof.

2. Evidence— character—truthfulness—testimony—foundation

The trial court abused its discretion in a prosecution for rape and other offenses by excluding the opinion testimony of three witnesses about the complainant's character for truthfulness. The exclusion of testimony was prejudicial because the complaining witness did not report the alleged rape until two weeks later, and there was little or no physical or medical evidence in the case.

Appeal by Defendant from judgment entered 18 January 2006 by Judge Steve A. Balog in Superior Court, Orange County. Heard in the Court of Appeals 19 March 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Dorothy Powers, for the State.

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

WYNN, Judge.

The proper foundation for the admission of opinion testimony as to a witness's character for truthfulness or untruthfulness is personal knowledge.[1] Here, Defendant argues that the trial court erred by refusing to allow the opinion testimony of three defense witnesses. Because Defendant established that the witnesses had personal knowledge of the complaining witness, the trial court prejudicially

1. *State v. Morrison*, 84 N.C. App. 41, 48-49, 351 S.E.2d 810, 814-15, *cert. denied*, 319 N.C. 408, 354 S.E.2d 724 (1987); *see also* N.C. Gen. Stat. § 8C-1, Rules 405(a) and 608(a) (2005); *State v. Oliver*, 85 N.C. App. 1, 23, 354 S.E.2d 527, 540, *disc. review denied*, 320 N.C. 174, 358 S.E.2d 64 (1987).

erred by excluding their opinions regarding the complaining witness's character for truthfulness or untruthfulness.

On 18 January 2006, Defendant Alvaro De Jesus Valdez Hernendez[2] was found guilty of second-degree rape, assault on a female, communicating threats, injury to personal property, harassing phone calls, and interfering with telephone lines, in charges stemming from an alleged attack on the complaining witness in the early morning hours of 5 November 2004. Defendant and the complaining witness had previously had what was characterized as a "stormy" romantic relationship from 1991 until February 2003, when Defendant moved out of the apartment they shared together in Carrboro, in Chatham County. The complaining witness had a domestic violence protective order against Defendant from April 2003 until April 2004.

According to Defendant's testimony at trial, he and the complaining witness resumed their romantic relationship in either September or October 2004. He testified that he and the complaining witness had plans to meet after she was finished with work on the evening of 4 November 2004; however, she testified that he showed up at her apartment and pushed his way inside without permission. Defendant stated that they had consensual sex that night, whereas the complaining witness asserted that he had raped her. Two and a half weeks later, on 22 November 2004, the complaining witness called the Chapel Hill Police Department; the next day, she went to the station and reported the alleged rape to two officers there. Defendant contends that the complaining witness reported the alleged rape after she became angry with him when she saw him kiss his new girlfriend, and that she had threatened him.

At trial, the trial court granted the State's motion *in limine* to exclude "any witness, evidence, testimony or argument regarding any prior domestic incidents between the victim and the Defendant that arose in Chatham County, North Carolina prior to 1998." After the complaining witness testified and at the close of the State's evidence, Defendant called as his first witness Sergeant James Bowden of the Siler City Police Department. Sergeant Bowden testified that he had spoken to or dealt with the complaining witness "more than half a dozen times" and then recounted an incident from March 2003 in which the complaining witness had allegedly

2. We note that the judgment from which Defendant appeals, as well as the warrant for his arrest, cites his last name as "Hernendez," whereas a number of other documents in the record, including the indictments, have his last name as "Hernandez."

harassed Defendant and his girlfriend during a soccer game at a local park. Defense counsel then began to question Sergeant Bowden as to his opinion of the complaining witness's "character with regard to truthfulness or untruthfulness[.]"

At that point, the prosecutor objected, and the trial court excused the jury. The trial court then "indicated that [he] had sustained the objection because [he] did not believe that a foundation has been laid for this officer to be allowed to express an opinion about [the complaining witness's] character of truthfulness." Defense counsel responded that it was not his intention to ask about specific instances, which would violate the trial court's prior grant of the State's motion *in limine*, or to inquire as to the complaining witness's reputation. Rather, defense counsel stated that Sergeant Bowden and another defense witness, Sergeant Mark Gonzalez of the Siler City Police Department, had previously had sufficient contact with the complaining witness to form an opinion as to her character for truthfulness. The trial court then agreed to a *voir dire* examination of both Sergeants Bowden and Gonzalez, as well as a third witness, court interpreter Mitch Million, for defense counsel to make an offer of proof of a proper foundation for their opinions as to the complaining witness's character for truthfulness.

Each individual testified to contact on numerous occasions with the complaining witness, and their opinions that she was not truthful. Sergeant Bowden stated that he "had an opportunity to speak with or deal with [the complaining witness]" "more than half a dozen times," "over numerous years," and that he had formed the opinion that "she was not being truthful" on those occasions. Sergeant Gonzalez likewise testified that he had met the complaining witness on "numerous occasions" over "multiple years," during which encounters he had communicated with her in Spanish, her native language, and that he had formed the opinion that "she was making untruthful statements." Mr. Million stated that he had "seen [the complaining witness] in court over a half dozen times, between six and a dozen times" during his service as a court interpreter, and had also seen her on "numerous occasions" at the community college where he taught. Through those encounters, Mr. Million had formed the opinion that the complaining witness had a character for untruthfulness. Mr. Million also testified that he had been called by the trial court to interpret in the instant case, but "because of [his] experiences with [the complaining witness] in the past," he had recused himself since he "knew that [he] could not be impartial because of her credibility."

At the conclusion of the *voir dire* examinations, the trial court again sustained the prosecutor's objections, stating that "the foundation offered is too equivocal to allow [Sergeant Bowden] to give his opinion[,]" that "there is simply nothing to establish that what she said is not truthful[,]" and that "[t]he foundation offered is not sufficient to give [Sergeants Bowden and Gonzalez] a basis on which to give this jury an opinion of the character for truthfulness of [the complaining witness[.]" The trial court further added that he believed Mr. Million's testimony to be "so far beyond the bounds . . . of permissible opinion testimony about somebody's character for truthfulness as to be ludicrous that it's offered[]" because its admission would allow "anybody who comes to court and sits and listens to testimony [to] make a decision about whether they believe somebody or not and then be able to come into court to testify about their character for truthfulness."

The trial court concluded that "in all of the testimony, there is nothing definitive to prove that [the complaining witness] ever told an untruthfulness to these officers or Mr. Million[,]" and, as such, "there is absolutely no foundation to allow testimony by these witnesses as to this witness' character for truthfulness, and the objections are sustained." The jury therefore did not hear any testimony from Sergeant Gonzalez and Mr. Million and heard Sergeant Bowden's testimony only as to the March 2003 incident at the soccer field. Following the jury's verdict of guilty of second-degree rape, assault on a female, communicating threats, injury to personal property, harassing phone calls, and interfering with telephone lines, the trial court entered judgment and sentenced Defendant to a minimum term of ninety-six months and a maximum term of one hundred twenty-five months in prison.

Defendant appeals, arguing several issues. However, we find it dispositive that the trial court erred by refusing to allow the testimony of three defense witnesses concerning their opinions of the complaining witness's character for truthfulness.[3]

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[1] 3. We note that Defendant properly preserved this issue for our review. At the outset of the case, the trial court granted the State's motion *in limine* as to "any prior domestic incidents between the victim and the Defendant that arose in Chatham County, North Carolina prior to 1998." During the presentation of his evidence to the jury, Defendant requested *voir dire* examination of the challenged witnesses and made offers of proof of the testimony he sought to have admitted into evidence. Accordingly, we find Defendant sufficiently preserved 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) (noting that an objection to the granting or denying of a motion *in limine* is

[2] We review a trial court's rulings on motions *in limine* and on the admission of evidence for an abuse of discretion. *State v. Ruof*, 296 N.C. 623, 628, 252 S.E.2d 720, 724 (1979); *State v. Boston*, 165 N.C. App. 214, 218, 598 S.E.2d 163, 166 (2004). This Court will find an abuse of discretion only where a trial court's ruling "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005) (citation and quotation omitted), *cert. denied*, 126 S. Ct. 1773, 164 L. Ed. 2d 523 (2006).

Under the North Carolina Rules of Evidence, "[t]he credibility of a witness may be attacked or supported by evidence in the form of reputation or *opinion* as provided in Rule 405(a)" but such evidence "may refer only to character for truthfulness or untruthfulness[.]" N.C. Gen. Stat. § 8C-1, Rule 608(a) (2005) (emphasis added). Rule 405(a) provides that "[i]n all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation *or by testimony in the form of an opinion*." N.C. Gen. Stat. § 8C-1, Rule 405(a) (2005) (emphasis added). Inquiry as to specific instances of conduct illustrating that character is allowed only on cross examination. *Id.* Thus, opinion and reputation evidence are admissible as evidence pertaining to a witness's credibility. *State v. Oliver*, 85 N.C. App. 1, 22, 354 S.E.2d 527, 539, *disc. review denied*, 320 N.C. 174, 358 S.E.2d 64 (1987).

Soon after Rule 608(a) was first adopted in North Carolina, this Court quoted the following language with approval when considering the difference between reputation and opinion evidence:

> That opinion testimony does not require the foundation of reputation testimony follows from an analysis of the nature of the evidence involved. The reputation witness must have sufficient acquaintance with the principal witness and his community in order to ensure that the testimony adequately reflects the community's assessment. . . . In contrast, opinion testimony is a *personal assessment* of character. The opinion witness is not relating community feelings, the testimony is *solely the impeachment witness' own impression of an individual's character for truthfulness*. Hence, a foundation of long acquaintance is not required for opinion testimony. Of course, the opinion witness must testify from personal knowledge. . . . But once that basis

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insufficient to preserve for appeal the question of the admissibility of the evidence, without further objection at the time the evidence is offered).

> is established the witness should be allowed to state his opinion, "cross-examination can be expected to expose defects."

State v. Morrison, 84 N.C. App. 41, 48-49, 351 S.E.2d 810, 814-15 (quoting *United States v. Watson*, 669 F.2d 1374 (11th Cir. 1982)) (internal citations omitted) (emphasis added), *cert. denied*, 319 N.C. 408, 354 S.E.2d 724 (1987). We further noted that, with respect to laying a foundation for opinion evidence regarding a witness's character for truthfulness or untruthfulness,

> The rule imposes no prerequisite conditioned upon long acquaintance or recent information about the witness; cross-examination can be expected to expose defects of lack of familiarity and to reveal reliance on isolated or irrelevant instances of misconduct or the existence of feelings of personal hostility towards the principal witness.

Id. at 48, 351 S.E.2d at 815 (quoting *United States v. Lollar*, 606 F.2d 587 (5th Cir. 1979)). Accordingly, we held that the proper foundation for the admission of opinion testimony as to a witness's character for truthfulness is personal knowledge. *Id.*; *see also Oliver*, 85 N.C. App. at 23, 354 S.E.2d at 540 ("There must be a proper foundation laid for the admission of opinion testimony as to another's character for truthfulness. That foundation is personal knowledge.").

In the instant case, the trial court excluded the testimony of defense witnesses Sergeants Bowden and Gonzalez and Mr. Million because "there is nothing definitive to prove that [the complaining witness] ever told an untruthfulness" to the witnesses, and, as such, "there is absolutely no foundation to allow testimony by these witnesses as to this witness' character for truthfulness[.]" Under North Carolina law, however, such a foundation is not required for opinion testimony as to a witness's character for truthfulness or untruthfulness, nor must a witness be shown to have been untruthful on a particular occasion in order to allow such testimony. Rather, Defendant needed to show only that each of the three witnesses had personal knowledge of the complaining witness and that the three had consequently formed an opinion as to her character for truthfulness or untruthfulness.

Based on the transcript of the *voir dire* examinations and offers of proof made by Defendant, we find that Defendant did establish such a foundation. The three witnesses testified to having personal knowledge of the complaining witness and to having formed an opin-

ion as to her character for untruthfulness. As such, we conclude that the exclusion of the opinion testimony of these witnesses was error. *See also Holt v. Williamson*, 125 N.C. App. 305, 314, 481 S.E.2d 307, 314 (noting that "the veracity of any witness may be attacked by opinion testimony as to the character of that witness for truthfulness" and allowing "brief details concerning the relationship of each [of three witnesses with plaintiff] . . . to establish a foundation as to their knowledge of [plaintiff]"), *disc. review denied*, 346 N.C. 178, 486 S.E.2d 204 (1997); *Morrison*, 84 N.C. App. at 49, 351 S.E.2d at 815 (holding that the trial court's exclusion of opinion testimony for failure to meet a requirement for foundation was error).

Having concluded that the trial court committed error by disallowing the testimony of Sergeants Bowden and Gonzalez and Mr. Million, we turn now to the question of whether such error was prejudicial, warranting a new trial. Under N.C. Gen. Stat. § 15A-1443(a):

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

N.C. Gen. Stat. § 15A-1443(a) (2005).

The record reflects that the State's case against Defendant rested almost exclusively on the complaining witness's testimony against him. Because the complaining witness did not report the alleged rape until over two weeks after the night in question, and Defendant admitted to having sexual intercourse with her, albeit claiming it was consensual, there was little or no physical or medical evidence at issue in the case, and it largely came down to a "he said, she said" situation. Thus, the credibility of the complaining witness was of significant probative value, not only for purposes of the impeachment of her testimony, but of the underlying case as a whole.

Given the "he said, she said" nature of this case, testimony by three defense witnesses—two of whom were police officers—that the complaining witness had a character for untruthfulness would likely have had some kind of impact on the weight the jury gave to her testimony. We find that there is "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]"

Because we conclude that the trial court's granting of the State's motion *in limine* and subsequent evidentiary ruling to disallow the testimony of these key defense witnesses were sufficiently prejudicial to warrant a new trial for Defendant, we decline to address the remainder of his arguments to this Court on appeal.

New trial.

Chief Judge MARTIN and Judge GEER concur.

STATE OF NORTH CAROLINA v. CARLOS LEE WILLIAMS

No. COA06-1309

(Filed 3 July 2007)

1. Child Abuse and Neglect— felonious abuse-sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of felonious child abuse inflicting serious physical injury where there was sufficient evidence that defendant intentionally inflicted injury that proved to be serious upon a nine-year-old child in his care by beating him multiple times with a belt.

2. Appeal and Error— preservation of issues—failure to object—not giving instruction

Defendant waived any objection to the trial court's failure to inform the jury that it had sustained defendant's objection to certain testimony where it is not clear that the objection was sustained, defendant did not move to strike, and defendant did not argue plain error. Even if there was error, the testimony was not sufficiently prejudicial to warrant a new trial.

3. Child Abuse and Neglect—felonious abuse—judgment—correction of clerical error

A judgment and commitment for felonious child abuse inflicting serious bodily injury as defined by N.C.G.S. 14-318.4(a3), a Class C felony, was corrected to show that defendant was found guilty of the lesser included offense of felonious child abuse inflicting serious physical injury as defined by N.C.G.S. § 14-318.4(a), a Class E felony.

Appeal by defendant from judgment entered 26 April 2006 by Judge W. Allen Cobb, Jr. in Wayne County Superior Court. Heard in the Court of Appeals 25 April 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Kimberly Duffley, for the State.

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

HUNTER, Judge.

Carlos Lee Williams ("defendant") was convicted of felony child abuse inflicting serious injury on 26 April 2006. Defendant appeals this conviction. After careful consideration, we find no error in the trial but remand to correct a clerical error.

D.H. is the alleged victim in this case and is the nine-year-old son of defendant. D.H. did not live with defendant but did visit him periodically. On 20 March 2005, D.H. went to visit defendant. The following day, D.H.'s cousin, Quadrick, came over to spend the weekend with defendant and D.H. On 22 March 2005, defendant allowed the two boys to play with a slingshot and then allowed the boys to shoot at bottles with a BB gun. After approximately fifteen minutes, defendant told the children that the gun was "out of bullets[,]" and they went inside for a few hours.

Quadrick suggested that they go back outside and he and D.H. brought the BB gun back outside. D.H. held the trigger end of the gun and Quadrick held the barrel end. Defendant, who was at a neighbor's house at the time, noticed that D.H. was pointing the gun at Quadrick and yelled at the boys to " '[p]ut that gun down.' " Quadrick dropped his end of the gun and it went off shooting Quadrick.

Defendant ran over to D.H. and sent him to his room. D.H. testified that defendant made him take off all of his clothes except his underwear, and then started beating him with a belt. D.H. went on to testify that the beating lasted for ten to fifteen minutes, then defendant took a break for approximately five minutes, and then beat him for another twenty minutes. After a second five minute break, D.H. testified that he was beaten with the belt for another twenty-five minutes. D.H. then testified that defendant struck him with a belt for the fourth time another twenty-five minutes. In all, D.H. testified that defendant struck him with a belt for at least forty minutes and as much as an hour and forty minutes. D.H. also testified that defendant

had him take a bath after the beatings. When D.H. returned to his mother's home, his mother noticed bruises on his arms, called Social Services, and took D.H. to the emergency room.

At the hospital, D.H. told the doctor that his father had beaten him, and he spoke with a detective who took pictures of his injuries. At trial, D.H. testified that he wore bandages for approximately one week and showed the jurors scars on his arms and legs. According to D.H., the scars were the result of injuries sustained while defendant beat him.

Aside from D.H.'s testimony regarding defendant's allegedly felonious conduct, and pertinent to the disposition of this appeal, D.H. stated that "earlier on in the year like in January, or maybe the 1st um [sic] day of the new year, [defendant] was—he was cussing at my mom and was like that he was going to start shooting people because it was a new year and stuff." Defense counsel objected, but the record does not disclose that the trial court provided counsel with a ruling on that objection or that defense counsel moved to strike the answer.

An expert in pediatric medicine, Dr. Horton, testified that he was called by an emergency room physician around 2:00 a.m. on 21 March 2005 and went to the hospital. Dr. Horton examined D.H. and discovered multiple bruising, abrasions, shallow lacerations, swelling, and concluded that D.H.'s condition was "[m]oderately to seriously severe." Dr. Horton admitted D.H. to the hospital to watch for the development of a condition called "compartment syndrome, where through injury the soft tissues of an extremity can swell and cause the blood supply to be cut off[.]" Dr. Horton was also concerned that rhabdomyolysis could develop. Rhabdomyolysis is a condition in which injured muscles release a protein that can poison blood, causing electrolyte level problems that can lead to cardiac and cognitive problems and perhaps acute renal failure. Testing for those problems proved negative. D.H., however, was diagnosed with "[n]onaccidental trauma."

Defendant's father and D.H.'s grandfather, Albert Lee Williams, testified that when he arrived at defendant's house D.H. was sitting in a chair and looked "like he was kind of mad, like he was puffed up; there was something going on," but that he did not see any bruises on D.H. He also testified that D.H. had his clothes on. Williams went to the hospital, and while there, saw bruises on D.H.

Defendant's brother, Ernesto Williams, testified that he had been at defendant's home and did not see defendant hit D.H. with a belt, and that to his knowledge there was never any beating. Defendant's neighbor, on the hand, testified that she saw defendant strike D.H. with the belt four times. She later took D.H. back to his mother's and testified that she thought "everything was fine[.]"

Defendant testified in his own defense. After the BB gun incident, defendant stated that he "took [his] belt off and hit [D.H.] a couple times on the butt," and that he "spanked him again a couple more times." Once inside the house, defendant stated that he spanked D.H. "a couple more times to get him into [his] room." Once in the room, defendant stated that he "beat him for like 10 or 15 minutes." Defendant maintains that there were not four beatings but only one and that D.H. kept his clothes on throughout. Defendant stated on cross-examination that the beatings were not intentional and that some of the injuries to D.H. likely occurred when D.H. had bumped into something.

At the close of the evidence, the trial court denied defendant's motion to dismiss. The court instructed the jury on the Class C felony defined by N.C. Gen. Stat. § 14-318.4(a3) (2005), and the lesser included offenses of the Class E felony defined by N.C. Gen. Stat. § 14-318.4(a), and a misdemeanor offense defined by N.C. Gen. Stat. § 14-318.2(a) (2005). The two subsections of N.C. Gen. Stat. § 14-318.4 contain the same elements except that to be convicted of the Class C felony the defendant must inflict a bodily injury that poses a "substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization." N.C. Gen. Stat. § 14-318.4(a3). The Class E felony, on the other hand, requires that serious physical injury be inflicted on the child. The jury acquitted defendant of the Class C felony but found him guilty of the lesser included Class E felony. Defendant pled guilty to being a habitual felon, and the trial court sentenced him to a minimum term of imprisonment of 116 months and a maximum term of 149 months.

Defendant presents the following issues on appeal: (1) did the trial court err in denying his motion to dismiss the charge of felonious child abuse for insufficiency of the evidence; (2) did the trial court err in not striking portions of D.H.'s testimony on the grounds

that it was unduly prejudicial; and (3) did the trial court commit an error in its written judgment.

I.

[1] Defendant argues that the trial court erred in denying his motion to dismiss at the close of the State's evidence and again at the end of all the evidence on the grounds that there existed insufficient evidence to establish that defendant intentionally inflicted serious physical injury upon or to the child. We disagree. The standard of review on a motion to dismiss for insufficient evidence is whether "there is substantial evidence [] of each essential element of the offense charged[.]" *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "The trial court is *not* required to determine that the evidence excludes every reasonable hypothesis of innocence prior to denying a defendant's motion to dismiss." *Powell*, 299 N.C. at 101, 261 S.E.2d at 118. In determining whether there is substantial evidence it is well settled that all the evidence "is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal[.]" *Id.* at 99, 261 S.E.2d at 117.

Defendant was convicted of the Class E felony child abuse offense. The elements of this offense are: (1) the accused is "[a] parent or any other person providing care to or supervision of a child[;]" (2) such child is less than sixteen (16) years of age; and (3) such defendant intentionally inflicts serious physical injury upon or to the child or intentionally commits an assault upon the child which results in serious physical injury. N.C. Gen. Stat. § 14-318.4(a). Defendant concedes that the State has met the first two elements in this case but argues that there was insufficient evidence to establish that he intentionally caused a serious physical injury. Accordingly, we limit our discussion to the same.

A "serious physical injury" under the statute has been defined as an injury that causes " 'great pain and suffering.' " *State v. Williams*, 154 N.C. App. 176, 179, 571 S.E.2d 619, 621 (2002) (citation omitted). Factors helpful in determining whether an injury meets this standard are: "[1] hospitalization, [2] pain, [3] loss of blood, and [4] time lost from work." *State v. Romero*, 164 N.C. App. 169, 172, 595 S.E.2d 208,

210 (2004). Under the circumstances presented here, courts should also review whether the child was unable to attend school or other activities. We have previously held that "whether an injury is 'serious' is generally a question for the jury." *Id.* at 172, 595 S.E.2d at 211; *Williams*, 154 N.C. App. at 180, 571 S.E.2d at 622 (holding that "conflicts in the evidence as to [the victim's] level of activity and the extent, if any, to which she appeared to be in pain after the alleged assault are for resolution by the jury").

The evidence presented in the light most favorable to the State establishes that: Defendant beat D.H. four different times with a belt for a total time between forty minutes and an hour and forty minutes; D.H. was bleeding, short of breath (due to asthma), and vomited; and both D.H.'s arms were almost entirely covered with bruises, his legs were swollen and puffy, his buttocks were black and blue; and D.H. was in pain for two weeks.

Additionally, it is undisputed that D.H. was hospitalized after the incident. Dr. Horton testified that: D.H.'s injuries were "[m]oderately to seriously severe," the injuries were severe enough as to possibly cause rhabdomolysis and/or compartment syndrome, and D.H. complained of pain during his stay and was given medication to combat the pain and swelling.

Viewed in the light most favorable to the State, we hold that the evidence was sufficient for a jury to reasonably infer that the injury inflicted by defendant caused D.H. great pain and suffering, and thus satisfied the statutory element of "serious physical injury." *See Romero*, 164 N.C. App. at 172, 595 S.E.2d at 211 (finding sufficient evidence to support a conviction under N.C. Gen. Stat. § 14.318.4(a) when the "defendant hit his one-year-old son at least once with a belt, that the child began to cry after being hit, and that the child suffered a visible bruise to his head"); *Williams*, 154 N.C. App. at 178-79, 571 S.E.2d at 621 (holding prolonged paddling that led to bleeding, swelling, and pain for more than a week constitutes sufficient evidence to support a conviction under N.C. Gen. Stat. § 14.318.4(a)).

Under N.C. Gen. Stat. § 14.318.4(a), the element of intent is "sufficiently established if a defendant intentionally inflicts injury that proves to be serious on a child of less than sixteen years of age in his care." *State v. Campbell*, 316 N.C. 168, 172, 340 S.E.2d 474, 476 (1986) (citation omitted). "He need not specifically intend that the injury be serious." *Id.* Given the evidence discussed above and Dr. Horton's testimony that D.H.'s injuries were "[n]onaccidental," we hold that the

evidence taken in the light most favorable to the State establishes the element of intent. The trial court did not err in denying defendant's motion to dismiss the charge of felonious child abuse.

II.

[2] Defendant next argues that the trial court erred in failing to inform the jury that it sustained defense counsel's objection to testimony that defendant claims was prejudicial. The record, however, does not clearly support the proposition that defendant's objection was sustained. Regardless, defendant failed to move to strike the objectionable portion of D.H's testimony. Our Supreme Court has held that "[f]ailure to move to strike the unresponsive part of an answer, *even though the answer is objected to*, results in a waiver of the objection." *State v. Chatmam*, 308 N.C. 169, 178, 301 S.E.2d 71, 77 (1983). Thus, because defendant waived any objection made at trial and has not argued that the trial court committed plain error, we find no error. In any event, even were we to assume a trial court error on this issue, we do not find that the admission of this testimony was sufficiently prejudicial to warrant a new trial. Accordingly, defendant's assignments of error as to this issue are overruled.

III.

[3] In his last argument, defendant requests that the written judgment and commitment reciting that defendant was guilty of felonious child abuse inflicting serious bodily injury as defined by N.C. Gen. Stat. § 14-318.4(a3), a Class C felony, be corrected to show that defendant was found guilty of the lesser included offense of felonious child abuse inflicting serious physical injury as defined by N.C. Gen. Stat. § 14-318.4(a), a Class E felony. We agree with defendant that this error should be corrected and the State does not oppose a remand to the trial court as to this issue. Accordingly, we remand to the trial court to correct this clerical error.

IV.

In summary, we find that the trial court properly denied defendant's motion to dismiss the charges brought against him and we find no plain error in the admission of testimony. We remand to the trial court only to correct a clerical error.

No error; remand to correct clerical error.

Judges ELMORE and GEER concur.

ELAINE FORD SMALL, PLAINTIFF v. SINCLAIR AUVANT PARKER, DEFENDANT

No. COA06-1336

(Filed 3 July 2007)

1. Appeal and Error— appealability—possibility of inconsistent verdicts—consent to settlement agreement withdrawn before order signed

The merits of an appeal from an interlocutory order were addressed due to the possibilities of inconsistent verdicts where the parties agreed to a mediated settlement, plaintiff withdrew her consent, and the agreement (for reasons which are not clear) was made an order of the court nonetheless.

2. Compromise and Settlement— transfer from superior to district court

The trial court did not err by transferring from superior court to district court a case arising from a mediated settlement agreement pertaining to a separation agreement; although the district court was the proper division for the matter, there was nothing to indicate that the court order which followed the settlement was set aside solely for being entered in the wrong division.

3. Compromise and Settlement— mediated settlement agreement—consent order—assent withdrawn prior to order

The trial court did not err by striking a consent order where the parties agreed to a mediated settlement, plaintiff withdrew her consent, and the agreement (for reasons which are not clear) became a consent order and an order of the court nonetheless. The evidence indicates that the order was signed without plaintiff's consent.

4. Compromise and Settlement— settlement and court ordered consent—consideration of settlement as contract only

The question of whether the trial court refused to enforce a mediated settlement agreement as a contract in a domestic case was not before the court where the trial court's order was limited to its refusal to enforce the agreement as an order of the court (which had been signed subsequently). The enforcement of the agreement as a contract was left to further proceedings in district court.

Appeal by defendant from order entered 18 July 2006 by Judge Jay D. Hockenbury in Pender County Superior Court. Heard in the Court of Appeals 4 June 2007.

J. Albert Clyburn, P.L.L.C., by J. Albert Clyburn, for plaintiff-appellee.

R. Kent Harrell for defendant-appellant.

MARTIN, Chief Judge.

Defendant-appellant Sinclair Avant Parker appeals an order of the Pender County Superior Court denying his motion to enforce a mediated settlement agreement ("Agreement"), granting the plaintiff's motion to set aside a consent order entered upon the agreement and transferring the proceedings to the Pender County District Court. For the reasons stated below, we affirm and remand for further proceedings.

The evidence before the trial court tended to show that defendant and plaintiff Elaine Ford Small were married on 14 April 1967 and divorced on 31 August 1990. The parties entered into an agreement to divide their assets on 29 May 1990, with some of the property going to their three children and the remainder to the plaintiff. On 6 May 1999, plaintiff filed a complaint seeking specific performance of the separation agreement. Defendant answered that the agreement was no longer enforceable, had been modified by the parties, and that he had made improvements to the real property for which he was entitled to compensation if he was determined to be no longer entitled to the property.

On 31 March 2000, the parties attended mandatory mediation at the office of Wilmington attorney Carter Lambeth. The parties were accompanied by counsel. At the mediation, the parties executed a document entitled "Memorandum of Consent Order in Mediated Settlement Conference." The document was signed by both parties and their counsel. It required the defendant to pay $47,000 to the plaintiff for her interest in real property located at Rocky Point, North Carolina. Upon the payment, plaintiff would execute a quitclaim deed conveying her interest in the property to the defendant. Defendant would also simultaneously transfer some property in Pender County to plaintiff.

On 2 April 2000, two days after executing the agreement, plaintiff faxed her attorney informing him that she had changed her mind and

asking him not to have the agreement entered as a court order. However, for reasons that are unclear from the record, the agreement was nevertheless signed by Superior Court Judge Ernest Fullwood on 10 April 2000 and made an order of the court.

Defendant attempted to tender the $47,000 to plaintiff on 11 August 2000. However, plaintiff's counsel declined the payment on 18 September 2000, stating that she deemed the mediation conference Agreement to be cancelled and void. The letter declining the payment stated that defendant had communicated with the plaintiff after the mediation conference, attempting to renegotiate the agreement and asking her to take a reduced sum since he was not in a position to fulfill his $47,000 obligation. In addition, plaintiff was concerned that defendant had not supplied the deeds he had agreed to provide.

On 27 January 2005, defendant filed a motion to enforce the agreement. On 11 May 2005, plaintiff sought to have the Agreement set aside. The Honorable Jay D. Hockenbury set aside the Agreement on 18 July 2006 and transferred the action to Pender County District Court. This appeal follows.

Interlocutory

[1] We first note that the plaintiff has moved to dismiss this appeal as interlocutory. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). A party cannot immediately appeal an interlocutory order unless (1) a trial court enters a final judgment to fewer than all of the claims or parties in an action and certifies that there is no reason to delay the appeal or (2) the failure to grant immediate review would affect a substantial right. *Davis v. Davis*, 360 N.C. 518, 524-25, 631 S.E.2d 114, 119 (2006) (citation omitted). Since the trial court has not entered the requisite certification, whether this appeal is interlocutory hinges on whether the failure to grant immediate review would affect a substantial right.

A right is substantial if it will be lost or irremediably and adversely affected if the trial court's order is not reviewed before a final judgment. *RPR & Assocs. v. Univ. of N.C.-Chapel Hill*, 153 N.C. App. 342, 347, 570 S.E.2d 510, 514 (2002). In determining whether a substantial right will be prejudiced by delaying an interlocutory appeal, our Supreme Court has emphasized that "[i]t is usually neces-

sary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which the appeal is sought is entered." *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 408 (1982) (citation omitted).

In an analogous case involving a wife's appeal of the dismissal of her equitable distribution counterclaims, we have held that the appeal was not interlocutory. *Small v. Small*, 93 N.C. App. 614, 617-18, 379 S.E.2d 273, 275-76 (1989). The principle behind permitting immediate review of such dismissals is that a subsequent and successful appeal would then require additional trial proceedings that could expose the parties to potentially inconsistent verdicts. *Davidson v. Knauff Ins. Agency, Inc.*, 93 N.C. App. 20, 25, 376 S.E.2d 488, 491 (1989). *See Whalehead Props. v. Coastland Corp.*, 299 N.C. 270, 278, 261 S.E.2d 899, 904 (1980) ("We are of the opinion that denial of defendants' claim . . . of specific performance prior to hearing evidence on the question of damages, affected a substantial right of the defendants and therefore was appealable.") Mindful of the fact that a later, successful appeal of the order here could subject the parties to inconsistent verdicts, we conclude the order affects a substantial rights and is therefore subject to immediate review. Therefore, we address the merits of defendant's claims.

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[2] Defendant first argues that the trial court erred in transferring the matter to district court in that the order was properly entered and should not have been set aside solely for being entered in the incorrect division. However, the record states that the trial court only determined that "[t]he proper division for this action is the District Court of Pender County, North Carolina." There is nothing in the record that supports defendant's assertion that Judge Fullwood's order was set aside only because it was entered in the improper division. On the other hand, the trial court was correct in its conclusion of law that the district court division is the proper division for litigating this matter. The relevant statute states that:

> The district court division is the proper division without regard to the amount in controversy, for the trial of civil actions and proceedings for annulment, divorce, equitable distribution of property, alimony, child support, child custody and the enforcement of separation or property settlement agreements between spouses, or recovery for the breach thereof.

N.C. Gen. Stat. § 7A-244 (2005). Therefore, this argument is without merit and is overruled.

[3] Next, defendant argues that the trial court erred in striking the Memorandum of Consent Order. In this regard, we emphasize the two differing documents involved here. The 31 March 2000 Mediated Settlement Conference produced an agreement that was entered into by the parties themselves, which is designated as the "Agreement" for the purposes of this appeal. Judge Fullwood's order incorporating the Agreement into a settlement order was an order of the court, designated the "Order." In this regard, a review of the record indicates that the trial court struck the Order, but not the Agreement, the underlying contract produced by the parties. The trial court's decision stated:

> 1. Plaintiff's Motion to Strike the Memorandum of Consent Order filed in this action on April 13, 2000 is allowed.
>
> 2. Defendant's Motion to Enforce the Memorandum of Consent Order filed in this action April 13, 2000 is denied.

It is well-settled that "[t]he power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto; and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement and promulgates it as a judgment." *Brundage v. Foye*, 118 N.C. App. 138, 140, 454 S.E.2d 669, 670 (1995) (quoting *King v. King*, 225 N.C. 639, 641, 35 S.E.2d 893, 895 (1945)). In this case, the evidence indicates that the plaintiff withdrew her assent on 2 April 2000, several days prior to Judge Fullwood's entering the consent order on 13 April 2000.

We have considered defendant's arguments that plaintiff's actions after 13 April 2000 comported with the existence of an agreement. Correspondence from her counsel to defendant's counsel accused defendant of failure to comply with the order as late as 18 September 2000. Indeed, plaintiff's counsel made no effort to notify defendant of plaintiff's decision to withdraw her consent from the order and made no effort to withdraw the order. Defendant is also correct in pointing out that North Carolina courts presume that actions taken by counsel on behalf of clients give rise to a presumption that counsel is acting within their authority and with the consent of the client. *Guilford County v. Eller*, 146 N.C. App. 579, 581, 553 S.E.2d 235, 237 (2001). However, a trial court's findings of fact are conclusive on appeal if there is substantial evidence to support them, even if the record could sustain findings to the contrary. *Shipman v. Shipman*, 357 N.C. 471, 474-75, 586 S.E.2d 250, 253-54 (2003). In this case, testimony from plaintiff's then counsel that he communicated with plaintiff regarding

her desire to withdraw her consent from the Agreement prior to Judge Fullwood's order constitutes competent evidence supporting the trial court's determination that the order was signed without plaintiff's consent. Therefore, this argument must be overruled.

[4] Defendant's third argument is that the trial court erred in denying his motion to enforce the mediated settlement agreement on the ground that the evidence established that a contract had been entered into by both parties. This issue is not properly before us at this time. Though both parties seem to be under the impression that the trial court refused to recognize the Agreement as a valid contract, a reading of the order shows that this is a misperception. The trial court's order was limited to its refusal to enforce the Agreement as an order of the court. The court decreed that, based on its findings of fact and conclusions of law:

> 1. Plaintiff's Motion to Strike the Memorandum of Consent Order filed in this action on April 13, 2000 is allowed.
>
> 2. Defendant's Motion to Enforce the Memorandum of Consent Order filed in this action on April 13, 2000 is denied.

This order contains no indication of a refusal by the court to enforce the Agreement as a contract. It is well settled that North Carolina appellate courts will not review an issue which has not been adjudicated by the tribunal below. *State v. Crews*, 286 N.C. 41, 48, 209 S.E.2d 462, 466 (1974). We therefore decline to address this argument and leave its resolution to the future proceedings in the Pender Court District Court.

The order of the Pender County Superior Court is affirmed, and the case is remanded for further proceedings consistent with this order.

Affirmed and remanded.

Judges McCULLOUGH and TYSON concur.

KEVIN L. GREENE, EMPLOYEE, PLAINTIFF v. CONLON CONSTRUCTION COMPANY, EMPLOYER, AND ST. PAUL TRAVELERS INSURANCE CO., INSURANCE CARRIER, DEFENDANTS

No. COA06-1311

(Filed 3 July 2007)

1. Workers' Compensation— weekly wage—per diem—correctly included

The Industrial Commission did not err in a workers' compensation case by including plaintiff's per diem stipend for food and lodging in its calculation of his weekly wage. Allowances made in lieu of wages are part of the wage contract. "In lieu of wages" needs no special definition, and there was competent evidence to support the finding that the per diem was in lieu of wages. N.C.G.S. § 97-2(5).

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

An issue was not preserved for appellate review where no error was assigned.

Appeal by defendants from Opinion and Award entered 3 August 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 April 2007.

Scudder and Hedrick, by John A. Hedrick and April D. Seguin, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Michael D. Moore, for defendant-appellants.

LEVINSON, Judge.

Conlon Construction Company and St. Paul Travelers Insurance Company (defendants) appeal from an Opinion and Award of the North Carolina Industrial Commission that awarded workers' compensation benefits to plaintiff Kevin Greene. We affirm.

The pertinent facts are summarized as follows: In June 2003 plaintiff was living in Wendell, North Carolina, and worked in the construction business. Plaintiff answered an advertisement by defendant Conlon Construction Company, and spoke on the phone several times with defendant's human resource supervisor about plaintiff's taking a

job with defendant. They agreed on the terms of employment, including the job description, starting date, hourly wage, weekly *per diem* payment for out-of-town work, and health benefits.

Plaintiff started working for defendant on 14 July 2003 at a job site in Athens, Georgia. On 25 August 2003 plaintiff suffered a compensable injury when he missed the last three rungs of a ladder, landed on his right leg, and injured his leg and back. After missing a few days of work, plaintiff continued to work for defendant until the Georgia project was completed. When the Georgia job was over, plaintiff returned home to North Carolina, expecting that defendant would send him next to a job in either Maryland or California. When plaintiff returned to North Carolina, he sought medical treatment for the increasing pain in his lower back and numbness in his leg. The treatments failed to relieve the pain, and plaintiff's physician recommended a "minimally invasive fusion surgery" to correct his back injury.

Plaintiff initially filed a workers' compensation claim in Georgia. Defendants accepted liability for plaintiff's claim under Georgia workers' compensation law, but refused to pay for the surgery recommended by plaintiff's doctor. Plaintiff then filed a North Carolina Industrial Commission Form 18, reporting the injury and seeking disability and medical benefits. Defendants denied liability, and a hearing was conducted on 16 June 2005.

Deputy Commissioner George R. Hall, III, issued an Opinion and Award in November 2005, awarding plaintiff medical and disability benefits, including plaintiff's *per diem* supplement in his calculation of plaintiff's average weekly wages. Defendants appealed to the Full Commission, which issued an Opinion and Award on 3 August 2006 that affirmed the Deputy Commissioner in all relevant respects. Defendants timely appealed from the Full Commission's Opinion and Award.

Standard of Review

"The [Industrial] Commission has exclusive original jurisdiction over workers' compensation cases and has the duty to hear evidence and file its award, 'together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue.' N.C.G.S. § 97-84 (2005). Appellate review of an award from the Industrial Commission is generally limited to two issues: (i) whether the findings of fact are supported by competent evidence, and (ii)

whether the conclusions of law are justified by the findings of fact." *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006) (citing *Clark v. Wal-Mart*, 360 N.C. 41, 42-43, 619 S.E.2d 491, 492 (2005)), *reh'g denied*, 361 N.C. 227, 641 S.E.2d 801 (2007). "The Commission's findings of fact 'are conclusive on appeal when supported by competent evidence even though' evidence exists that would support a contrary finding." *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 705, 599 S.E.2d 508, 512 (2004) (quoting *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982)). "Determinations of the weight and credibility of evidence are for the Commission; this Court simply determines whether the record contains any evidence tending to support the finding. Findings of fact not assigned as error are conclusively established on appeal." *Hensley v. Industrial Maint. Overflow*, 166 N.C. App. 413, 418, 601 S.E.2d 893, 897 (2004) (citing *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965), and *Robertson v. Hagood Homes, Inc.*, 160 N.C. App. 137, 140, 584 S.E.2d 871, 873 (2003)), *disc. review denied*, 359 N.C. 631, 613 S.E.2d 690 (2005).

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[1] Defendants argue on appeal that the Industrial Commission erred by including plaintiff's *per diem* stipend in its calculation of plaintiff's weekly wage. We disagree.

This issue is addressed by N.C. Gen. Stat. § 97-2(5) (2005), which provides in pertinent part that "[w]herever allowances of any character made to an employee in lieu of wages are specified part of the wage contract, they shall be deemed a part of his earnings." Defendants argue first that our common law precedent has not defined the meaning of the words "in lieu of wages." We conclude that this phrase needs no special definition. "Wages" are commonly understood to be "payment for labor or services," *see* 1610 BLACK'S LAW DICTIONARY 8th Ed, and "in lieu of" means "instead of or in place of," *see* 803 BLACK'S LAW DICTIONARY 8th Ed. Thus, allowances made "in lieu of wages" are those made "in place of payment for labor or services."

The determination of whether an allowance was made in lieu of wages is a question of fact:

> [Defendant-employer] argues that the full Commission erred in concluding that [claimant's] average weekly wage should include . . . mileage reimbursement. . . . [W]e are bound by the findings of the full Commission so long as there is some evidence of record

> to support them[.] . . . As . . . there is competent evidence to support the finding that [claimant] was paid mileage in lieu of wages, the full Commission properly included the mileage in her average weekly wage.

Chavis v. TLC Home Health Care, 172 N.C. App. 366, 373-74, 616 S.E.2d 403, 410 (2005), *appeal dismissed*, 360 N.C. 288, 627 S.E.2d 464 (2006). Similarly, in *Shah v. Howard Johnson*, 140 N.C. App. 58, 535 S.E.2d 577 (2000), defendant argued that "the Commission erred in finding that the value of plaintiff's lodging was $ 100.00 per week, and that plaintiff . . . [was] receiv[ing] lodging in lieu of additional wages[.]" *Id.* at 65, 535 S.E.2d at 582. This Court upheld the Commission, noting that "we are bound by the findings so long as there is some evidence of record to support them[.] . . . [T]here was ample evidence to support a finding that lodging was furnished to plaintiff as part of his employment contract, and . . . had a value of $100.00." *Id.* at 66, 535 S.E.2d at 582.

In the present case, the Commission found in pertinent part that:

> 18. . . . [P]laintiff earned hourly wages[.] . . . Additionally, [defendant] paid plaintiff allowances for food and lodging that . . . were not based on actual expenses for lodging or meals and plaintiff was not required to submit receipts or other documentation in order to receive allowances. [Defendant] paid plaintiff the weekly allowance of $320.00 regardless of whether he in fact had any expenses for lodging or meals. [Defendant] allowed plaintiff complete discretion of how to spend the allowances, if at all. The allowances paid to plaintiff were, therefore, in lieu of wages.

Regarding the Commission's findings that the $320.00 per week *per diem* (1) was not based on actual expenses or submission of receipts for reimbursement; (2) was paid in the same amount every week, even if plaintiff had no actual expenses for lodging and meals; and (3) was to be spent in plaintiff's complete discretion, defendants concede that these "findings are factually accurate." Defendants challenge only the Commission's finding that the allowance was "in lieu of wages."

We conclude that there is competent evidence to support the finding that the *per diem* was in lieu of wages. This finding is consistent with the Commission's other findings which, as discussed above, are conceded by defendants to be accurate. Additionally, defendants'

own guidelines on the payment of the *per diem* allowance support the finding that this payment is in lieu of wages. Defendant's "Lump Sum *per diem* guidelines" states that:

> Lump Sum *per diem* is defined as the weekly amount you will receive for living expenses while working away from your principal residence and is currently set at $320 per week. . . . Your *per diem* will be paid weekly and included on your paycheck. . . .
>
> . . . .
>
> . . . We suggest you shop for the best deals available. You are spending your own money. . . . It is not expected that this will cover all of your expenses for meals and lodging in all locations, but this will cover the majority of your additional expenses for travel.
>
> Conlon has the option to cover lodging and transportation at the actual expense. If Conlon pays for transportation and lodging . . . [and] for meals also, the employee receives no *per diem*.
>
> . . . .
>
> For projects with extremely high or low hotel rates, we will consider a request for changes in allowances to reflect the expense.

These guidelines clearly establish the payment of a set amount, neither determined by reference to actual receipts, nor expected to cover all expenses of travel. Indeed, reimbursement for actual expenses is set out as an alternative option. We conclude that the Commission did not err by finding that the *per diem* allowance was paid in lieu of wages. This assignment of error is overruled.

[2] Defendants also argue that the Commission erred by finding that its calculation of plaintiff's weekly wage was "fair and just to both parties." Because defendants did not assign error to this finding, this issue was not preserved for appellate review. N.C. R. App. P. 10(a).

For the reasons discussed above, we conclude that the Commission did not err and that its Opinion and Award should be

Affirmed.

Judges McGEE and JACKSON concur.

STATE OF NORTH CAROLINA v. ROGER DALE HOWELL

No. COA06-1473

(Filed 3 July 2007)

1. Probation and Parole— revocation—unconstitutional condition—sufficient other violations

The revocation of defendant's probation was not in error even though the conditions of his probation included an unconstitutional requirement of admission of culpability, because it was clear that defendant violated numerous other conditions of his probation warranting revocation.

2. Constitutional Law— effective assistance of counsel—probation revocation—no bearing on outcome

Defendant's assistance of counsel was effective in a probation revocation where defendant pointed to the failure of his counsel to object to the unconstitutional probation condition that he admit responsibility for the offenses, but the record clearly shows violation of several other unrelated conditions. It cannot be said that the outcome of the hearing would have been any different had counsel objected to the condition.

Appeal by defendant from judgments entered 5 June 2006 by Judge Richard L. Doughton in Gaston County Superior Court. Heard in the Court of Appeals 24 May 2007.

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

Glenn Gerding for defendant appellant.

McCULLOUGH, Judge.

Roger Dale Howell ("defendant") appeals the trial court's decision to revoke his probation and activate six consecutive 6- to eight-month sentences.

On 25 November 2002, defendant was convicted by a jury of 43 counts of third-degree sexual exploitation of a minor. The trial judge sentenced defendant consistent with the jury verdict to six consecutive 6- to 8-month terms of imprisonment.[1] The sentences were there-

1. In this Court's opinion in *State v. Howell*, 169 N.C. App. 58, 60, 609 S.E.2d 417, 418 (2005), the Court made a clerical error in stating that defendant was originally sentenced to six consecutive terms of imprisonment of 6 to 8 **years**. The judgments in the

after suspended and defendant was placed on supervised probation for 60 months. Defendant appealed such convictions and sentences and this Court found no error on appeal. *State v. Howell*, 169 N.C. App. 58, 609 S.E.2d 417 (2005).

On 11 October 2005, defendant's probation officer, Shana Withers, filed a probation violation report with the Gaston County Clerk of Superior Court for each of defendant's six cases of probation citing the following violation:

> Special conditions of supervised probation for sexual offenders #6 in that the defendant is to participate in a sexual abuse treatment program approved by the supervising officer and complete the same to the satisfaction of the treatment provider. Fully comply with all program requirements. Program participation is defined as attending all meetings, prompt payment of fees, admission of responsibility for his offense and progress toward reasonable treatment goals. The defendant was terminated from such treatment on 08/24/05 due to his refusal to meaningfully participate in group sessions, he would not interact unless pushed and would attempt to retry his case. It is the opinion of the treatment provider that the defendant is not amenable to outpatient treatment at this time.

At the probation revocation hearing, defendant denied the willfulness of any violations. The lower court found that defendant willfully and without just excuse violated the terms and conditions of probation, revoked defendant's probation, and activated his sentences. Defendant appeals.

[1] Defendant contends on appeal that the revocation of his probation was in error where it was revoked on the violation of an unconstitutional condition of probation.

In the instant case, the lower court set forth several special conditions of defendant's probation including:

> 6. Participate in a sexual abuse treatment program approved by the supervising officer and complete the same to the satisfaction of the treatment provider. Fully comply with all program requirements. Program participation is defined as attendance at all meetings, prompt payment of fees, admission of respon-

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instant case clearly show that defendant was sentenced to six consecutive terms of 6 to 8 **months**' imprisonment.

sibility for his/her offense and progress toward reasonable treatment goals.

We recognize that this Court has held that under N.C. Gen. Stat. § 15A-1446 the issue of whether a sentence "was illegally imposed, or is otherwise invalid as a matter of law" may be addressed on appeal even though no objection, exception or motion has been made at the trial level. N.C. Gen. Stat. § 15A-1446(d)(18) (2005)*; see In re T.R.B.*, 157 N.C. App. 609, 619, 582 S.E.2d 279, 286 (2003), *disc. review improvidently allowed and appeal dismissed*, 358 N.C. 370, 595 S.E.2d 146 (2004). In *T.R.B.*, this Court held that the imposition of a special condition of probation requiring a defendant to admit culpability for the crimes charged violated a defendant's constitutional right against self-incrimination, and the lower court was in error to impose such condition. *Id.* at 622, 582 S.E.2d at 288. However, we need not address the issue on appeal in the instant case where the record is replete with evidence amounting to sufficient violations to warrant revocation of probation. *See id.* at 622-23, 582 S.E.2d at 288 ("Our holding does not prevent a court from revoking probation based upon a probationer's overall failure to participate in a validly required program simply because one aspect of the probationer's refusal to cooperate is an unwillingness to admit responsibility for his offense.").

The probation violation report clearly stated that defendant was terminated from sexual abuse treatment for refusal to meaningfully participate in group sessions, refusing to interact unless pushed and attempting to retry his case during group sessions. Defendant's probation officer testified that defendant informed her that he had no interest in hearing anything that the treatment provider, Mr. Navarro, had to say and that the others in the program just learned to say things in the way the provider wanted to hear them and he would not comply with that. Further defendant testified that he was terminated from the program for failing to communicate enough during the group sessions. In addition, the record reveals that defendant refused to attend any meetings for the sexual abuse treatment program in August 2005 and has not attended such since that time.

Where it is clear that defendant violated numerous conditions of his probation warranting revocation, the imposition of the condition that defendant admit responsibility for his actions was harmless error and therefore this assignment of error is overruled. *See State v. Freeman*, 47 N.C. App. 171, 175-76, 266 S.E.2d 723, 725, *disc. review*

denied, 301 N.C. 99, 273 S.E.2d 304 (1980) (stating that it is within the court's discretion to revoke a defendant's probation where it has been shown that a defendant has willfully violated any valid condition of his probation).

[2] Defendant further contends that he received ineffective assistance of counsel at his probation revocation hearing.

To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984); *see also State v. Poindexter*, 359 N.C. 287, 290-91, 608 S.E.2d 761, 764 (2005). Deficient performance may be established by showing that "counsel's representation 'fell below an objective standard of reasonableness.' " *Wiggins v. Smith*, 539 U.S. 510, 521, 156 L. Ed. 2d 471, 484 (2003) (citation omitted). Generally, "to establish prejudice, a 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Id.* at 534, 156 L. Ed. 2d at 493 (citation omitted).

Defendant contends that his attorney rendered ineffective assistance of counsel by failing to object at the probation revocation hearing to the imposition of the special condition of probation requiring defendant to admit responsibility for the offenses which he was convicted. However, it cannot be said that but for failure of defendant's attorney to object to the special condition of probation, the result of the proceeding would have been different.

As stated *supra*, the evidence of record clearly shows that defendant violated several conditions of his probation unrelated to his admission of responsibility for the commission of the offenses. These violations clearly show that defendant refused to cooperate with the treatment provider thereby thwarting any attempts at reasonable progress. This Court clearly stated in its opinion in *T.R.B.*, that its opinion did not prevent probation revocation where one aspect of the violation was a defendant's refusal to admit responsibility for his offenses. *See T.R.B.*, 157 N.C. App. at 622, 582 S.E.2d at 288. Where defendant effectively failed to participate in the court ordered sexual abuse treatment program as evidenced by

his failure to participate and communicate, it cannot be said that the outcome of the probation revocation hearing would have been any different had counsel for defendant objected to the aforementioned condition of probation.

Accordingly, the judgment and order of the trial court is affirmed.

Affirmed.

Judges BRYANT and STROUD concur.

JUDICIAL STANDARDS COMMISSION

IN RE:	)	
INQUIRY CONCERNING A JUDGE, NO. 07-223,	)	**PUBLIC REPRIMAND**
KARL ADKINS, RESPONDENT	)	

Respondent, Karl Adkins, was at all times referred to herein a judge of the General Court of Justice, Superior Court Division, and as such was subject to the Canons of the North Carolina Code of Judicial Conduct, the laws of the State of North Carolina, and the provisions of the oath of office for a superior court judge as set forth in North Carolina General Statutes, Chapter 11.

On October 17, 2007, respondent was stopped by a law enforcement officer in Randolph County for speeding. Respondent submitted to a test to measure his blood alcohol level which revealed his blood alcohol level to be 0.08. Respondent was charged with speeding 83 MPH in a 55 MPH zone and driving while under the influence of an impairing substance, to wit alcohol.

On March 12, 2008, respondent entered an Alford plea to the charge of impaired driving, in violation of North Carolina General Statute §20-138.1, and was found guilty and convicted of that charge. The speeding charge was dismissed. Respondent was placed on one year of unsupervised probation, ordered to obtain a substance abuse assessment and complete any recommended education or treatment, pay a $50.00 fine, courts costs, $200.00 community service fee, to complete twenty four hours of community service, and comply with other conditions of probation.

Respondent has paid all court ordered financial obligations, completed the court ordered substance abuse assessment and is complying with recommended education/treatment, and has completed the court ordered community service.

Respondent self-reported his conviction to the Commission and has promptly answered any questions and provided any information requested by the Commission as part of its investigation into this matter.

Respondent's actions that led to the conviction described above evidence a serious disregard of the principles of personal conduct embodied in the North Carolina Code of Judicial Conduct, including failure to personally observe appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be

preserved (Canon 1), and failure to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Canon 2). Respondent's actions also constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute (N.C. Const. art IV, § 17 and N.C.G.S. § 7A-376(a)).

Respondent agrees that he will not repeat such conduct in the future, mindful of the potential threat any repetition of his conduct poses to public confidence in the integrity and impartiality of the judiciary and to the administration of justice.

Respondent agrees he will promptly read and familiarize himself with the Code of Judicial Conduct.

Respondent acknowledges that the Commission has caused a copy of this Public Reprimand to be served upon him, and that he had 20 days within which to accept the Public Reprimand or to reject it and demand, in writing, that disciplinary proceedings be instituted in accordance with Rule 12 of the Rules of the Judicial Standards Commission.

Respondent has represented himself during this proceeding. Respondent affirms he has consulted with, or had the opportunity to consult with counsel prior to acceptance of this Public Reprimand.

Respondent further agrees that he will not retaliate against any person known or suspected to have cooperated with the Commission, or otherwise associated with this matter.

Served upon respondent, Karl Adkins on the 29th day of April, 2008.

By: s/Paul R. Ross 5/9/08
Paul R. Ross, Executive Director Date
Judicial Standards Commission

Accepted this the 8th day of May, 2008.

s/Karl Adkins 5-8-08
Hon. Karl Adkins Date

ORDER OF PUBLIC REPRIMAND

Now therefore, pursuant to the Constitution of North Carolina, Article IV, Section 17, the procedures prescribed by the North Carolina General Assembly in the North Carolina General Statutes,

Chapter 7A, Article 30, and Rule 11(b) of the Rules of the Judicial Standards Commission, the North Carolina Judicial Standards Commission, hereby orders that respondent, Karl Adkins, be and is hereby PUBLICLY REPRIMANDED for the above set forth violations of the Code of Judicial Conduct. Respondent shall not engage in such conduct in the future and shall fulfill all of the terms of the Public Reprimand as set forth herein.

Dated this the 9th day of May, 2008.

s/John Martin
John C. Martin, Chairman
Judicial Standards Commission

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 3 JULY 2007

BROWN v. DEPARTMENT OF TRANSP. No. 06-1044	Watauga (04CVS723)	Affirmed
C. WAYNE McDONALD CONTR'R, INC. v. GENDELMAN No. 06-1352	Davidson (02CVS3158)	Dismissed
COLEMAN v. FIRST STAR, INC. No. 06-1445	Mecklenburg (04CVS11192)	Affirmed
CROCKER v. ROETHLING No. 06-802-2	Johnston (04CVS2571)	Affirmed
FRANZ v. TRIBECK, INC. No. 06-1143	Mecklenburg (04CVS17501)	Reversed
FUCITO v. FRANCIS No. 06-1237	Caldwell (93CVD66)	Affirmed
HAILEY v. TERMINIX CO. No. 06-675	New Hanover (05CVS1546)	Affirmed
IN RE A.A.R. No. 07-280	Onslow (06J137)	Vacated and remanded
IN RE E.L.W., S.B.W. No. 06-1468	Yancey (03J55-56)	Affirmed
IN RE E.R.R. & H.A. No. 06-1169	Yancey (05J72-73)	Affirmed
IN RE J.L.D. Jr. & J.N.D. No. 07-218	Caldwell (06J1-2)	Affirmed
IN RE J.Z.S. No. 06-1462	Wilkes (06J24)	Vacated and remanded
IN RE M.B. No. 06-1291	Buncombe (05J487)	Affirmed
IN RE M.B.P., K.E.D.W., T.M.W. No. 06-1512	Rutherford (04J67-69)	Affirmed
IN RE N.A.F. No. 07-291	Haywood (05J138)	Affirmed
IN RE R.B., A.M. No. 06-1296	Wayne (04JA244-45)	Affirmed in part; reversed and remanded in part
IN S.L.M., T.S.M. No. 07-163	Mecklenburg (06JT350-51)	Affirmed

LLOYD v. SOUTHERN ELEVATOR CO. No. 06-944	Pitt (05CVS1997)	Affirmed
McDOWELL v. FORSYTH MOTOSPORTS, LLC No. 06-1360	Forsyth (03CVD739)	Affirmed in part; reversed in part
MONTGOMERY INS. COS. v. THERMADOR CORP. No. 06-1289	Mecklenburg (05CVS17245)	Affirmed
MORRIS v. MORRIS No. 06-1547	Mecklenburg (06CVD3928)	Appeal dismissed
ROYAL v. N.C. DEP'T CRIME CONTROL & PUB. SAFETY No. 06-756	Wake (03CVS15891)	Affirmed
SETZER v. LEGACY ENVTL. SERVS., INC. No. 06-1353	Guilford (01CVS8403)	Dismissed
STATE v. ALERS No. 06-1708	Wake (03CRS12276-77) (03CRS17779-88)	Affirmed and remanded in part for correction of the order revoking probation
STATE v. BATTLE No. 07-97	Halifax (03CRS54974)	No error
STATE v. BROWN No. 06-1606	Jackson (04CRS53086) (04CRS53281) (05CRS928)	No error
STATE v. CAUFMAN No. 06-1058	Johnston (05CRS55697) (05CRS55698)	No error
STATE v. CHAPMAN No. 05-254-2	Macon (03CRS52282) (03CRS52284) (03CRS52286) (03CRS52287) (04CRS652)	No prejudicial error
STATE v. COOPER No. 06-1076	Mecklenburg (04CRS234270-72) (04CRS234274)	No error
STATE v. EDWARDS No. 06-961	Mecklenburg (02CRS216576) (02CRS78775)	No error

STATE v. ESQUIVEL No. 06-1342	Wake (05CRS7243) (05CRS7245)	Vacated
STATE v. FINNEY No. 05-850-2	Buncombe (01CRS7899)	No error
STATE v. GRAY No. 06-1240	Lincoln (01CRS4156) (01CRS4158)	No error
STATE v. GREENE No. 06-1504	Lenoir (05CRS52402)	No error
STATE v. HARGROVE No. 07-82	Iredell (05CRS58700) (05CRS14440) (05CRS10503-04)	No error
STATE v. HEARD No. 06-1429	Wake (05CRS20158-60)	No error
STATE v. HUNTER No. 06-1203	Mecklenburg (01CRS54637) (05CRS55219)	No error
STATE v. LINCOLN No. 06-1431	Wake (97CRS30316-17)	No error in 97CR30316; remanded for new sentencing hearing in 97CR30317
STATE v. LOVE No. 06-916	Columbus (03CRS54718) (03CRS54761)	No error
STATE v. McPHAIL No. 06-1177	Robeson (04CRS50631) (04CRS51228-48)	No error in part; reversed in part
STATE v. MOWERY No. 06-947	Guilford (05CRS84543)	No error
STATE v. PATTON No. 06-1710	Henderson (05CRS6239-42)	No error
STATE v. PEARSON No. 06-1046	Forsyth (04CRS52135) (04CRS15146) (04CRS62068-69) (05CRS57112) (05CRS58384)	Affirmed
STATE v. SINCLAIR No. 06-762	Durham (03CRS61221) (03CRS61277-79)	Affirmed

STATE v. STAGNER No. 06-1521	Davidson (04CRS59353) (04CRS59355)	No error
STATE v. WATSON No. 06-1519	Mecklenburg (05CRS252887)	No error
STATE v. WEAVER No. 06-1215	Alamance (00CRS1308) (00CRS5381)	Dismissed in part, no error in part
STATE v. WHITE No. 06-1387	Rowan (02CRS53363) (02CRS53371) (02CRS53421)	No prejudicial error
STATE v. WILLIAMS No. 06-1541	Wake (04CRS84879) (04CRS103205)	No error
STATE v. WOOD No. 06-978	Harnett (04CRS55638) (04CRS55736)	No error
STATE v. WRIGHT No. 06-1181	Durham (05CRS50872) (05CRS50877)	No error in part and reversed in part
VAN WINKLE v. REEMS No. 06-1350	Buncombe (05CVD5039)	Affirmed
WEST v. CONSOLIDATED DIESEL CO. No. 06-1282	Ind. Comm. (I.C. 364195) (I.C. 367025)	Affirmed and remanded

IN RE H.L.A.D.

[184 N.C. App. 381 (2007)]

IN THE MATTER OF: H.L.A.D., MINOR CHILD

No. COA07-34

(Filed 3 July 2007)

1. Termination of Parental Rights— jurisdiction-continuing—child moving out of state

A North Carolina court did not lack subject matter jurisdiction to enter an order terminating parental rights where the child and the child's guardians had moved from North Carolina to Alabama. The courts of North Carolina retained exclusive, continuing jurisdiction after the initial custody determination, and the requisites of "substantial connection" jurisdiction were met.

2. Termination of Parental Rights— jurisdiction—notice—failure to attach copy of custody order to petition

The trial court had jurisdiction over a termination of parental rights proceeding where petitioner did not attach a copy of the custody order to the petition. There was no indication that respondent was unaware of the child's placement, and respondent was unable to demonstrate any prejudice.

3. Appeal and Error— preservation of issues—sufficiency of petition—not raised below

A Rule 12(b)(6) motion may not be made for the first time on appeal, and respondent did not properly preserve for appeal the issue of whether the petition for termination of parental rights alleged sufficient facts. Respondent's motions to dismiss came at the close of the evidence and were based on sufficiency of the evidence rather than sufficiency of the petition.

4. Termination of Parental Rights— grounds—failure to make progress toward correcting conditions—reunification efforts ended

The requirements for terminating parental rights based on leaving the child in placement outside the home without reasonable progress were met even though the court had ceased reunification efforts and the permanent plan had been changed to custody by a guardian. The court's findings were based on clear, cogent, and convincing evidence from the time between the initial removal and entry of the order granting guardianship.

5. Evidence— hearsay—prejudice—general argument not sufficient

The respondent in a termination of parental rights hearing did not demonstrate prejudice from the introduction of a DSS file and other hearsay. A general claim that the evidence was highly prejudicial is not sufficient; furthermore, other evidence supported the court's findings and conclusion.

6. Termination of Parental Rights— findings—negative influence on child

The trial court's findings in a termination of parental rights case that respondent had a disruptive and negative influence on the juvenile were supported by clear, cogent, and convincing evidence.

7. Appeal and Error— assignments of error—sufficiency of evidence to support findings—specificity required

Findings in a termination of parental rights case that were not supported by specific assignments of error were deemed to be supported by sufficient evidence and were binding on appeal.

8. Termination of Parental Rights— appeal—only one ground required—others not considered

Only one ground for termination of parental rights is necessary. Contentions concerning other grounds were not considered on appeal where the first was properly found.

Judge LEVINSON dissenting.

Appeal by respondent father from order entered 14 September 2006 by Judge Thomas G. Taylor, in Gaston County District Court. Heard in the Court of Appeals 23 April 2007.

Sofie W. Hosford for petitioners-appellees, James R. Helms and Crystal Helms.

Page Dolley Morgan, for Guardian ad Litem.

Duncan B. McCormick for respondent-appellant father.

STEELMAN, Judge.

When a court of this State, in an initial custody order, awards custody of a child to custodial guardians who thereafter move out of

North Carolina, the courts of this State maintain exclusive, continuing jurisdiction pursuant to the Uniform Child-Custody Jurisdiction and Enforcement Act when the guardians file a petition, in a separate action, for the termination of parental rights.

H.D. was born in 2002 in Gaston County, North Carolina. On 27 March 2003, H.D. was found with her father, Chad D. (respondent), while he "was under the influence of marijuana[.]" Respondent "had left two loaded unsecured guns[,] a handgun and a rifle, within the reach of [one-year old H.D.]" At that time, respondent "had mental health problems" and "suffered from alcohol abuse."

On 28 March 2003, H.D. was placed in the custody of Gaston County Department of Social Services (DSS), and on 13 May 2003, the court adjudicated H.D. to be neglected and dependent. H.D. was placed with Kelly A. (mother). Thereafter, mother and respondent resumed their relationship, and mother and H.D. moved in with respondent, in violation of a court order. DSS removed H.D. from mother's custody.

On 19 August 2003, the court approved a case plan ordering that respondent "submit to random drug screens, comply with parenting training, anger management and drug and psychological evaluations." Prior to August 2003, respondent attended only two of five scheduled supervised visitations with H.D.

On 21 October 2003, the court placed H.D. in foster care with Tony and Christine Helms, relatives of H.D.'s mother, and ordered that respondent comply with the recommendations of DSS. Between October 2003 and 14 January 2004, the court found that "[mother and respondent] made minimal efforts to comply with recommendations and remedy the conditions that necessitated removal." Respondent's contact with Tony and Christine Helms was "disruptive and negative," and respondent's "repeated interference" resulted in the foster parents "surrendering [H.D.] to [DSS] rather than deal further with [respondent]."

On 14 March 2005, the District Court of Gaston County, North Carolina, entered an order, to which respondent consented, granting custody of H.D. to James R. and Crystal Helms, who were also relatives of H.D.'s mother.

On 27 June 2005, the court entered an order amending the 14 March 2005 order to require respondent to submit to "hair follicle

drug tests." The court also scheduled telephonic contact between respondent and H.D.

On 31 August 2005, the court entered an order suspending visitation and finding that respondent had not submitted to drug tests as previously ordered. Respondent testified that he "had no good excuse" for not taking the required drug tests.

On 17 May 2006, respondent sought to reinstate visitation with H.D. through a motion in the cause, on grounds that he had complied with the court's 31 August 2005 order. Respondent complied with the order in that he had submitted to a hair follicle drug test, but the results of the test were positive for marijuana metabolites. On 21 June 2005, the court entered an order denying respondent visitation. After the court's order on 21 June 2005, respondent made "no effort to comply with the ordered drug tests."

In February 2006, the court entered an order finding that H.D. had been placed with James R. and Crystal Helms for more than one year and that placement was stable. The trial court found that father violated the March 2005 order by failing to take required drug tests, by interfering with the Helms' peace and quiet through unwarranted "inquiries regarding [H.D.] in an uncooperative, confrontational, and belligerent manner[,]" by refusing to stop using marijuana, and by displaying hostility toward DSS, the foster parents, and the Helms throughout the previous three years.

On 4 April 2006, James R. and Crystal Helms filed a petition in a separate action pursuant to N.C. Gen. Stat. § 7B-1103(a)(2), to terminate respondent and mother's parental rights.

On 14 September 2006, the court entered an order terminating respondent and mother's parental rights, concluding pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), that they had willfully left H.D. in placement outside the home for more than twelve months without reasonable progress, and that it was in H.D.'s best interests to terminate respondent's parental rights.

From this order, respondent appeals. Mother did not appeal the order of termination.

I: Subject Matter Jurisdiction

[1] In his first argument, respondent contends that the trial court lacked subject matter jurisdiction to enter the order terminating his

parental rights, because H.D. and her custodial guardians resided in Alabama when the petition for termination was filed. We disagree.

"Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question . . . . [and] is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). Subject matter jurisdiction cannot be conferred by consent or waiver, and the issue of subject matter jurisdiction may be raised for the first time on appeal. *See In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006). "The determination of subject matter jurisdiction is a question of law and this Court has the 'power to inquire into, and determine, whether it has jurisdiction and to dismiss an action . . . when subject matter jurisdiction is lacking.' " *In re J.B.*, 164 N.C. App. 394, 398, 595 S.E.2d 794, 797 (2004).

N.C. Gen. Stat. § 7B-1101 (2005), states that "[t]he court shall have *exclusive original jurisdiction* to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion." *Id.* (emphasis added). N.C. Gen. Stat. § 7B-1101 also requires that "before exercising jurisdiction under this Article, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204[,]" which are jurisdictional provisions under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA). *See In re N.R.M., T.F.M.*, 165 N.C. App. 294, 298, 598 S.E.2d 147, 149 (2004); N.C. Gen. Stat. § 50A-101 *et seq.* (2005).

"[W]hen a prior custody order exists, a court cannot ignore the provisions of the UCCJEA and the [Parental Kidnapping Prevention Act]." *In re Brode*, 151 N.C. App. 690, 695, 566 S.E.2d 858, 861 (2002). The first provision under the UCCJEA, N.C. Gen. Stat. § 50A-201, addresses jurisdiction for initial child-custody determinations. The phrase "initial determination" is defined as "the first child-custody determination concerning a particular child." N.C. Gen. Stat. § 50A-102(8). We note that the definition of a "child-custody proceeding" under the UCCJEA specifically includes a proceeding for neglect, abuse, dependency or termination of parental rights. N.C. Gen. Stat. § 50A-102(4).

Once a court of this State has made an initial child-custody determination, the UCCJEA provides for "*exclusive, continuing jurisdiction*" pursuant to N.C. Gen. Stat. § 50A-202 (2005), which mandates that:

> (a) Except as otherwise provided in G.S. 50A-204, a court of this State which has made a child-custody determination consistent with G.S. 50A-201 or G.S. 50A-203 has exclusive, continuing jurisdiction over the determination until:
>
> (1) A court of this State determines that neither the child, the child's parents, and any person acting as a parent do not have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships; or
>
> (2) A court of this State or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State.
>
> (b) A court of this State which has made a child-custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under G.S. 50A-201.

N.C. Gen. Stat. § 50A-202 (2005). This section of the UCCJEA is consistent with *In re Baby Boy Scearce*, in which this Court held that "[o]nce jurisdiction of the court attaches to a child custody matter, it exists for all time until the cause is fully and completely determined." *In re Baby Boy Scearce*, 81 N.C. App. 531, 538-39, 345 S.E.2d 404, 409 (1986) (citations omitted). Further, N.C. Gen. Stat. § 7B-201 provides: "[w]hen the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first." *Id.*

Importantly, we note the distinction between the "exclusive, original jurisdiction" of N.C. Gen. Stat. § 7B-1101, and the "exclusive, continuing jurisdiction" of the UCCJEA. *Blacks Law Dictionary*, 869 (8th ed. 2004), defines "exclusive jurisdiction" to mean "[a] court's power to adjudicate an action or class of actions to the exclusion of all other courts[.]" Further, "original jurisdiction" means "[a] court's power to hear and decide a matter before any other court can review the mat-

ter." *Id.* "Continuing jurisdiction[,]" however, is defined as "[a] court's power to retain jurisdiction over a matter after entering a judgment, allowing the court to modify its previous rulings or orders." *Blacks Law Dictionary*, 868 (8th ed. 2004). N.C. Gen. Stat. § 7B-1101 therefore provides that the district court in that district shall have the power to adjudicate termination of parental rights proceedings to the exclusion of, and before, all other courts when the circumstances specified in N.C. Gen. Stat. § 7B-1101 relating to that district exist. This, however, does not preclude the district court's exercise of jurisdiction in circumstances in which the court already has "exclusive, continuing jurisdiction" pursuant to the UCCJEA.

The opinion cited by the dissent, *In re Leonard*, 77 N.C. App. 439, 335 S.E.2d 73 (1985) is distinguishable from the instant case. In *Leonard*, this Court held that the district court lacked jurisdiction pursuant to N.C. Gen. Stat. § 7A-289.23 even though the court had jurisdiction pursuant to N.C. Gen. Stat. § 50A-3, the prior version of the UCCJEA, the Uniform Child Custody Jurisdiction Act ("UCCJA"). In *Leonard*, unlike the instant case, there was no indication that there was ever a prior custody determination that would have given the court exclusive, continuing jurisdiction over the child. The codification of N.C. Gen. Stat. § 50A-202, which provided for "exclusive, continuing jurisdiction, *see* 1999 N.C. Sess. Laws ch. 223, § 3, followed the publication of *Leonard.* The concept of "continuing jurisdiction" was neither specifically addressed in the UCCJA nor contemplated by the *Leonard* court.

The provisions of the Parental Kidnapping Prevention Act ("PKPA") are instructive. The PKPA provides that "[t]he jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant." 28 U.S.C.A. § 1738A(d) (2002). Subsection (c)(1) provides that "[a] child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if . . . (1) such court has jurisdiction under the law of such State[.]" 28 U.S.C.A. § 1738A(b)(3) defines a child custody determination as "a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications." This Court has held that "[t]he PKPA has established the national policy with regard to custody jurisdiction, and to the extent a state custody statute conflicts

with the PKPA, the federal statute controls. *In re Bean*, 132 N.C. App. 363, 366, 511 S.E.2d 683, 686.

In the instant case, James R. and Crystal Helms, H.D.'s custodial guardians, resided with H.D. in Alabama when the petition for termination was filed. H.D.'s parents resided in Gaston County, North Carolina. The initial custody determination was made by the Gaston County, North Carolina, court on 28 March 2003, when H.D. was placed in the custody of Gaston County DSS. After this initial custody determination, the courts of this State maintained exclusive, continuing jurisdiction. A court of this State has not made a determination that neither H.D., H.D.'s parents, nor any person acting as H.D.'s parent lack a significant connection with this State. N.C. Gen. Stat. § 50A-202 (2005)(a)(1). Nor has a court determined that "substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships." *Id.* Further, neither a North Carolina court, nor an Alabama court has determined that "the child, the child's parents, and any person acting as a parent do not presently reside in this State." N.C. Gen. Stat. § 50A-202 (2005)(a)(2). To the contrary, both parents continue to reside in Gaston County, North Carolina.

Respondent specifically argues that *In re D.D.J.*, 177 N.C. App. 441, 628 S.E.2d 808, (2006), is binding precedent, and that the trial court lacked jurisdiction to terminate his parental rights. We disagree. In the case of *In re D.D.J.*, this Court held, pursuant to N.C. Gen. Stat. § 7B-1101, that "there are three sets of circumstances in which the court has jurisdiction to hear a petition to terminate parental rights:"

> (1) if the juvenile resides in the district at the time the petition is filed; (2) if the juvenile is found in the district at the time the petition is filed; or (3) if the juvenile is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time the petition is filed.

In re D.D.J., 177 N.C. App. at 442-43, 628 S.E.2d at 810. While this is a correct statement of the law, the language of N.C. Gen. Stat. § 7B-1101 and *In re D.D.J.* does not foreclose the establishment of exclusive continuing jurisdiction over a juvenile pursuant to N.C. Gen. Stat. § 50A-201 and 202 of the UCCJEA. In fact, one purpose of the codification of the UCCJEA is specifically to provide for "continuing jurisdiction" in circumstances similar to those of H.D.,

and to address the considerable confusion of the former UCCJA's silence as to continuing jurisdiction.

Further, *In re D.D.J.* is distinguishable from the instant case in two respects. First, in *D.D.J.*, DSS did not have custody of the juvenile, and therefore, lacked standing to file for termination pursuant to N.C. Gen. Stat. § 7B-1103(a)(3) (2005), which provides:

> A petition or motion to terminate the parental rights of either or both parents to his, her, or their minor juvenile may only be filed by one or more of the following: . . . Any county department of social services, consolidated county human services agency, or licensed child-placing agency to whom custody of the juvenile has been given by a court of competent jurisdiction.

Second, the trial court in *D.D.J.* had no jurisdiction to enter the 17 March 2004 order on termination subsequent to granting "full custody" of the juveniles to custodial guardians on 26 September 2003 and specifying that "this case is closed." *See In re P.L.P.*, 173 N.C. App. 1, 7, 618 S.E.2d 241, 245 (2005), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006) (holding that jurisdiction in the district court was "terminated by the trial court's order to 'close' the case" and that DSS was required to file a new petition alleging neglect).

Here, James R. and Crystal Helms, H.D.'s guardians, had custody of H.D., and therefore, had standing to file a petition for termination pursuant to N.C. Gen. Stat. § 7B-1103(a)(3) (2005). Further, the district court of Gaston County had exclusive, continuing jurisdiction pursuant to N.C. Gen. Stat. § 50A-202(a) (2005). The court did not, at any time, specify that the case as to H.D. was "closed." To the contrary, in an order entered 28 February 2006, the court specifically retained jurisdiction "for further orders." We conclude that the trial court had exclusive, continuing jurisdiction to enter the order terminating respondent's parental rights after jurisdiction attached on 28 March 2003, when the North Carolina court entered an order as to the custody of H.D. Since jurisdiction under the UCCJEA is exclusive and continuing, the courts of North Carolina still had jurisdiction over H.D. to enter an order terminating respondent's parental rights, even though H.D. resided in Alabama with the custodial guardians, because the requisites of "substantial connection" jurisdiction pursuant to Section 201 were met. This assignment of error is overruled.

II: Motions to Dismiss

[2] In his second argument, respondent contends that the trial court erred by denying respondent's motions to dismiss.

Specifically, respondent argues that the trial court did not have jurisdiction to enter the order terminating respondent's parental rights because petitioners failed to attach a copy of the custody order to the petition for termination in violation of N.C. Gen. Stat. 7B-1104(5) (2005). We disagree.

N.C. Gen. Stat. § 7B-1103 identifies the parties with standing to petition the trial court for termination of parental rights. N.C. Gen. Stat. § 7B-1103; *see also In re T.B.*, 177 N.C. App. 790, 792, 629 S.E.2d 895, 897 (2006). N.C. Gen. Stat. § 7B-1104(5) (2005), sets out the requirements for a petition for termination of parental rights and provides in relevant part that the petition "shall set forth . . . (5) The name and address of any person or agency to whom custody of the juvenile has been given by a court of this or any other state; and a copy of the custody order shall be attached to the petition or motion."

Respondent specifically relies upon *In re Z.T.B.*, 170 N.C. App. 564, 613 S.E.2d 298 (2005), and *In re T.B.*, 177 N.C. App. 790, 629 S.E.2d 895, in which this Court held that failure to comply with N.C. Gen. Stat. § 7B-1104(5) divested the trial court of subject matter jurisdiction. *See In re Z.T.B.*, 170 N.C. App. 564, 613 S.E.2d 298 (holding that because the petitioner failed in the petition to set forth facts known to petitioner, or state that petitioner has no knowledge of facts, regarding the name and address of any judicially appointed guardian, or person or agency awarded custody of the child by a court, and failed to attach the existing custody order to the petition, it was facially defective and did not confer subject matter jurisdiction upon the trial court); *In re T.B.*, 177 N.C. App. 790, 629 S.E.2d 895 (holding that because the petition did not have a copy of the custody order, the petition failed to confer subject matter jurisdiction on the trial court)*; but see In re B.D.*, 174 N.C. App. 234, 242, 620 S.E.2d 913, 918 (2005) (holding that the failure to attach a custody order was not reversible error because there was no showing of prejudice where the respondents were aware of the child's placement, the petition noted that "custody of [the child] was given by prior orders[,]" the respondent admitted that the child was "in the legal custody of the Buncombe County Department of Social Services," and the respondents were present at pre-termination hearings in which custody was

granted to petitioner and hearings in which visitation options were discussed and determined), *In re W.L.M.*, 181 N.C. App. 518, 640 S.E.2d 439 (2007) (holding that the failure to attach a custody order was not reversible error because there was no showing of prejudice where there was no indication that the respondent was unaware of the placement or custody of the children at any time, the motion to terminate stated that DSS was given legal custody of the minor children, and the record included a copy of an order, in effect when the motion was filed, that awarded DSS custody of the children). We follow the reasoning of *B.D.* and *W.L.M.* and conclude that *Z.T.B.* and *T.B.* are distinguishable from the instant case.

In *Z.T.B.*, this Court held that the petition to terminate the father's parental rights was facially defective, and the trial court lacked subject matter jurisdiction due to the petitioner's failure to attach an existing custody order to the petition. However, in *Z.T.B.*, "the issue of where the child was physically located and who had legal custody was very much in question at the time the petition to terminate the father's parental rights was filed." *In re W.L.M.*, 181 N.C. App. 518, 640 S.E.2d 439 (2007). This fact situation does not exist in the instant case.

In the case of *In re T.B.*, 177 N.C. App. at 793, 629 S.E.2d at 897, this Court held that "where DSS files a motion for termination of parental rights, the trial court has subject matter jurisdiction only if the record includes a copy of an order, in effect when the petition is filed, that awards DSS custody of the child." However, the Court in *T.B.* also stated that this "omission *need not have been fatal* if petitioner had simply amended the petition by attaching the proper custody order or otherwise ensured the custody order was made a part of the record before the trial court." *Id.*, 177 N.C. App. at 793, 629 S.E.2d at 898 (emphasis in original).

In the instant case, petitioners concede that they did not attached a copy of the custody order to the petition to terminate respondents' parental rights. However, there is also no indication that respondent was unaware of H.D.'s placement at any point during the case. In fact, respondent entered into a consent order providing for H.D.'s guardianship with petitioners. Respondent was certainly aware of H.D.'s residence with the custodial guardians in Alabama. Further, the petition noted that "on February 9, 2005[,] the Petitioners were granted guardianship of the minor child, H.D[,]" and the custody order was made part of the record before the trial court. The petition also stated that "[o]n February 28, 2006, an Order was entered in the

matter of In Re: H.D., . . . which provides that the Court sanctions a permanent plan of Guardianship and that the Petitioners shall remain the juvenile's permanent guardians pending further orders[.]" Various trial court orders in the record on appeal and referenced in the order terminating respondent's parental rights note that respondent was present at pre-termination hearings in which custody was granted to petitioners as well as hearings in which visitation options were determined.

In light of the foregoing, we conclude that respondent is unable to demonstrate any prejudice whatsoever arising from petitioners' failure to attach the pertinent custody order to the petition. Accordingly, we overrule this argument.

[3] Respondent next argues that petitioners failed to allege sufficient facts as required by N.C. Gen. Stat. § 7B-1104(6) to warrant a determination that grounds existed to terminate his parental rights.

N.C. Gen. Stat. § 7B-1104 (2005) provides that "[t]he petition, or motion pursuant to G.S. 7B-1102, . . . shall set forth such of the following facts as are known; and with respect to the facts which are unknown the petitioner or movant shall so state: . . . (6) Facts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist." *Id.* "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." *In re Hardesty*, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002); see also *In re A.D.L.*, 169 N.C. App. 701, 709, 612 S.E.2d 639, 644, *disc. rev. denied by* 359 N.C. 852, 619 S.E.2d 402 (2005). Merely using words similar to the relevant statutory ground for termination is not sufficient to comply with N.C. Gen. Stat. § 7B-1104(6). *In re Hardesty*, 150 N.C. App. at 384, 563 S.E.2d at 82.

In the instant case, however, respondent failed to preserve this matter for appeal. "The Rules of Civil Procedure apply to proceedings for termination of parental rights[,]" *In re McKinney*, 158 N.C. App. 441, 444, 581 S.E.2d 793, 795 (2003), and a Rule 12(b)(6) motion may not be made for the first time on appeal. *Dale v. Lattimore*, 12 N.C. App. 348, 351-52, 183 S.E.2d 417, 419 (1971) (citations omitted). Respondent made a motion to dismiss after the presentation of petitioner's evidence and at the close of all evidence. Those motions were based on the insufficiency of the evidence, not the legal insufficiency of the petition. Therefore, respondent has not properly preserved this issue for appeal, and this assignment of error is overruled.

III: Reasonable Progress

[4] In his final argument, respondent contends that the trial court erred by concluding that the father willfully left H.D. in placement outside the home for more than twelve months without showing to the satisfaction of the court that reasonable progress had been made to correct the conditions which led to the removal of H.D. We disagree.

Respondent specifically argues that because the trial court ceased reunification efforts and, in an order consented to by respondent, changed the child's permanent plan to custody by a permanent guardian, respondent lost the opportunity to make reasonable progress, and that N.C. Gen. Stat. 7B-1111(a)(2) cannot provide grounds for termination. Respondent argues that respondent's failure to make reasonable progress under N.C. Gen. Stat. 7B-1111(a)(2) could never be willful, since DSS had ceased reunification efforts. We find respondent's argument unpersuasive.

In the case of *In re A.C.F.*, 176 N.C. App. 520, 526, 626 S.E.2d 729, 734 (2006), this Court concluded that the language, " 'for more than 12 months,' " in N.C. Gen. Stat. § 7B-1111(a)(2), must be defined as "the duration of time beginning when the child was 'left' in foster care or placement outside the home pursuant to a court order, *and ending when the motion or petition for termination of parental rights was filed*." *In re A.C.F.*, 176 N.C. App. at 526, 626 S.E.2d at 734 (emphasis in original); *see also In re C.L.C.*, 171 N.C. App. 438, 447, 615 S.E.2d 704, 709 (2005) (stating that after the termination statute was amended in 2001, the "focus is no longer solely on the progress made in the 12 months prior to the petition"); *In re J.G.B.*, 177 N.C. App. 375, 384, 628 S.E.2d 450, 457 (2006) (stating that "[e]vidence supporting a determination of reasonable progress under N.C.G.S. § 7B-1111(a)(2) 'is not limited to that which falls during the twelve month period next preceding the filing of the motion or petition to terminate parental rights' "). Here, DSS took nonsecure custody of H.D. on 29 March 2003, after which she did not return to respondent's custody. Respondent entered into a consent order on 9 February 2005, granting guardianship to petitioners. This was more than twenty-two months after H.D. was initially removed from respondent's custody, meeting the requirement of N.C. Gen. Stat. § 7B-1111(a)(2) as interpreted by *A.C.F.* The petition for termination was filed on 4 April 2006. H.D. had lived outside of respondent's custody for more than three years. We conclude, and respondent admitted at the hearing on termination, that there was clear, cogent

and convincing evidence of respondent's failure to make reasonable progress between the time of the initial custody determination and the signing of the consent order. At the hearing, attorney for respondent stated that if "they're referring to . . . how [respondent] willfully left the child in a placement outside the home for more than 12 months, okay, that's true, if you take everything that they're saying, before guardianship. We fully admit that." (T Vol 5, P 209).

Moreover, the trial court entered the following findings, which are binding on this Court due to respondent's failure to "set out [an argument] in [his] brief," with cited authority. *See* N.C. R. App. R. 28(b)(6).

> 43. The Respondents, as parents, have only sporadically complied with the case plans and have, on balance, failed to show any positive response to the efforts to assist them.
>
> 44. The Respondent . . . has willfully refused, with no good cause, to stop using marijuana.
>
> 45. Respondent . . . is competent to participate in this case, and has been lucid and aware of the meaning of the hearing, and has meaningfully participated in, and assisted his lawyer in his presentation of, evidence before the court.
>
> 46. That Respondent . . . has displayed inappropriate behavior and unwarranted hostility toward [DSS], foster parents, and the juvenile's guardians throughout the last three years, leading this Court to conclude that he has not meaningfully address the anger problems which contributed to the juvenile's removal.

Because the trial court's findings support its conclusion that grounds for termination existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), and because these findings were based on clear, cogent and convincing evidence stemming from the period of time between H.D.'s initial removal from respondent's custody and respondent's entry of the consent order granting guardianship to petitioners, we conclude that the requirements set forth by N.C. Gen. Stat. § 7B-1111(a)(2) and *A.C.F.* are satisfied. This assignment of error is overruled.

IV: Hearsay

[5] In his next argument, respondent contends that the trial court erred by overruling his objections to the admission of the DSS file, testimony with respect to the contents of the file, and other tes-

timony that constituted inadmissible hearsay. We disagree. Even assuming *arguendo* that the records contain inadmissible hearsay, respondent has failed to demonstrate that the trial court's order must be reversed.

Respondent does not demonstrate prejudice in his argument on appeal, which is necessary for this Court to reverse the trial court's order. *See In re T.M.*, 180 N.C. App. 539, 548, 638 S.E.2d 236, 241-42 (2006) (citing *In re M.G.T.-B.*, 177 N.C. App. 771, 775, 629 S.E.2d 916, 919 (2006) (holding that "even when the trial court commits error in allowing the admission of hearsay statements, one must show that such error was prejudicial in order to warrant reversal"). Here, respondent makes a general claim that the admission of hearsay "was highly prejudicial." This general argument is not sufficient to establish that the admission of the alleged hearsay evidence prejudiced him. Further, the court's findings and conclusions here are supported by evidence other than the evidence challenged as hearsay. Respondent's own testimony, and that of respondent's father, contained competent evidence to support the findings that grounds existed for termination pursuant to N.C. Gen. Stat. 7B-1111(a)(2). *See In re McMillon*, 143 N.C. App. 402, 411, 546 S.E.2d 169, 175, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001) (holding that "[w]here there is competent evidence to support the court's findings, the admission of incompetent evidence is not prejudicial").

Further, there is a presumption in a bench trial is that "the judge disregarded any incompetent evidence that may have been admitted unless it affirmatively appears that he was influenced thereby." *In re L.C.*, 181 N.C. App. 278, 284, 638 S.E.2d 638, 642 (2007) (citing *Stanback v. Stanback*, 31 N.C. App. 174, 180, 229 S.E.2d 693, 696 (1976), *disc. review denied*, 291 N.C. 712, 232 S.E.2d 205 (1977). Respondent bears the burden of showing that the trial court relied on the incompetent evidence in making its findings. *In re Huff*, 140 N.C. App. 288, 301, 536 S.E.2d 838, 846 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001). As in the case of *In re L.C.*, respondent has not met this burden. The records and documents to which respondent objects contain over two-thousand pages. However, respondent has failed to make specific allegations that the trial court disregarded inadmissible evidence in making its findings of fact. Rather, respondent generally argues that "the inadmissible hearsay supported a number of adjudicatory findings[.]" This general sort of argument is not sufficient to rebut the presumption that the judge disregarded any incompetent evidence.

We conclude that respondent has failed to demonstrate that the trial court's order must be reversed and overrule this assignment of error.

V: Clear, Cogent and Convincing Evidence

[6] In respondent's next argument, respondent contends that pertinent findings of fact were not supported by clear, cogent and convincing evidence, and do not support the trial court's conclusion to terminate respondent's parental rights. We disagree.

On appeal, this Court must determine whether the trial court's findings of fact were supported by clear, cogent and convincing evidence, and whether its conclusion that grounds existed to terminate parental rights was supported by those findings of fact. *In re Huff*, 140 N.C. App. at 291, 536 S.E.2d at 840. The trial court's findings of fact are conclusive if supported by clear and convincing competent evidence, even where the evidence might support contrary findings. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997).

In its order terminating respondent's parental rights, the court found that:

> 42. Respondent . . . has been a disruptive and negative influence on the juvenile, insisting on the focus of his contact with the juvenile being primarily on the juvenile's reference to him as "daddy," rather than on the juvenile's development, emotional state or interests, all to the juvenile's confusion and detriment.

Respondent contends that even though respondent "had an extremely contentious relationship with the petitioners[,]" respondent was not "disruptive" or "negative," because he made weekly calls to H.D., all of which "did not deal with whether his daughter called him 'daddy'[.]" However, petitioner testified that "[respondent] tells her that . . . we're her pretend daddy and not her real mommy and daddy[;] . . . [that] she's been a bad little girl and Jesus doesn't like it; he's watching[;] . . . that we're trying to steal her from him." Petitioner said, respondent "continue[s] to tell her that we're the reason that he can't visit." Petitioner stated that respondent "was very antagonistic with me [when he called], [and] tried to engage me in arguments." We conclude that respondent's argument as to this finding is unpersuasive, and that the finding is supported by clear, cogent and convincing evidence. *See In re Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676 (holding that findings of fact are conclusive if supported by clear and

convincing competent evidence, even where the evidence might support contrary findings).

[7] Respondent generally argues that the remaining challenged findings of fact, numbers 41, 43, 48, 49, 60 and 61, were not supported by clear, cogent and convincing evidence. However, respondent does not bring forward her assignments of error with specific arguments challenging these findings of fact. Rather, respondent only generally states that the findings "are not supported by clear, cogent and convincing evidence." Findings of fact not argued on appeal are deemed to be supported by sufficient evidence, and are binding on appeal. N.C. R. App. P. 28(b)(6) (2006).

VI: Neglect

[8] In respondent's final argument, he contends that the trial court erred by concluding that grounds existed to terminate respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). As only one ground is necessary to support the termination, and the trial court properly concluded that grounds for termination existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), we need not address whether evidence existed to support termination based on N.C. Gen. Stat. § 7B-1111(a)(1). *See In re J.A.A.*, 175 N.C. App. 66, 74, 623 S.E.2d 45, 50 (2005). We decline to address this question.

For the foregoing reasons, we affirm the trial court's decision to terminate respondent's parental rights.

AFFIRMED.

Judge GEER concurs.

Judge LEVINSON dissents in separate opinion.

LEVINSON, Judge dissenting.

I respectfully dissent, on the grounds that the trial court lacked subject matter jurisdiction to enter the order terminating respondent's parental rights. Neither the court's general jurisdiction over proceedings for termination of parental rights, nor its continuing jurisdiction over custody after an initial custody determination, may substitute for the specific standing requirements for termination of parental rights.

Subject matter jurisdiction for termination of parental rights is governed by N.C. Gen. Stat. § 7B-1101 (2005), which provides in pertinent part that:

> The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services . . . at the time of filing of the petition or motion. . . . Provided, that before exercising jurisdiction under this Article, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204. . . . (emphasis added).

"When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Diaz v. Division of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citing *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)). The language of Section 7B-1101 is "clear and without ambiguity" and must be applied as written. When petitioners filed the termination of parental rights petition, the minor did not reside in North Carolina, was not found in North Carolina, and was not in the custody of a North Carolina county social services agency. Thus, under G.S. § 7B-1101, the court lacked jurisdiction over the case.

This Court has held that there are

> three sets of circumstances in which the court has jurisdiction to hear a petition to terminate parental rights: (1) if the juvenile resides in the district at the time the petition is filed; (2) if the juvenile is found in the district at the time the petition is filed; or (3) if the juvenile is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time the petition is filed.

In re D.D.J., 177 N.C. App. 441, 442-43, 628 S.E.2d 808, 810 (2006). The majority concedes that "this is a correct statement of the law," yet asserts that "the language of N.C. Gen. Stat. § 7B-1101 and *In re D.D.J.* does not foreclose the establishment of . . . jurisdiction over a juvenile" in a termination of parental rights proceeding "pursuant to N.C. Gen. Stat. §§ 50A-201 and 202 of the UCCJEA." I respectfully disagree for several reasons.

The majority opinion presumably is based on language in Section 7B-1101 following the statute's articulation of the prerequisites for jurisdiction, that "before exercising jurisdiction under this Article, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. [§] 50A-201, 50A-203, or 50A-204." This statutory language requires that the court not only determine that jurisdiction exists under Section 1101, but that it also make sure "before exercising jurisdiction under this Article" that the exercise of jurisdiction would not run afoul of the UCCJEA. The statute nowhere suggests that compliance with the UCCJEA is a substitute for the jurisdiction requirements of G.S. § 7B-1101. Further, while Section 50A-201 *et seq.* addresses the general limits on a state's jurisdiction in a situation where more than one state might be involved, Section 1101 is specifically addressed to the subject matter jurisdiction requirements for termination of parental rights proceedings. It is a legal truism that "a statute dealing with a specific situation controls, with respect to that situation, other sections which are general in their application." *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969). Accordingly, to the extent that they conflict, the specific provisions of Section 1101 would control jurisdiction in a termination of parental rights case.

Moreover, binding precedent of this Court has held that the provisions of the UCCJEA are no substitute for the jurisdictional requirements of the juvenile code. In *In re Leonard*, 77 N.C. App. 439, 335 S.E.2d 73 (1985), the petitioner father filed to terminate the parental rights of respondent mother. Respondent, who had remarried and moved to Ohio with the minor just days before the petition was filed, argued that "since the mother left with the child for Ohio four days before the petition was filed, the child was not 'residing in' or 'found in' the district 'at the time of filing' and therefore the petition should fail for lack of subject matter jurisdiction." *Id.* at 440, 335 S.E.2d at 73. This Court agreed, and vacated the order for termination of parental rights. In so doing, the Court expressly rejected the position of the majority opinion. In 1985, as is true today, "[b]efore determining parental rights, the court must find under G.S. § 50A-3 [now § 50A-201 *et. seq.*] that it has jurisdiction to make a child custody determination." *Id.* at 441, 335 S.E.2d at 74. In *Leonard* the trial court had "concluded that it would have jurisdiction to determine [the child's] custody under G.S. § 50A-3 [now § 50A-201, *et. seq.*]" *Id.* This Court held that:

> While a determination of jurisdiction over child custody matters will precede a determination of jurisdiction over parental rights, it does not supplant the parental rights proceedings.

Id. (emphasis added). It makes no difference whether certain uniform child custody jurisdiction provisions have changed since *Leonard* was decided in 1985, because the essential holding of *Leonard* is that jurisdiction under the UCCJEA cannot substitute for the specific termination of parental rights jurisdictional requirements.

Other cases have likewise held that, before exercising jurisdiction over a termination of parental rights proceeding, the trial court must determine that it has jurisdiction under both G.S. § 7B-1101 and Chapter 50A. *See, e.g.*, *In re N.R.M. and T.F.M.*, 165 N.C. App. 294, 298, 598 S.E.2d 147, 149 (2004) (although children present in North Carolina, thus meeting "the general requirement that the children reside in or be found in the district where the petition is filed" the court nonetheless lacked jurisdiction where Arkansas continued to exercise jurisdiction over the child's custody); *In re Bean*, 132 N.C. App. 363, 366, 511 S.E.2d 683, 686 (1999) (same result where child lived in North Carolina but Florida court still had jurisdiction; Court notes that statute "requires a two-part process" wherein the trial court determines that it has custody under both the UCCJA and G.S. § 7B-1101).

Finally, the holding of *In re D.D.J.*, 177 N.C. App. 441, 628 S.E.2d 808 is functionally indistinguishable from the instant case. In *D.D.J.* this Court held that, where the court did not have jurisdiction under § 7B-1101, the trial court lacked subject matter jurisdiction over the termination of parental rights proceeding. The majority attempts to distinguish *D.D.J.* on the basis that in that case, unlike the instant case, the petitioner lacked standing to file a petition. This is a distinction without a difference because whether a petitioner has standing to file a petition is an issue completely separate from whether a court has jurisdiction under Section 1101.

The majority is correct that, having made an initial custody determination, North Carolina continued to enjoy exclusive continuing jurisdiction over custody matters generally. However, North Carolina did not meet the specific jurisdictional requirements of Section 1101. Both the plain language of the statute and binding precedent establish that the trial court lacked jurisdiction over this termination of parental rights proceeding. Accordingly, the order on appeal must be vacated.

STATE OF NORTH CAROLINA v. RICHARD LIONEL COOK

No. COA06-1355

(Filed 3 July 2007)

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

There was no error in either the verdicts returned, judgment entered, or sentences imposed for defendant's convictions for assault with a deadly weapon inflicting serious injury because defendant failed to contest the validity of his assault convictions.

2. Discovery— blood alcohol concentration—retrograde extrapolation opinion—disclosure of basis

A second-degree murder case is remanded to the trial court for a determination of whether its denial of defendant's motion to continue was harmless beyond a reasonable doubt because the record and transcripts are silent on whether defendant possessed knowledge of or if the State disclosed all the information in its possession and used by the State's witness in making his calculations regarding defendant's blood alcohol concentration.

Judge WYNN dissenting.

Appeal by defendant from judgments entered 22 February 2006 by Judge J.B. Allen, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 22 May 2007.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance Widenhouse, for defendant-appellant.

TYSON, Judge.

Richard Lionel Cook ("defendant") appeals from judgment entered after a jury found him to be guilty of one count of second-degree murder and two counts of assault with a deadly weapon inflicting serious injury. We find no error in part and remand in part with instructions.

I. Background

Gene Mullis ("Mullis") has known defendant since 1994 and hired him to work temporarily at Triad Coatings, a distributor of

retail and wholesale paint products. On the evening of 28 October 2004, defendant and Mullis made arrangements for friends and customers to come to the shop and play cards. At approximately 5:00 p.m., defendant left the shop, went to the ABC store, and returned with a bottle of vodka.

By the end of the card game, it was apparent to Mullis that defendant had been drinking, but he did not know the volume of alcohol defendant consumed that evening. After the card game ended, Mullis planned to drive defendant to a Days Inn hotel where he resided. Mullis offered to drive because defendant had been drinking and "had a terrible sense of directions."

As Mullis secured the store for the night, defendant walked out of the back door. Another individual present at the store said he heard a car start. Mullis walked outside, saw defendant sitting in a car, and waved his arms, but defendant drove away.

Lieutenant Robert Wilborne of the Alamance County Sheriff's Department ("Lieutenant Wilborne") was patrolling Interstate 40/85 on the evening of 28 October 2004. At approximately 11:34 p.m. Lieutenant Wilborne stopped a 1989 Chevrolet Beretta with three occupants between exits 141 and 143 for failing to display an illuminated license tag light. Lieutenant Wilborne issued the driver, Adan Guerrero Rosales ("Adan"), a citation for failure to possess a valid driver's license. No occupant inside the vehicle possessed a valid driver's license. Lieutenant Wilborne instructed Adan to drive to the next exit and call someone who possessed a valid license to drive. The occupants requested they be permitted to remain on the shoulder of the interstate and to call someone to come get them. Lieutenant Wilborne consented and left the scene.

Adan testified he was stopped and cited for driving without a license on 28 October 2004. After receiving the citation, Adan sat in his car with his brother, Sergio Guerrero Rosales ("Sergio"), and Anibal Amaya Guevara ("Guevara"). Sergio sat behind the front passenger seat and Guevara sat behind the driver's seat. Adan was talking on his cell phone when his car was struck by defendant's vehicle. The force of the impact knocked Adan unconscious. Sergio suffered a fractured bone in his back and had "ground up blood" in his stomach. Guevara was killed in the collision. The accident occurred at approximately 12:05 a.m.

Alamance County paramedics Kyle Buckner ("Buckner") and Mike Childers ("Childers") responded to the scene. Childers

smelled alcohol inside defendant's car and he asked if defendant had been drinking. Defendant responded he "had two beers." Buckner also spoke with defendant as he was being transported in the ambulance. He testified defendant's breath smelled of alcohol and defendant "dozed off" while being transported in the ambulance.

After arrival at UNC Hospitals in Chapel Hill, defendant was diagnosed with a lacerated spleen and fractured ribs. Defendant was administered morphine in the ambulance by the paramedics, and two subsequent doses of morphine at the hospital between the time he arrived and 3:00 a.m. A blood sample was drawn from defendant at the hospital at 1:38 a.m. and analyzed at 1:50 a.m. The test results showed defendant's blood alcohol concentration to be .059.

Defendant's blood also tested positive for amphetamines, marijuana and opiates. The treating physician testified that the presence of opiates "certainly can be explained by [the morphine]," but no medicines would account for the amphetamine or marijuana. Defendant admitted at the hospital that he had "been in rehab many times." State Trooper Clint Carroll ("Trooper Carroll") investigated the accident and obtained a blood sample drawn from defendant at 3:00 a.m., which showed defendant's blood alcohol concentration level at that time to be .03.

Defendant was indicted for second-degree murder, felony death by motor vehicle, two counts of assault with deadly weapon inflicting serious injury, reckless driving, and driving while impaired on 24 January 2006. The State did not proceed on the charges of felony death by motor vehicle, reckless driving, and driving while impaired.

A. State's Evidence

The State presented evidence from several witnesses to the accident. Truck driver John Talbot ("Talbot") was driving on Interstate 40 through Alamance County on the evening of 28 October 2004. Around the 143 or 144 mile marker, Talbot observed a white car "right on [his] back bumper." Talbot moved onto the right shoulder and the car moved onto the right shoulder as well. Talbot testified the white car drove quickly around his truck and was "drifting." Talbot estimated the white car was traveling between seventy-five to eighty miles per hour. Talbot "radioed" the truck driver ahead of him to "watch out" because the driver of the white car was "either asleep or drunk." After the white car passed Talbot's truck, he observed it swerve to the left, which caused a "tango truck" to swerve to avoid

being hit. A few seconds later, Talbot saw the white car "upside down in the middle of the [interstate]."

Andrew Brady ("Brady") was also driving on Interstate 40/85 on the evening of 28 October 2004. He testified that he saw a white car "coming toward [him] from the left, far lanes [sic] and cross[] over in front of [him]," drift onto the shoulder of the road, "jerk some," and collide with another vehicle. Brady testified that the car "shot up in the air and flipped several times" before coming to rest on its hood.

Timothy Mitchell ("Mitchell") lives in a house facing Interstate 40/85. On the evening of 28 October 2004 Mitchell observed a police car stop a purple car. The police car left and the purple car remained parked on the shoulder of the highway. Mitchell heard a crash and observed a white car flip in the air.

Paul Glover ("Glover"), an employee of the North Carolina Department of Health and Human Services, qualified as an expert witness on blood analysis and the effects of alcohol and drugs on human performance over defendant's objections. Glover testified defendant's alcohol elimination rate was .0147, based solely on the two "snapshot" tests of defendant's blood at 1:38 a.m. and 3:00 a.m. respectively, and over defendant's continuing objections. Based upon the results of the 1:38 a.m. hospital and 3:00 a.m. SBI blood alcohol analyses, Glover opined that at the time of the collision, 12:05 a.m., defendant's blood alcohol concentration would have been .07, less than the .08 presumptive level of impairment. N.C. Gen. Stat. § 20-138.1(a)(2) (2005).

Glover further testified the combined presence of alcohol, amphetamines, and marijuana would have a "synergistic effect," and presence of all three substances in a person's blood would cause a more impairing effect on a person than any one of the substances alone. The trial court instructed the jury to find defendant guilty of second-degree murder if they found the State had proved beyond a reasonable doubt that, *inter alia*, defendant was driving while impaired at the time of the collision and Guevara's death.

The jury found defendant guilty of second-degree murder, assault with deadly weapon inflicting serious injury on Adan, and assault with deadly weapon inflicting serious injury on Sergio. Defendant was sentenced in the presumptive range to a minimum of 176 and a maximum of 221 months imprisonment for the second-degree murder conviction and consecutive terms of a minimum of 27 months and a

maximum of 42 months imprisonment for each assault with a deadly weapon inflicting serious injury conviction. Defendant appeals.

II. Issues

Defendant argues the trial court erred in: (1) denying defendant's motion to continue; (2) precluding *ex mero motu* defendant's cross examination regarding Mullis's personal knowledge of the side effects of the chemicals to which defendant was exposed at work on 28 October 2004; (3) allowing the State to refresh the recollection of Talbot and Buckner; and (4) admitting Trooper Carroll's opinion testimony that defendant was impaired at the time the collision occurred.

III. Assault With A Deadly Weapon Inflicting Serious Injury

[1] We note initially defendant's argued assignments of error do not challenge either of his convictions for assault with a deadly weapon inflicting serious injury. All four issues before us argue whether evidence and testimony that defendant was appreciably impaired at the time of the collision were properly admitted or denied. As defendant does not contest the validity of his assault convictions, we hold there is no error in either the verdicts returned, judgments entered, or sentences imposed for defendant's convictions for assault with a deadly weapon inflicting serious injury.

IV. Motion to Continue

[2] Defendant argues the trial court erred in denying his motion to continue.

A. Standard of Review

> Although a motion for a continuance is ordinarily addressed to the discretion of the trial judge and is reviewable only upon a showing of an abuse of discretion, when the motion is based on a constitutional right the ruling of the trial judge is reviewable [de novo] on appeal as a question of law.

State v. Maher, 305 N.C. 544, 547, 290 S.E.2d 694, 696 (1982). Defendant's argument is based on his constitutional right to due process and is reviewable *de novo* as a question of law. *Id.*

"The denial of a motion to continue, even when the motion raises a constitutional issue, is grounds for a new trial only upon a showing by the defendant that the denial was erroneous and also that his case was prejudiced as a result of the error." *State v. Branch*, 306 N.C. 101,

104, 291 S.E.2d 653, 656 (1982). "If the error amounts to a violation of defendant's constitutional rights, it is prejudicial unless the State shows the error was harmless beyond a reasonable doubt." *State v. Barlowe*, 157 N.C. App. 249, 253, 578 S.E.2d 660, 662-63, *disc. rev. denied*, 357 N.C. 462, 586 S.E.2d 100 (2003).

B. Retrograde Extrapolation

The State notified defendant's counsel on 15 February 2006 that it intended to call Glover to testify as an expert witness and provided defendant with Glover's *curriculum vitae*. On Friday afternoon, 17 February 2006, the State provided defendant with a one-page report prepared by Glover entitled "Retrograde Extrapolation of Alcohol Concentrations," dated 13 January 2006. This report purportedly consisted of calculations Glover had used to base his opinion of defendant's blood alcohol concentration at the time of the accident. The report opined defendant's blood alcohol concentration at the time of the collision was .08, based upon defendant's assumed blood alcohol elimination rate of .0172.

Defense counsel filed a written motion to continue on Friday afternoon, after receipt of Glover's report. Defendant's motion to continue was heard prior to trial on Monday, 20 February 2006. Defense counsel restated the allegations contained in his motion and explained, that despite his extensive trial experience, he was unfamiliar with this type of testimony and unable to retain an expert over the weekend to review Glover's retrograde extrapolation report and to possibly testify for the defense. The trial court reserved ruling until such time Glover's testimony was proffered, and the trial proceeded. When Glover was called as a State's witness, the trial court held a *voir dire* hearing and, over defendant's continuing objections, permitted Glover to testify.

Expert opinion of the rate at which a body eliminates alcohol has been admitted, either without defendant's specific objection or subject to a proper relevancy foundation, as tending to show a driver's blood alcohol concentration at the time of an accident, after a blood sample was obtained from the driver subsequent to the accident. *State v. Catoe*, 78 N.C. App. 167, 169-70, 336 S.E.2d 691, 692 (1985) (defendant failed to specifically object to the retrograde extrapolation opinion at trial; "[o]f course, the usual constraints of relevance continue to apply."), *disc. rev. denied*, 316 N.C. 380, 344 S.E.2d 1 (1986); *State v. Taylor*, 165 N.C. App. 750, 756, 600 S.E.2d 483, 488 (2004) (requiring a proper foundation for Glover's retrograde extrap-

olation testimony when Glover used the average blood alcohol elimination rate). *See also State v. Wood*, 174 N.C. App. 790, 793, 622 S.E.2d 120, 122 (2005) ("The State laid no foundation to show the relevancy of [the retrograde extrapolation] testimony.")

At trial, Glover testified he calculated defendant's blood alcohol concentration at the time of the accident by determining the change in defendant's blood alcohol concentration based on the elapsed time between the two blood samples drawn at 1:38 a.m. and 3:00 a.m. Based upon the difference in these two blood alcohol concentrations results and the elapsed time, Glover calculated defendant's alcohol elimination rate to be .0147 per hour. Glover opined, over defendant's objection, that based upon defendant's alcohol elimination rate, defendant's blood alcohol level at the time of the accident was .07.

C. Duty to Disclose

The record shows defendant filed two discovery motions, one on 19 January 2005 and the other on 23 March 2005. These motions specifically sought, *inter alia*: (1) "[a]ll memoranda, documents, and reports of all law enforcement officers connected with [the case] . . ." and (2) "[r]esults of all reports of any scientific tests or experiments or studies made in connection with the . . . case and all copies of such reports."

N.C. Gen. Stat. § 15A-903 provides:

> (a) Upon motion of the defendant, the court must order the state to:
>
> . . . .
>
> (2) Give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. The State shall also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. The State shall give the notice and furnish the materials required by this subsection *within a reasonable time* prior to trial, as specified by the court.

N.C. Gen. Stat. § 15A-903(a)(2) (2005) (emphasis supplied). N.C. Gen. Stat. § 15A-907 (2005) provides that if the State:

> discovers prior to or during trial additional evidence or witnesses, or decides to use additional evidence or witnesses, and the evidence or witness is or may be subject to discovery or inspection under this Article, the *party must promptly notify the attorney* for the other party of the existence of the additional evidence or witnesses.

N.C. Gen. Stat. § 15A-907 (2005) (emphasis supplied).

In *State v. Branch*, our Supreme Court stated:

> The constitutional guarantees of due process, assistance of counsel and confrontation of witnesses unquestionably include the right of a defendant to have a reasonable time to investigate and prepare his case. No precise time limits are fixed, however, and what constitutes a reasonable length of time for the preparation of a defense must be determined upon the facts of each case.

306 N.C. at 104-05, 291 S.E.2d at 656. In *State v. Castrejon*, this Court stated:

> Last minute or "day of trial" production to the defendant of discoverable materials the State intends to use at trial is an unfair surprise and may raise constitutional and statutory violations. We do not condone either non-production or a "sandbag" delivery of relevant discoverable materials and documents by the State. *See State v. Payne*, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990) ("[T]he purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate."), *cert. denied*, 498 U.S. 1092, 111 S. Ct. 977, 112 L. Ed. 2d 1062 (1991).

179 N.C. App. 685, 695, 635 S.E.2d 520, 526-27 (2006) *disc. rev. denied*, 361 N.C. 222, 642 S.E.2d 709 (2007).

D. Prejudice

Under our standard of review, defendant must show "that the denial was erroneous and also that his case was prejudiced as a result of the error." *Branch*, 306 N.C. at 104, 291 S.E.2d at 656. In *State v. Fuller*, the defendant appealed from her conviction for driving while impaired and argued the trial court erred in denying her motion to prevent the State's expert witness from testifying. 176 N.C. App. 104, 107, 626 S.E.2d 655, 657 (2006). Defendant asserted the State did not "promptly notify" her of its intention to call the expert within a "reasonable time" in order to allow her to procure a rebuttal witness. *Id*;

N.C. Gen. Stat. §§ 15A-907, 903(a)(2) (2005). In *Fuller*, the State served notice on defendant the morning of the defendant's trial, that it would be calling an expert witness to opine to defendant's probable blood alcohol content at the time she was driving, by using an average retrograde extrapolation rate. 176 N.C. App. at 107, 626 S.E.2d at 657. We held the trial court did not err in admitting an opinion of the defendant's probable blood alcohol content at the time she was driving "in light of defendant's clear understanding of the importance of [the] evidence to the State's case against her and its longstanding acceptance in the courts of this state." *Id.* at 108, 626 S.E.2d at 658.

Here, defendant was indicted on 14 February 2005. One of the charges listed in the indictments is driving while impaired. Defendant went to trial over a year later, on 20 February 2006. Defendant's trial counsel acknowledged that he had defendant's medical records from the hospital, which showed a blood test being drawn and that defendant had a blood alcohol concentration of .059 at 1:38 a.m.

Nothing in the record or transcripts shows that either defendant or defense counsel was aware a second sample was drawn or that the results of that sample showed defendant's blood alcohol level was .03 at 3:00 a.m. The 3:00 a.m. blood sample was apparently taken from defendant by hospital personnel and transferred directly to Trooper Carroll. Nothing in the record shows the blood draw or that defendant's .03 blood alcohol concentration was recorded in his medical records or provided to defendant or his attorney prior to trial.

Glover used the difference between the results of the 1:38 a.m. and 3:00 a.m. blood draws to opine that defendant's specific blood alcohol elimination rate was .0147 per hour rather than the average human blood alcohol elimination rate of .0165 per hour that Glover testified to in *State v. Taylor.* 165 N.C. App. at 752, 600 S.E.2d at 486 ("The alcohol elimination rate used by Glover in this calculation was an average rate of .0165.").

Under *Fuller*, defendant could be reasonably expected to anticipate the State might produce retrograde extrapolation evidence tending to show defendant's blood alcohol concentration at the time of the crash. 176 N.C. App. at 108, 626 S.E.2d at 658. However, without a showing defendant knew of the second blood sample or that its results showed his blood alcohol concentration was .03 at 3:00 a.m., defendant could not reasonably foresee the State would, based on the difference between the two samples, use his specific blood alcohol elimination rate of .0147 rather than the "average rate" of

.0165, or review the second test and obtain rebuttal testimony in his client's defense.

Furthermore, Glover's report, provided to defendant on the Friday afternoon before trial the following Monday, shows defendant's blood alcohol elimination rate as .0172. Glover testified at trial that defendant's blood alcohol elimination rate was .0147. The alcohol elimination rate used in the calculations causes the estimation of defendant's blood alcohol level, at any given time, to vary widely.

E. Remand

Whether the trial court committed constitutional or statutory error in denying a defendant's motion to continue is determined on a case-by-case basis. *State v. Barlowe*, 157 N.C. App. 249, 253, 578 S.E.2d 660, 663 (2003) (citing *Avery v. Alabama*, 308 U.S. 444, 84 L. Ed. 377 (1940)).

The record and transcripts before us are silent on whether the defendant possessed knowledge of or if the State disclosed all the information in its possession and used by Glover in making his calculations, as it was constitutionally and statutorily required. On this record, we are unable to determine whether defendant was prejudiced by the State's delivery of Glover's retrograde extrapolation report dated 13 January 2006 to defendant on the Friday afternoon, 17 February 2006, prior to defendant's trial the following Monday morning, and whether the trial court's denial of defendant's motion to continue was harmless beyond a reasonable doubt. *Fuller*, 176 N.C. App. at 107, 626 S.E.2d at 657.

We remand this case to the trial court for a hearing and determination of: (1) whether defendant or defense counsel, prior to 17 February 2006, had knowledge that an additional blood sample was taken from defendant at 3:00 a.m. which showed defendant's blood alcohol concentration to be .03 at that time; (2) when, prior to 17 February 2006, defendant or defense counsel became aware a second blood sample was taken at 3:00 a.m. that showed defendant's blood alcohol concentration to be .03; (3) the dates the State provided the defendant's blood test results to Glover and procured Glover as an expert witness to testify in this trial; (4) when Glover calculated and prepared and when the State received possession of Glover's retrograde extrapolation report; (5) whether Glover was listed as an expert witness in the pre-trial order or any other witness list required to be disclosed by the State to defendant pursuant to

N.C. Gen. Stat. § 15A-903(a)(2); (6) the date defense counsel received possession of any pre-trial order or other State's witness list; (7) whether the delivery of Glover's report to defendant's trial counsel at 2:00 p.m. on the Friday prior to trial the following Monday morning occurred "within a reasonable time prior to trial" pursuant to N.C. Gen. Stat. § 15A-903(a)(2) and whether the State otherwise complied with N.C. Gen. Stat. § 15A-903(a)(2), the other provisions of N.C. Gen. Stat. § 15A-903, the provisions of N.C. Gen. Stat. § 15A-907, i.e., if the State "promptly notif[ied] the attorney for the other party of the existence of the additional evidence or witnesses;" and (8) whether the State acted in conformity with the constitutional provisions set forth in *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963) and *State v. Smith*, 337 N.C. 658, 662, 447 S.E.2d 376, 377-78 (1994). Upon remand, the trial court shall hold a hearing, receive evidence, and make findings of fact and conclusions of law regarding each of these factors.

V. Conclusion

Defendant failed to assign error to his two assault with a deadly weapon inflicting serious injury convictions. We find no error in these convictions.

All of defendant's remaining assignments of error challenge the admission or exclusion of evidence relating to his conviction for second degree murder. These remaining assignments of error are preserved until after the trial court's hearing and entry of order on remand.

This case is remanded to the trial court for further proceedings consistent with this opinion.

No error in part and remanded in part with instructions.

Judge CALABRIA concurs.

Judge WYNN dissents in a separate opinion.

WYNN, Judge, dissenting.

I respectfully dissent, observing a well-established rule of appellate law:

> 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. . . . While we recognize that a panel of the Court of Appeals may disagree with, or even find error in, an opinion by a prior panel and may duly note its disagreement or point out that error in its opinion, the panel is bound by that prior decision until it is overturned by a higher court.

State v. Jones, 358 N.C. 473, 487, 598 S.E.2d 125, 133-34 (2004) (internal quotation and citation omitted).

In *State v. Fuller*, this Court held that the trial court did not abuse its discretion by denying the defendant's motion to prevent the State from presenting extrapolation evidence from the same expert witness at issue in the instant case. 176 N.C. App. 104, 107-08, 626 S.E.2d 655, 657-58 (2006). The defendant in *Fuller*, as here, argued that she had insufficient time to procure a rebuttal witness. We noted "defendant's clear understanding of the importance of this evidence to the State's case against her and its longstanding acceptance in the courts of this state." *Id.* at 108, 626 S.E.2d at 658. Indeed, such evidence has been offered in North Carolina since 1985. *State v. Catoe*, 78 N.C. App. 167, 169-70, 336 S.E.2d 691, 693 (1985), *disc. review denied*, 316 N.C. 380, 344 S.E.2d 1 (1986); *see also State v. Taylor*, 165 N.C. App. 750, 752-58, 600 S.E.2d 483, 486-89 (2004); *State v. Davis*, 142 N.C. App. 81, 89-90, 542 S.E.2d 236, 241, *disc. review denied*, 353 N.C. 386, 547 S.E.2d 818 (2001).

Here, although the record may not contain definitive evidence as to whether Defendant had notice of the results of the three a.m. blood test, neither is there any suggestion—by either the State or Defendant himself, in his arguments to this Court—that the trial court had incomplete information as to Defendant's notice and degree of knowledge. In light of the facts at issue in this case, Defendant unquestionably had notice that the State would offer evidence as to his alleged impairment and blood alcohol content. The "longstanding acceptance" of extrapolation evidence likewise should have put Defendant on notice that the State would use his blood tests to estimate his blood alcohol content at the time of the crash. The sole surprise was the name of the expert, which should not have precluded Defendant from preparing a rebuttal.[1]

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1. I note, too, that even assuming *arguendo* that it was an abuse of discretion for the trial court to deny the motion to continue, such error was not prejudicial to Defendant. The expert testimony at trial was actually more beneficial to Defendant, as the expert stated that his blood alcohol content would have been 0.07 (and below the legal limit), rather than the 0.08 stated in his report. Moreover, the State had other evi-

I see no meaningful distinction between the facts in the instant case and those of *Fuller*. As such, our decision should be controlled by our prior precedent. *Jones*, 358 N.C. at 487, 598 S.E.2d at 133-34. I would therefore affirm the trial court's denial of the motion to continue, as well as reach the merits of Defendant's other arguments.

HARRY J. WILLIAMS, AND GLENDA V. WILLIAMS, PLAINTIFFS v. HOMEQ SERVICING CORPORATION F/K/A THE MONEY STORE, DEFENDANT

No. COA06-674

(Filed 3 July 2007)

1. Appeal and Error— preservation of issues—notice of appeal from summary judgment—sufficient assignment of error

Defendant's motion to dismiss plaintiffs' appeal based on an alleged failure to specifically assign error to the trial court's order as required by N.C. R. App. P. 10 is denied because a notice of appeal from a summary judgment order is itself sufficient to assign error to the order of summary judgment.

2. Emotional Distress— negligent infliction—severe mental condition—insufficient evidence

The trial court properly entered summary judgment for defendant loan servicer on plaintiffs' claim for negligent infliction of emotional distress based upon defendant's repeated phone calls and debt collection practices where the only evidence plaintiffs offered in support of their claim was their testimony that they suffer from chronic depression, but they conceded that they have never been diagnosed by any doctor as suffering from chronic depression or any other type of severe mental condition.

3. Creditors and Debtors— unfair debt collection—telephone calls to place of employment—statute of limitations

Plaintiff mortgagor's claim against defendant loan servicer for unfair debt collection under N.C.G.S. § 75-52(4) based upon

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dence against Defendant, including testimony as to his earlier blood tests, paramedic testimony that the car smelled of alcohol, and witness testimony that he was driving erratically immediately prior to the accident, that would have supported the jury's verdicts; the issue of impairment did not need to be proven as an element of any of the crimes of which he was convicted.

telephone calls to his place of employment was barred by the four-year statute of limitations of N.C.G.S. § 75-16.2 where the claim was brought more than four years after plaintiff retired from his employment.

4. Creditors and Debtors— unfair debt collection—wrongful charges and fees—correction of improprieties

Summary judgment was properly entered for defendant loan servicer on plaintiff mortgagor's claim for unfair debt collection under N.C.G.S. § 75-52(2) based upon the alleged wrongful imposition of charges and fees where improperly imposed late fees and improper application of suspense funds were reversed and corrected.

5. Creditors and Debtors— telephone harassment by debt collector—genuine issue of material fact

Summary judgment was improperly entered for defendant loan servicer on plaintiff mortgagor's claim under N.C.G.S. § 75-52(3) for telephone harassment by a debt collector where defendant's records showed that plaintiff and his wife were called by defendant's employees at least 2,200 times, up to six time per day, over a six-year period; plaintiff contends the calls were rude, abrasive and demeaning; and plaintiff testified to specific calls in which he felt particularly harassed by defendant's employees.

6. Creditors and Debtors— telephone harassment by debt collector—calls within limitations period—admissibility of calls outside limitations period

Plaintiff mortgagor's claim against defendant debt servicer under N.C.G.S. § 75-52(3) for telephone harassment by a debt collector was not barred by the four-year statute of limitations where plaintiff received harassing telephone calls at home within the limitations period. Plaintiff may offer evidence of harassing telephone calls that occurred outside the statute of limitations period to prove his claim for calls that occurred within the period but may not recover for calls that occurred beyond the four-year limitations period.

7. Creditors and Debtors— unfair debt collection—harassing telephone calls—actual injury

Plaintiff mortgagor showed sufficient actual injury from defendant loan servicer's harassing telephone calls to support his claim for unfair debt collection where plaintiff offered evi-

dence through his deposition and affidavit, as well as the deposition of his wife, tending to show that the telephone calls caused him emotional distress. Actual injury does not mean out-of-pocket damages.

8. Creditors and Debtors— collection agency—exemption—estoppel

The trial court properly dismissed plaintiff mortgagor's claims against defendant loan servicer for prohibited acts by a collection agency under N.C.G.S. § 58-70 because: (1) defendant is the type of bank subsidiary meant to be exempt under N.C.G.S. § 58-70-15(c)(2), and a failure to assert the exemption in the pleadings does not bar defendant from raising it at a hearing for summary judgment; and (2) although defendant held a collection agency permit as insurance against subjecting its business and employees to criminal prosecution, there is no legal authority to impose liability on a party for simply holding a permit when the party is otherwise exempt from the statute.

Judge JACKSON concurring in part and dissenting in part.

Appeal by plaintiffs from judgment entered 11 January 2006 by Judge J.B. Allen, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 14 December 2006.

Clark Bloss & Wall, PLLC by John F. Bloss, for plaintiffs-appellants.

Womble Carlyle Sandridge & Rice, PLLC, by Christopher T. Graebe, for defendant-appellee.

CALABRIA, Judge.

Harry J. Williams ("Mr. Williams") and Glenda V. Williams ("Mrs. Williams") (collectively "the plaintiffs") appeal from summary judgment entered in favor of defendant, HomEq Servicing Corporation ("HomEq"). We affirm in part and reverse and remand in part.

In 1996, Mr. Williams refinanced his home in Mebane, North Carolina, by executing a promissory note in the amount of $77,600.00 secured by a deed of trust executed by the Williams to lender R.& R. Funding Group, Inc. Since Mrs. Williams did not sign the promissory note, she was not a party to the loan. The loan was subsequently assigned to TMS Mortgage, Inc., which later changed its name to HomEq. As servicer of the loan, HomEq performed bookkeeping

services, collected payments, and ensured that property taxes and insurance were paid.

For the first few months of the loan, Mr. Williams made all payments on the loan, often after the grace period but before the next payment was due. However, in August of 1996, HomEq's system recorded Mr. Williams had stopped payment on the check for the August 1996 payment. Mr. Williams denied stopping payment on the check. However, he did not produce any evidence during discovery showing the check was not stopped. As a result of the alleged stopped payment, Mr. Williams fell one month behind in his mortgage payments. In August of 1999, he again missed a payment, rendering him two months behind in his mortgage payments.

Sometime in 2000, Mr. Williams allowed their homeowners' insurance to lapse. As per the mortgage agreement, HomEq purchased a policy for the property and notified the plaintiffs to reimburse HomEq for the insurance. Mr. Williams continued to pay the monthly mortgage payment but did not pay the additional funds required to repay the insurance. As a result, a portion of his monthly mortgage payment was used each month to repay the insurance. The remaining balance of the payment was applied to the mortgage as an incomplete payment. After several months of incomplete payments, the plaintiffs accumulated an overdue balance equivalent to an entire monthly payment on the mortgage. Mr. Williams was notified by HomEq that he was three months in arrears, he was in default, and foreclosure proceedings were imminent. Mr. Williams did not believe he was in default and hired counsel to represent him in the matter. Mr. Williams' attorney corresponded with HomEq as well as with the North Carolina and California Attorney General's Offices.

In October of 2001, HomEq instituted foreclosure proceedings. In November of 2001, the plaintiffs signed a "Default Forbearance Agreement." Under the agreement, HomEq would stay foreclosure proceedings if the plaintiffs would admit they were in default and agree to pay an incrementally higher payment each month over a 24-month period. The agreement also stated the plaintiffs would be held in default for any overdue liens, taxes, or insurance, and reserved HomEq's right to pay any of these overdue items and allocate any portion of the plaintiffs' monthly payment as reimbursement for the cost of the overdue items before applying the payment to the mortgage.

During the 24-month payment period, Mr. and Mrs. Williams failed to pay their property taxes. HomEq paid the taxes and added

the amount paid for the taxes to Mr. Williams' monthly payment. Although Mr. Williams paid on time, he continued to pay the amount of the original monthly payment agreed to under the payment plan. Therefore, Mr. Williams failed to pay the additional amount that had been adjusted for the property taxes even though HomEq informed Mr. Williams that he needed to repay the property taxes. Mr. Williams' failure to pay additional fees for the taxes resulted in default of the forbearance agreement, and HomEq again instituted foreclosure proceedings.

On 3 February 2005, the plaintiffs brought an action against HomEq, alleging prohibited acts by a collection agency, prohibited acts by debt collectors, usury, actual/constructive fraud, unfair and deceptive trade practices, and negligent infliction of emotional distress. A hearing for summary judgment was held 3 January 2006. On 11 January 2006, summary judgment was granted for defendant on all claims. Plaintiffs appeal from the order granting summary judgment.

The standard of review for a trial court's grant of a motion for summary judgment is *de novo*. *Stafford v. County of Bladen*, 163 N.C. App. 149, 151, 592 S.E.2d 711, 712 (2004). Viewing the evidence in the light most favorable to the non-moving party, we determine if any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). "The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense." *Dawes v. Nash County*, 357 N.C. 442, 445, 584 S.E.2d 760, 762 (2003) (citations omitted). In determining if a grant of summary judgment is proper, we consider "admissions in the pleadings, depositions on file . . . affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken." *Thompson v. First Citizens Bank & Tr. Co.*, 151 N.C. App. 704, 707, 567 S.E.2d 184, 187 (2002).

I. Motion to Dismiss the Appeal

[1] HomEq has moved to dismiss the appeal asserting the plaintiffs' assignments of error do not comply with Rule 10 of the North Carolina Rules of Appellate Procedure because they fail to specifically assign error to the trial court's order. The plaintiffs' assignments of error are:

1. The Superior Court erred in granting summary judgment in favor of defendant on plaintiffs' claims under G.S. §§ 58-70-1, *et seq.* . . .

2. The Superior Court erred in granting summary judgment in favor of defendant on plaintiffs' claims under G.S. §§ 75-50, *et seq.* . . .

3. The Superior Court erred in granting summary judgment in favor of defendant on plaintiffs' claim of Usury.

4. The Superior Court erred in granting summary judgment in favor of defendant on plaintiffs' claim of Actual/Constructive Fraud. . . .

5. The Superior Court erred in granting summary judgment in favor of defendant on plaintiffs' claims under G.S. §§ 75-1.1, *et seq.* . . .

6. Whether the Superior Court erred in granting summary judgment in favor of defendant on plaintiffs' claim of Negligent Infliction of Emotional Distress. . . .

In *Nelson v. Hartford Underwriters Ins. Co.*, 177 N.C. App. 595, 630 S.E.2d 221 (2006), this Court recently reaffirmed that a notice of appeal from a summary judgment order is itself sufficient to assign error to the order of summary judgment. The reasoning is that "[a]n appeal from an order granting summary judgment raises only the issues of whether, on the face of the record, there is any genuine issue of material fact, and whether the prevailing party is entitled to a judgment as a matter of law." *Id.* at 601, 630 S.E.2d at 226-27 (citations omitted). *See also*, *Ellis v. Williams*, 319 N.C. 413, 415, 355 S.E.2d 479, 481 (1987). Therefore, the plaintiffs' assignments of error are sufficient to comply with Appellate Rule 10.

II. Negligent Infliction of Emotional Distress

[2] The plaintiffs contend they suffered severe emotional distress as a result of HomEq's repeated phone calls and aggressive debt collection practices. In order to recover for negligent infliction of emotional distress in North Carolina, the plaintiff must prove: "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as 'mental anguish'), and (3) the conduct

did in fact cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). "Severe emotional distress" is defined to mean "any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of *severe and disabling* emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Id.*, 327 N.C. at 304, 395 S.E.2d at 97 (emphasis added). The question before this Court is whether the plaintiffs presented sufficient evidence to establish they have suffered from severe emotional distress. We hold they have not.

Mr. Williams alleges HomEq's repeated phone calls to his place of employment placed him under an undue amount of stress because he believed he would lose his job in addition to his home. As a result, Mr. Williams claims he suffered from moderate chronic depression. Mrs. Williams also claims she suffered moderate chronic depression as a result of watching her husband suffer. Mrs. Williams has been prescribed sleep aids for her depression, but she concedes she was unable to locate a doctor who would testify Mrs. Williams' disorder is caused by HomEq's conduct.

Although severe emotional distress is defined in terms of diagnosable emotional or mental conditions, "proof of severe emotional distress does not require medical expert testimony." *Coffman v. Roberson*, 153 N.C. App. 618, 627-28, 571 S.E.2d 255, 261 (2002). Testimony of friends, family, and pastors can be sufficient to support a claim for negligent infliction of emotional distress. *Id.* However, this Court has held dismissal of a claim for negligent infliction of emotional distress is proper when the "plaintiff fails to produce any real evidence of severe emotional distress." *Pacheco v. Rogers & Breece, Inc.*, 157 N.C. App. 445, 450, 579 S.E.2d 505, 508 (2003). The only evidence the plaintiffs have offered in support of their claim is their testimony stating they suffer from chronic depression. Previously, we held summary judgment was proper when the sole evidence of a plaintiff's alleged emotional distress was in her responses to defendant's interrogatories, when she answered she suffered from nightmares, was afraid of the dark and suffered stress-related illness. *Johnson v. Scott*, 137 N.C. App. 534, 539, 528 S.E.2d 402, 405 (2000). The plaintiff in *Johnson* and the plaintiffs in the case before us conceded they were never "diagnosed by any doctor as suffering from neurosis, psychosis, chronic depression, phobia or any other type of severe mental condition." *Id.* In *Johnson*, we held the plaintiff's uncorroborated evidence was insufficient to establish severe emo-

tional distress. *Id.* "When a plaintiff fails to produce any evidence of an essential element of her claim, the trial court's grant of summary judgment is proper." *Pacheco*, 157 N.C. App. at 452, 579 S.E.2d at 509. Because the plaintiffs have offered no real evidence of severe emotional distress, it was proper for the trial court to grant summary judgment for the defendant on this claim.

III. North Carolina Debt Collection Claims

Mr. Williams next argues the trial court erred in granting summary judgment to defendant with respect to his unfair debt collection claims. N.C. Gen. Stat. § 75-50 *et seq.* prohibits certain acts by debt collectors. Mr. Williams contends that in the last seven years, HomEq has violated § 75-51(1),(3),(6),(8); § 75-52(3),(4); § 75-54(4),(6); and § 75-55(2). However, Mr. Williams only specifically argues in his brief that HomEq violated § 75-52 (3), (4) and § 75-55(2). Therefore, Mr. Williams' remaining assignments of error with respect to HomEq's alleged violations are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6) (2005). Furthermore, Mrs. Williams, who was not a party to the loan at issue, can not challenge the entry of summary judgment on her claims regarding unfair debt collection.

[3] After a thorough review of the record, hearing transcripts, depositions, and exhibits, we agree with the trial court that no genuine issue of material fact existed with respect to § 75-52(4) and § 75-55(2). Under N.C. Gen. Stat. § 75-52(4) (2005), a debt collector is forbidden from:

> [p]lacing telephone calls or attempting to communicate with any person, contrary to his instructions, at his place of employment, unless the debt collector does not have a telephone number where the consumer can be reached during the consumer's nonworking hours.

Id. HomEq's telephone records show HomEq attempted to communicate with Mr. Williams at his place of employment on numerous occasions. Additionally, Mr. Williams' deposition testimony indicates that HomEq continued to call him at work even after he instructed them not to call him at work. However, Mr. Williams retired in September of 2000. He has not offered evidence of specific incidents under § 75-52(4) that occurred after 3 February 2001. North Carolina General Statute § 75-16.2 (2005), provides for a four-year statute of limitations for any civil action brought under Chapter 75. *Id.* Thus, Mr. Williams' claim under § 75-52(4) are barred by the statute of limitations.

[4] Pursuant to § 75-55(2), a debt collector is prohibited from:

> [C]ollecting or attempting to collect from the consumer all or any part of the debt collector's fee or charge for services rendered, collecting or attempting to collect any interest or other charge, fee or expense incidental to the principal debt unless legally entitled to such fee or charge.

N.C. Gen. Stat. § 75-55(2) (2005). With respect to Mr. Williams' claimed wrongful imposition of charges and fees under § 75-55 (2), the brief includes the following citation: "*See*, *e.g.*, Dept. Tr. of M. Charles at 13, 23, 31)." On page 13 of the deposition of Molly Charles—a HomEq consumer advocacy analyst—Ms. Charles admitted that Mr. Williams was overcharged for late fees, but she further testified that she "had the late charges waived." On page 23, she agreed with Mr. Williams' counsel that some suspense funds were improperly applied to pay for fees and corporate advances, but she explained that those actions were reversed. Finally, on page 31, Ms. Charles is asked about a late charge assessed on 23 February 2004, which may or may not have been waived. Mr. Williams does not point to any evidence that the 23 February 2004 fee was not waived. Further, Mr. Williams provides no argument on appeal as to how he suffered actual injury since the wrongful imposition of fees was corrected. Therefore, we find that summary judgment was proper with respect to these claims.

[5] We do, however, agree with appellants there is a genuine issue of material fact with respect to the § 75-52(3) claim. N.C. Gen. Stat. § 75-52 governs harassment by debt collectors. A debt collector is prohibited from:

> [c]ausing a telephone to ring or engaging any person in telephone conversation with such frequency as to be unreasonable or to constitute a harassment to the person under the circumstances or at times known to be times other than normal waking hours of the person.

N.C. Gen. Stat. § 75-52(3) (2005). What constitutes unreasonable conduct or harassment under § 75-52 is a case of first impression in North Carolina. In looking to other jurisdictions for guidance, we find courts construing similar statutes in other states have normally left the question of harassment for the jury, as "the effect of repeated telephone calls is colored by their tone and purpose." *Story v. J.M. Fields*, 343 So. 2d 675, 676 (Fla. Dist. Ct. App. 1st Dist. 1977). A claim

for telephone harassment by a debt collector should be considered on a "case by case basis, after considering not only the frequency of the calls but also the legitimacy of the creditor's claim, the plausibility of the debtor's excuse, the sensitivity or abrasiveness of the personalities, and all other circumstances that color the transaction." *Id.* at 677. Here, HomEq's records show the plaintiffs were called at least 2200 times since 1999, sometimes up to six times in one day. The plaintiffs allege the callers were rude and abrasive, and the telephone calls were demeaning. Mr. Williams also testified to specific calls in which he felt particularly harassed by HomEq employees. Viewing the evidence in the light most favorable to the plaintiffs, there was a genuine issue of material fact as to whether HomEq's phone calls were harassing.

[6] Alternatively, HomEq argues that even if the telephone calls violated § 75-52(3), a majority of the calls were made before 2001, and any action by the plaintiffs is barred by the statute of limitations. We disagree.

In general, the statute of limitations for any civil action brought under Chapter 75 is four years. N.C. Gen. Stat. § 75-16.2 (2005). However, Mr. Williams relies on *Bryant v. Thalhimer Brothers, Inc.*, 113 N.C. App. 1, 437 S.E.2d 519 (1993), to counter HomEq's statute of limitations argument. Mr. Williams cites *Bryant* for the proposition he "should be entitled to present evidence of violations that occurred more than four years before the initiation of this lawsuit." In *Bryant*, this Court considered a claim for intentional infliction of emotional distress based on ongoing sexual harassment that started substantially before the three-year period prior to the filing of the lawsuit.

The *Bryant* Court first noted the "decision by the North Carolina Supreme Court, *Waddle* [*v. Sparks*, 331 N.C. 73, 87, 414 S.E.2d 22, 29 (1992)], held that where the plaintiff could not show that 'any of the specific incidents' took place within the statutory period, she could not survive a motion for summary judgment." 113 N.C. App. at 7, 437 S.E.2d at 523. The *Bryant* Court concluded the requirements of *Waddle* had been met in that case because the plaintiff presented "evidence of specific incidents occurring within three years of the filing of the suit against Thalhimers." *Id.* at 11, 437 S.E.2d at 525. The Court then reasoned "evidence" of actions outside the statute of limitations was admissible to prove the claim of intentional infliction of emotional distress, a claim not barred by the statute of limitations. "The statutes of limitations serve to bar *claims*, not *evidence* of contribut-

ing factors to an ultimate claim that has not yet come into existence." *Id.* at 13, 437 S.E.2d at 526 (emphasis added). *See also Dickens v. Puryear*, 302 N.C. 437, 455 & n. 11, 276 S.E.2d 325, 336 & n. 11 (1981) (holding the plaintiff could offer evidence of assault claims barred by statute of limitations in support of timely-filed intentional infliction of emotional distress claim, although damages could not be awarded for assault).

Here, Mr. Williams has presented evidence that he received harassing phone calls at home after 3 February 2001—the date four years prior to the filing of the lawsuit. Plaintiffs testified in their depositions, and Mr. Williams stated in his affidavit, the phone calls to their home continued at least until their current attorney became involved in 2005. Thus, consistent with *Bryant*, Mr. Williams has, with respect to the phone calls to his home, presented evidence of specific incidents occurring within the statute of limitations period. Furthermore, Mr. Williams may offer evidence of harassing phone calls occurring *outside* the statute of limitations period to prove his claim for phone calls occurring *within* the period, but he may not recover for calls that occurred prior to 3 February 2001.

[7] Finally, HomEq argues Mr. Williams' § 75-50 claims must be dismissed because they have failed to state actual damages. We disagree. HomEq cites to *Poor v. Hill*, 138 N.C. App. 19, 530 S.E.2d 838 (2000), in support of its contention Mr. Williams' debt collection claims are barred because Mr. Williams has failed to show any actual injury. HomEq is mistaken. In *Poor*, this Court specifically held that plaintiffs asserting Chapter 75 claims "must prove they suffered actual injury as a proximate result of defendants' misconduct." *Id.* at 34, 530 S.E.2d at 848 (internal quotations omitted). We disagree that Mr. Williams failed to offer evidence of injury proximately caused by the telephone calls. Mr. Williams has offered evidence through his deposition and affidavit, as well as the deposition of Mrs. Williams, tending to show the phone calls caused him emotional distress.

To the extent HomEq equates "actual injury" with out-of-pocket damages, that is not the law. Such a view would be inconsistent with N.C. Gen. Stat. § 75-16 (2005), which provides a person who was "injured" as a result of conduct in violation of Chapter 75 "shall have a right of action on account of such injury done, *and if damages are assessed* in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict." *Id.* (emphasis added). The statute thus distinguishes between "injury" and "damages." *See Shell Oil Co. v. Commercial*

Petroleum, Inc., 928 F.2d 104, 109 n.7 (4th Cir. 1991) (affirming district court's injunction in favor of Shell under N.C. Gen. Stat. § 75-1.1 (2005), but also holding because the Fourth Circuit "affirm[ed] the [district] court's finding [of] no actual damages, Shell is not entitled to treble damages under state law."). Moreover, emotional distress damages are recoverable for fraud. Since fraud may be a basis for finding a Chapter 75 violation, it would be illogical to hold such damages were unavailable under Chapter 75 when that chapter was specifically enacted to provide a broader range of relief. *See Poor*, 138 N.C. App. at 34, 530 S.E.2d at 848.

With respect to the evidence of actual injury, HomEq contends its log of phone calls refutes plaintiffs' assertions regarding the frequency of calls during the statute of limitations period. Further, HomEq points to the fact Mr. Williams only recalled the specifics of two phone calls during that time frame. The log, however, creates a genuine issue of material fact as to the frequency of the calls. Whether to believe the log or the plaintiffs is a question for the jury, not for the trial court or this Court.

IV. Collection Agency Claims

[8] Mr. Williams also appeals the dismissal of his claims under N.C. Gen. Stat. § 58-70 (2005). For the purposes of § 58-70, a collection agency "means a person directly or indirectly engaged in soliciting, from more than one person delinquent claims of any kind owed or due or asserted to be owed or due the solicited person and all persons directly or indirectly engaged in the asserting, enforcing or prosecuting of those claims." N.C. Gen. Stat. § 58-70-15(a) (2005). More importantly, the definition of collection agency does not include "banks, trust companies, or bank-owned, controlled, or related firms, corporations or associations engaged in accounting, bookkeeping, or data processing services where a primary component of such services is the rendering of statements of accounts and bookkeeping services for creditors." N.C. Gen. Stat. § 58-70-15(c)(2) (2005).

The evidence in the record shows HomEq is the type of bank subsidiary meant to be exempt under § 58-70-15(c)(2) (2005). Mr. Williams does not dispute HomEq is exempt under the statute; rather, he argues HomEq should be estopped from asserting exemption under the statute because HomEq failed to assert the exemption in the pleadings, and because HomEq held a collection agency license for a period of time.

We turn first to the question of whether a failure to raise the exemption in the pleading bars HomEq from raising the exemption at a hearing for summary judgment. We hold it does not.

The North Carolina Rules of Civil Procedure Rule 8(c) requires "any matter constituting an avoidance or affirmative defense" should be set forth in the pleadings. N.C. Gen. Stat. § 1A-1, Rule 8(c) (2005). Our Supreme Court has held "it is desirable to treat the pleading as though it were amended to conform to the evidence presented at the hearing." *Whitten v. Bob King's AMC/Jeep, Inc.*, 292 N.C. 84, 90, 231 S.E.2d 891, 894 (1977). Specifically, "unpleaded defenses, when raised by the evidence, should be considered in resolving a motion for summary judgment." *Bank v. Gillespie*, 291 N.C. 303, 306, 230 S.E.2d 375, 377 (1976). Thus, a "[defendant's] answer may be deemed amended to reflect the affirmative defense . . . as of the time the case was before the court on the motion for summary judgment." *Sample v. Morgan*, 311 N.C. 717, 726, 319 S.E.2d 607, 613 (1984).

HomEq was well within its bounds to raise the exemption during the summary judgment hearing, and it produced evidence which showed, as a matter of law, HomEq is exempt from § 58-70-15. Although it would have been preferable for HomEq to address this issue in its answer, the failure to do so did not preclude HomEq from raising the preemption at the hearing for summary judgment. Thus, it was not improper for the trial court to dismiss the action on these grounds.

Mr. Williams also argues HomEq should be estopped from asserting exemption under § 58-70-15 because HomEq held a collection agency permit for most of the years during which the conduct at issue occurred.

Under § 58-70-1, any business operating as a "collection agency" is required to obtain a permit before commencing business. N.C. Gen. Stat. § 58-71-1 (2005). Failure to procure a permit subjects the business itself to a Class I felony, and subjects agents of the business to a Class 1 misdemeanor. *Id.* HomEq contends it held a permit as insurance against subjecting its business and employees to criminal prosecution.

The application requirements for obtaining a collection agency permit are laid out in exhaustive detail in § 58-70-5. The application requirements do not require an applicant to fall under the definition of "collection agency" in order to qualify for a permit. There is noth-

ing in the article governing collection agencies which indicates any person or entity is subject to liability merely on the basis of holding a permit. Furthermore, we could find no legal authority which would allow us to impose liability on a party for simply holding a permit when the party is otherwise exempt from the statute. Thus, we hold the trial court was not in error for dismissing the § 58-70 claims.[1]

For the reasons stated herein, we reverse and remand for further proceedings Mr. Williams' claim under N.C. Gen. Stat. § 75-52(3). We affirm the trial court with respect to all other claims.

Affirmed in part, reversed and remanded in part.

Judges GEER concurs.

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

JACKSON, Judge concurring in part and dissenting in part.

I concur with sections I, II, and IV of the majority's opinion. However, I must dissent from the majority's analysis found in section III of the opinion, in which the majority disagrees with defendant's argument that plaintiff's section 75-50 claims must be dismissed because they have failed to prove they suffered actual damages. I would hold there was no genuine issue of material fact with respect to plaintiff's section 75-52(3) and section 75-52(4) claims.

The majority relies upon the holdings in *Bryant v. Thalhimer Bros., Inc.*, 113 N.C. App. 1, 437 S.E.2d 519 (1993) and *Waddle v. Sparks*, 331 N.C. 73, 414 S.E.2d 22 (1992), in support of its conclusion that plaintiff Mr. Williams may present evidence of incidents occurring outside of the statute of limitations period in support of his claims under section 75-52(3). Neither of these cases relate to Chapter 75 claims, and they have not been used previously in the Chapter 75 context to support an extension of the statute of limitations time period. I would decline to extend the reasoning in *Bryant* and *Waddle* to this case.

I believe *Poor v. Hill*, 138 N.C. App. 19, 530 S.E.2d 838 (2000), is controlling in the instant case, with respect to defendant's argument

1. Additionally, HomEq argues that any 58-70 claims are precluded by federal law. Because we hold that HomEq is exempt from any 58-70 claims, we do not reach the issue of federal preclusion.

that plaintiffs have failed to plead and prove actual damages. *Poor* discusses the trial court's award of attorney damages, but the portion of the opinion upon which defendant relies does not relate to an award of attorney's fees. Instead, the portion of *Poor* defendant relies upon discusses the types of damages a plaintiff may be entitled to for a Chapter 75 claim which arises out of a breach of contract claim. *See id.* at 34, 530 S.E.2d at 848. The Court in *Poor* specifically states that the plaintiffs in the case, on retrial, "must prove they 'suffered actual injury as a proximate result of defendants' misconduct." *Id.* at 34, 530 S.E.2d at 848. From my reading of *Poor*, a plaintiff must at least allege to have suffered actual injury as a result of the defendant's conduct, which I believe plaintiff in the instant case has failed to do.

In the instant case, the record demonstrates that defendant began calling plaintiffs several times per day in 1997. Defendant's earliest documentation of the calls is from December 1998, during which time, according to defendant's records, plaintiffs' phone was disconnected. Defendant was unable to contact plaintiff from 12 June 2000 until 1 August 2000. Plaintiff Harry Williams, who stated that he received calls from defendant at work until the day before he retired, retired from his employment in September 2000. Plaintiff also testified at deposition on 19 December 2005 that the last time he had received a telephone call at home was the day before he retired. Subsequently, on 29 December 2005, plaintiff filed an affidavit dated 28 December 2005 stating that, "[u]ntil my counsel intervened in about early 2005, defendant HomEq continued to make harassing telephone calls to me and my wife on an approximately daily basis." This conflict is problematic, however, because as we previously have ruled, "a party opposing a motion for summary judgment cannot create a genuine issue of material fact by filing an affidavit contradicting his prior sworn testimony." *Pinczkowski v. Norfolk S. Ry. Co.*, 153 N.C. App. 435, 440, 571 S.E.2d 4, 7 (2002). Thus we must credit plaintiff's deposition testimony, rather than his affidavit.

Defendant's "Communication History" records show over 2,000 entries related to communications with plaintiff between 8 December 1998 and 11 February 2005. However, this record shows only one outgoing call to plaintiff from 1 October 2002 through 11 February 2004.

Thus, although the statute of limitations for defendant's alleged violations of Chapter 75 may have renewed each time a call was placed, each week that the violation continued constituted a separate offense. *See* N.C. Gen. Stat. § 75-16.2. The statute of limitations for defendant's violations of sections 75-52(3) and 75-52(4) remains four

years. Based upon the record before us, defendant may have called plaintiff numerous times throughout the years, however I believe evidence of, at most, a single call during the applicable statute of limitations period cannot be sufficient to constitute an actual injury. While defendant's conduct may have constituted a continuing wrong, plaintiff may not use calls placed more than four years ago as evidence to support harassment and actual injury. As noted by the majority, there is no existing caselaw interpreting section 75-52, and I believe we should not extend the application of *Bryant* and *Waddle* to incidents such as this where the evidence is lacking, and the plaintiff has failed to allege facts and forecast evidence sufficient to survive summary judgment.

As such, I would hold that plaintiff failed to allege that they suffered actual injury as a result of the defendant's conduct, and thus the trial court acted properly in granting defendant's motion for summary judgment on these claims.

JOSEPH O'MARA, A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, LARRY REAVIS; AND JANELLA O'MARA, PLAINTIFFS v. WAKE FOREST UNIVERSITY HEALTH SCIENCES; NORTH CAROLINA BAPTIST HOSPITAL; FORSYTH MEMORIAL HOSPITAL, INC., AND NOVANT HEALTH, INC., DEFENDANTS

No. COA06-1067

(Filed 3 July 2007)

1. Medical Malpractice— standard of care—local vs. national

The trial court did not err in a medical malpractice case by excluding the testimony of one of plaintiff's expert witnesses based on the doctor's use of a national standard of care, because: (1) plaintiffs failed to include the doctor's deposition in the record on appeal, and thus, it cannot be assessed whether his testimony, when viewed in its entirety, meets the standard of N.C.G.S. § 90-21.12; (2) the twelve pages from the doctor's 100 page deposition that plaintiffs included in the appendix do not establish the doctor has the requisite familiarity with the local standard of care, and plaintiffs failed to direct attention to any other testimony pertinent to the doctor's competence as an expert on the standard of care applicable to defendant hospital's medical staff; and (3) although plaintiffs bring forward new theories that were not argued before the trial court, any

issues and theories of a case not raised below will not be considered on appeal.

2. Medical Malpractice— exclusion of testimony—standard of care

The trial court did not err in a medical malpractice case by excluding testimony by a nurse defense witness that in certain situations the failure to discontinue the use of pitocin would constitute a violation of the standard of care required of nurses, because: (1) there was no foundation for the witness's testimony when the nursing standard was never established; (2) "some evidence" of negligence does not constitute proof that violation of a hospital policy is a per se violation of the standard of care; and (3) in a medical malpractice action, the standard of care is normally established by the testimony of a qualified expert, and plaintiff failed to offer such testimony regarding the duty of care of a labor and delivery nurse.

3. Witnesses— qualification of defendant as an expert—negligence

The trial court did not err in a medical malpractice case by concluding that plaintiffs' allegations of negligence against a nurse did not preclude her from qualifying as an expert, because: (1) contrary to plaintiffs' assertion, *Sherrod v. Nash General Hospital*, 348 N.C. 526 (1998), did not hold that a defendant could not be qualified as an expert, but only that the ruling should be made outside the presence of the jury; and (2) contrary to plaintiffs' assertion, the trial court gave them an opportunity to tender the nurse as an expert witness.

4. Medical Malpractice— violation of hospital's policy—standard of care—denial of instruction

The trial court did not err in a medical malpractice case by denying plaintiffs' request for an instruction to the jury that violation of the hospital's policy regarding administration of pitocin was evidence of the proper standard of care for obsetetric nurses, because: (1) plaintiffs failed to establish either the standard of care for nurses in relation to administration of pitocin, or whether violation of the hospital's policy manual would also constitute a violation of the applicable standard of care; (2) violation of a hospital's policy is not necessarily a violation of the applicable standard of care when the hospital's rules and policy may reflect a standard that is above or below what is generally con-

sidered by experts to be the relevant standard; and (3) in the specialized context of intrapartum care, proof of medical malpractice or deviation from the standard of care requires a plaintiff to first establish what the standard of care is, and plaintiffs in the instant case failed to do so.

5. Medical Malpractice— denial of special instruction—standard of care—specialized professional skills

The trial court did not err in a medical malpractice case by instructing the jury that in determining the standard of care, the jurors were to consider only the testimony of experts who had spoken to this issue and not their own views on the matter, because: (1) there are no cases in which the standard of care in a medical malpractice action involving specialized professional skills, such as those required of a labor and delivery nurse, was established in part by the jurors' own views on the matter; and (2) N.C.G.S. § 90-21.12 contradicts plaintiffs' contention.

6. Medical Malpractice— doctor testimony—possible genetic explanations for condition

The trial court did not err in a medical malpractice case by admitting the testimony of two defense doctors regarding possible genetic explanations for the minor child's condition, because: (1) plaintiffs do not articulate how the exclusion of this evidence would have been likely to change the outcome of the trial; (2) assuming arguendo that the testimony was inadmissible, plaintiffs failed to show prejudice; and (3) a review of the evidence revealed that it was highly unlikely that this testimony had any significant effect on the jury's verdict.

7. Trials— bias—judge questioning witness—clarifying testimony

The trial court in a medical malpractice case did not show bias against plaintiffs by questioning a medical witness of plaintiffs because: (1) the trial court's questions focused on the mechanics of difficult scientific concepts and were for the purpose of clarifying testimony for the jury's benefit; (2) the trial court asked plaintiffs several times, out of the jury's presence, to put on the record any questions by the court that plaintiffs found prejudicial, but they did not do so; and (3) the trial court exhibited fairness and poise during a long and difficult trial.

8. Costs— expert witnesses—travel expenses—exhibits

The trial court erred in a medical malpractice case by awarding certain costs to defendants, and the trial court's order is remanded to reduce the costs to $22,595.33, because: (1) charges for expert witnesses' testimony are not recoverable where the expert witnesses were not placed under subpoena, the record does not show that certain expert witnesses were placed under subpoena, and the trial court did not make a finding that the witnesses were placed under subpoena; (2) the trial court erred by awarding costs to defendants for their expert witnesses' review, preparation, and consultation with defense counsel; and (3) travel expenses for defendants' employees and expenditures associated with obtaining and displaying trial exhibits are not recoverable.

Appeal by plaintiffs from judgment entered 30 November 2005 by Senior Resident Judge Michael E. Helms in Yadkin County Superior Court. Heard in the Court of Appeals 22 March 2007.

Law Offices of Wade E. Byrd, P.A., by Wade E. Byrd; and The Lawing Firm, P.A., by Sally A. Lawing, for plaintiff-appellants.

Wilson & Coffey, L.L.P., by Tamura D. Coffey, and Linda L. Helms, for defendant-appellees.

White & Stradley, LLP, by J. David Stradley, for Amicus Curiae North Carolina Academy of Trial Lawyers.

Yates, McLamb, & Weyher, L.L.P., by John W. Minier, Maria C. Papoulias, and Oliver G. Wheeler, IV, for Amicus Curiae North Carolina Association of Defense Attorneys.

LEVINSON, Judge.

The present appeal arises from a medical malpractice action. Plaintiffs appeal from a judgment and order decreeing that they recover nothing from defendants, and taxing the costs of the action against plaintiffs. We affirm in part and reverse in part.

Plaintiff Janella O'Mara (Janella) is the mother of plaintiff Joseph O'Mara (Joseph), born 28 July 2001 at defendant Forsyth Memorial Hospital (the hospital). Joseph, who is profoundly disabled, suffers from spastic quadriparetic cerebral palsy, and diffuse cystic encephalomalacia. On 20 May 2004 plaintiffs filed suit against defendants, seeking damages for medical malpractice. Plaintiffs alleged that

Joseph's cerebral palsy was caused by brain damage resulting from intrapartum asphyxia, or oxygen deprivation during birth. Plaintiffs also alleged that Joseph's injury could have been prevented if defendants had properly responded to certain indications of fetal distress during Joseph's birth. Defendants answered and denied the material allegations of the complaint. The trial of this matter lasted several weeks. We will discuss the evidence pertinent to the issues presented on appeal, but do not attempt to summarize all of the evidence.

Certain facts are largely undisputed including, in relevant part, the following: At the time of Joseph's birth, Janella was eighteen years old and was living with her parents. She described herself as a "slow learner" and was in special education classes in school. In May 2001, shortly before she graduated high school, Janella went to a local medical clinic and learned that she was seven months pregnant. She received prenatal care at the clinic for the last two months of her pregnancy. Defendant Wake Forest University Health Sciences operates a medical residency program at the hospital. The residency program is under contract to deliver babies whose mothers, like Janella, do not have a private physician. They work in teams of four, consisting of three medical residents and one supervising ob/gyn physician.

On the morning of 27 July 2001 Janella was admitted to the hospital in the early stages of labor. She was given a bed, her vital signs were recorded, and an external fetal heart monitor was used to record her baby's heartbeat. At the time of her arrival the baby's heartbeat was within the normal range, and there were no signs of labor complications. Janella was given epidural anesthesia, and the first twelve hours of her labor were relatively uneventful.

At around 7:00 p.m. the hospital shift changed, and a new team of health care providers arrived. Thereafter Janella was attended by Dr. Heather Mertz, an obstetrician-gynecologist (ob/gyn); Dr. Anna Imhoff, the chief medical resident; Dr. Michael Potts, a third year medical resident; Dr. Felicia Nash, a first year medical resident; and Dana Morris, a registered nurse. During this time the drug pitocin was administered intermittently, and an internal fetal heart monitor was put in place. The parties generally agree that Janella's labor progressed normally until around midnight, with no signs of fetal distress serious enough to compromise the baby's health or require an emergency surgical delivery.

After midnight Janella was in the stage of labor characterized by the mother's "pushing" during contractions in order to deliver the

baby. A disputed issue at trial was the proper interpretation of the fetal heart monitor strip for this stage of labor. The parties agree, however, that there were indications of fetal distress during the last half hour before Joseph's birth. At 3:28 a.m. Dr. Mertz came to Janella's room for the first time and remained until after Joseph's birth. When Joseph was born at 3:52 a.m., he was limp, his skin was blueish, he was unable to breath, and he did not exhibit the neonatal suck, grasp, or startle reflexes. Joseph remained in the hospital until 7 August 2001, and then was transferred to North Carolina Baptist Hospital for several weeks until Janella could take him home.

It is not disputed that Joseph is profoundly disabled and suffers from cystic encephalomalacia and spastic quadriparetic cerebral palsy. He cannot roll over or sit up, but must lie on his back. He has little or no vision, cannot control the movement of his limbs or head, cannot swallow or talk, and will always have to wear diapers. He has esophogeal reflux disease, and is fed through a tube in his stomach. He cannot walk, talk, or care for himself. He also suffers from a seizure disorder and asthma.

The parties presented conflicting evidence as to whether medical malpractice during Joseph's birth was a cause of his brain damage. It was uncontradicted that the placenta, which supplied Joseph with nutrients and oxygen prior to birth, was abnormal. The parties' experts disagreed about the significance of placental disease, and about the correct interpretation of the available information about the placenta. Evidence was also introduced tending to show that certain risk factors for fetal health were present before birth, including: (1) Janella's failure to obtain prenatal care until she was seven months pregnant; (2) Janella's exposure to secondhand smoke in her house; and (3) the fact that Janella was anemic when she first came to the clinic. The parties disputed the relevance of these factors. Also, during labor and delivery, the medical staff assigned to Janella monitored the results of various measurements of Janella's and Joseph's status. Two of these measurements assumed particular significance during trial.

The first of these involved the drug pitocin, which was administered intravenously to Janella during her labor. Pitocin is often used in childbirth to increase the strength and frequency of uterine contractions. Because pitocin can also lead to reduced fetal oxygen, its use must be carefully supervised. The parties agree on the general criteria for administration of pitocin. However, they differ sharply on other issues pertaining to pitocin, including: (1) the accuracy of

the hospital's medical records as to whether pitocin was discontinued at some point before Joseph's birth; (2) whether or not the use of pitocin bore a causal relationship to Joseph's cerebral palsy; and (3) the relationship, if any, between the standard of care applicable to an obstetrical nurse and the hospital's rules for nurses regarding use of pitocin.

The other disputed issue arising from the measurement of maternal and fetal status during labor and delivery was the proper interpretation of the fetal heart monitor strip. Plaintiffs' experts testified generally that the fetal heart monitor strip showed that Joseph was experiencing significant oxygen deprivation and distress before birth, and that emergency delivery would have prevented Joseph's brain damage. Defendants' experts generally testified that the fetal heart monitor strip showed nothing alarming until the last few minutes before birth, and that there was no need for a surgical delivery because Janella delivered Joseph spontaneously just a few minutes after non-reassuring findings appeared on the fetal heart monitor strip.

Following the presentation of evidence the jury took less than an hour to return a verdict finding defendants not responsible for Joseph's cerebral palsy and other disabilities. Upon this verdict the trial court entered judgment dismissing plaintiffs' complaint with prejudice, and ordering plaintiffs to pay $181,592.50 in costs. From this judgment plaintiffs timely appeal.

Standard of Review

"In a medical malpractice action, a plaintiff must show (1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff." *Weatherford v. Glassman*, 129 N.C. App. 618, 621, 500 S.E.2d 466, 468 (1998) (citations omitted).

> The scope of a physician's duty to his patient, the basis of any medical malpractice claim, was succinctly described by Justice Higgins in *Hunt v. Bradshaw*, 242 N.C. 517, [521-22], 88 S.E.2d 762, [765] (1955), as follows:
>
> A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others

> similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patient.

McAllister v. Ha, 347 N.C. 638, 642, 496 S.E.2d 577, 581 (1998). The first requirement is defined in N.C. Gen. Stat. § 90-21.12 (2005):

> In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

"Because questions regarding the standard of care for health care professionals ordinarily require highly specialized knowledge, the plaintiff must establish the relevant standard of care through expert testimony. . . . Further, the standard of care must be established by other practitioners in the particular field of practice of the defendant health care provider or by other expert witnesses equally familiar and competent to testify as to that limited field of practice." *Smith v. Whitmer*, 159 N.C. App. 192, 195, 582 S.E.2d 669, 672 (2003) (citing *Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 625, 504 S.E.2d 102, 108 (1998)). In addition, "the witness must demonstrate that he is familiar with the standard of care in the community where the injury occurred, or the standard of care of similar communities. The 'same or similar community' requirement was specifically adopted to avoid the imposition of a national or regional standard of care for health care providers." *Smith*, 159 N.C. App. at 196, 582 S.E.2d at 672 (citing *Henry v. Southeastern OB-GYN Assocs., P.A.*, 145 N.C. App. 208, 210, 550 S.E.2d 245, 246-47 (2001)) (other citations omitted).

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[1] Plaintiffs argue first that the trial court erred by excluding the testimony of one of their expert witnesses, Dr. Berke. During his deposition Dr. Berke testified that he was applying a national standard of care. For this reason, the trial court excluded his testimony. Plaintiffs assert that this was error.

Plaintiffs contend that "the foundation established in his deposition" qualified him to testify under N.C. Gen. Stat. § 90-21.12 (2005). Plaintiffs argue that a witness's use of a national standard of care does not automatically disqualify him or her from testifying if the expert's testimony, viewed as a whole, establishes that he is familiar with the standard of care in the same or similar communities. However, because plaintiffs have failed to include Dr. Berke's deposition in the Record on Appeal, we cannot assess whether his testimony, when viewed in its entirety, meets the standard of Section 90-21.12. The twelve (12) pages from Dr. Berke's 100 page deposition that plaintiffs included in their appendix do not establish that Dr. Berke has the requisite familiarity with the local standard of care, and plaintiffs fail to direct attention to any other testimony pertinent to Dr. Berke's competence as an expert on the standard of care applicable to the hospital's medical staff.

Plaintiffs further assert that, even if a proper foundation for Dr. Berke's testimony was not established at the deposition, the trial court nonetheless should have allowed plaintiffs the opportunity to call Dr. Berke as a witness and qualify him at trial. Plaintiffs concede that precedent allows the trial court to disqualify an expert witness on the basis of deposition testimony, but argue that the instant case is distinguishable because in other decisions neither "the fairness of such a result, or the dictates of Rule 32(d)(3)(a) [were] considered." Plaintiffs did not argue either of these theories before the trial court. "This Court has long held that issues and theories of a case not raised below will not be considered on appeal, and this issue is not properly before this Court." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001) (citing *Smith v. Bonney*, 215 N.C. 183, 184-85, 1 S.E.2d 371, 371-72 (1939), and *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). This assignment of error is overruled.

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[2] Plaintiffs argue next that the trial court erred in excluding testimony by a defense witness, Nurse Dana Morris, that in certain situations the failure to discontinue the use of pitocin would constitute a violation of the standard of care required of nurses. We disagree.

Plaintiffs failed to present expert testimony establishing the standard of care for nurses. Because the nursing standard was never established, there was no foundation for Morris to testify that a nurse's failure to discontinue the use of pitocin would, in certain circumstances, constitute a violation of the nursing standard of care.

We have considered and rejected plaintiffs' arguments to the contrary. Plaintiffs direct our attention to testimony by Morris, that the hospital's policy required nurses to discontinue the use of pitocin under the circumstances present in this case. Plaintiffs contend that Morris's testimony "establish[ed] that the national standard regarding nursing care was followed at Forsyth Memorial[.]" However, this presupposes that the "national standard regarding nursing care" was established by other evidence. In this regard, plaintiffs assert that "the national standard [Dr. Berke] described" is the same as the hospital's policy, thus establishing that Forsyth Memorial followed a national standard of nursing care as regards the use of pitocin. However, as discussed above, Dr. Berke's testimony was excluded, on the grounds that plaintiffs failed to properly qualify him as an expert witness.

Plaintiffs also assert that a violation of the nursing standard of care can be found, given that: (1) there was evidence from which the jury could find that pitocin was not turned off; and (2) the hospital's policy manual directed that pitocin be turned off under the conditions present at the time of Joseph's birth. "While the routine practice of Forsyth Hospital was thus presented, Nurse [Morris] shed no light whatsoever on whether that practice was in accordance with the standard of care[.]" *Clark v. Perry*, 114 N.C. App. 297, 313, 442 S.E.2d 57, 66 (1994).

Additionally, plaintiffs argue that they were not required to present expert testimony to establish the nursing standard of care. To support this position, plaintiffs cite ordinary negligence cases in which violation of a safety rule was held to be "some evidence of negligence." *See, e.g.*, *Peal v. Smith*, 115 N.C. App. 225, 444 S.E.2d 673 (1994) (violation of company policy barring operation of machinery while under the influence of drugs or alcohol). Plaintiffs cite no medical malpractice cases concerning complex and technical aspects of childbirth wherein the standard of care was established by lay testimony or inferred from the mere violation of an institutional rule or policy. Moreover, we note that "some evidence" of negligence does not constitute proof that violation of a hospital policy is a *per se* violation of the standard of care.

"[I]n a medical malpractice action, the standard of care is normally established by the testimony of a qualified expert. This general rule is based on the recognition that in the majority of cases the standard of care for health providers concerns technical matters of 'highly specialized knowledge,' and a lay factfinder is 'dependent on

expert testimony' to fairly determine that standard." *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 196, 593 S.E.2d 764, 767 (2004) (quoting *Jackson v. Sanitarium*, 234 N.C. 222, 227, 67 S.E.2d 57, 61 (1951), *overruled in part on other grounds*, *Harris v. Miller*, 335 N.C. 379, 438 S.E.2d 731 (1994)). Plaintiff failed to offer such testimony regarding the duty of care of a labor and delivery nurse.

[3] Plaintiffs next argue that, because Morris was "a target of [p]laintiffs' allegations of negligence" she was "in the position of a defendant" which precluded them from qualifying her as an expert. In support of this position, plaintiffs cite *Sherrod v. Nash General Hospital*, 348 N.C. 526, 534, 500 S.E.2d 708, 713 (1998). However, *Sherrod* did not hold that a defendant could not be qualified as an expert, but only that the ruling should be made outside the presence of the jury:

> [W]hile it was entirely proper for the trial court to rule that defendant Thompson could testify as an expert, with the legal parameters and privileges incident to such ruling, it was prejudicial error for the trial court to announce to the jury that it in fact and law found defendant Thompson to be an expert.

Id. Plaintiffs further allege that the trial court did not give them an opportunity to tender Morris as an expert witness. This is inaccurate. At the close of Morris's testimony, the trial court specifically asked plaintiffs if they wanted to make an offer of proof as to Morris's competence to offer expert testimony, or what her testimony would have been. Plaintiffs did not voir dire Morris or tender her as an expert witness outside the presence of the jury.

Plaintiffs' remaining arguments concerning this issue are without merit. This assignment of error is overruled.

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[4] Plaintiffs next argue that the trial court erred by denying their request for an instruction to the jury that violation of the hospital's policy regarding administration of pitocin was evidence of the proper standard of care for nurses. We disagree.

As discussed above, plaintiffs failed to establish either the standard of care for nurses in relation to administration of pitocin, or whether violation of Forsyth Memorial's policy manual would also constitute a violation of the applicable standard of care. Plaintiffs thus failed to present evidence supporting their proposed instruction, that violation of the hospital's policy regarding administration

of pitocin was *per se* evidence of a breach of standard of care for obstetric nurses.

In support of their contention that they were entitled to the requested instruction, plaintiffs cite ordinary negligence cases wherein the violation of a safety rule was held to be one piece of evidence showing negligence. However, violation of a hospital's policy is not necessarily a violation of the applicable standard of care, because the hospital's rules and policies may reflect a standard that is above or below what is generally considered by experts to be the relevant standard. As discussed above, in the specialized context of intrapartum care, proof of medical malpractice or deviation from the standard of care requires a plaintiff to first establish what the standard of care is. Plaintiffs did not do this, so their request for the proposed instruction was not supported by the evidence. This assignment of error is overruled.

[5] Plaintiffs also argue that, in addition to denying their request for a special instruction, the trial court misstated the law by instructing the jury that, "in determining the standard of care, they were to consider only the testimony of experts who had spoken to this issue and not their own views on the matter." Plaintiffs cite no cases, and we find none, in which the standard of care in a medical malpractice action involving specialized professional skills, such as those required of a labor and delivery nurse, was established in part by the jurors' "own views on the matter." Moreover, G.S. § 90-21.12 clearly contradicts plaintiffs' contention. This assignment of error is overruled.

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[6] In the next two arguments, plaintiffs assert that the trial court committed reversible error by admitting the testimony of Dr. Virginia Floyd and Dr. Michael Pollard, regarding possible genetic explanations for Joseph O'Mara's condition.

Dr. Floyd, an ob/gyn with more than twenty-five years of practice, offered a detailed reconstruction of Janella's labor and Joseph's birth, including minute-by-minute analysis of fetal monitor strip in the context of other medical records. She offered an expert opinion that the health care providers responsible for managing Janella's labor and Joseph's delivery performed at or above the standard of care. Dr. Floyd strongly concluded that, based upon her extensive review, Joseph's cerebral palsy was not caused by intrapartum event(s). This opinion was the central focus of her testimony.

Dr. Floyd defended her opinion in part by reliance on criteria for diagnosis of neonatal encephopathology set out in a publication by the American College of Obstetricians and Gynecologists (ACOG). The ACOG requires a diagnosis of neonatal encephopathology before a further diagnosis can be made that brain injury was caused by an intrapartum hypoxia. Accordingly, Dr. Floyd reviewed the ACOG criteria for neonatal encephopathology. One of those criteria is the exclusion of other causes for the child's cerebral palsy.

In this context defense counsel briefly questioned Dr. Floyd about whether the child's medical record included other family members with illnesses or conditions that were "significant in the overall picture of this child's condition." Dr. Floyd testified that the baby's first cousin was "slow" and that his father had also suffered from neonatal breathing problems and had a seizure disorder. On cross-examination she conceded that the father's premature birth might explain his breathing problems, although "maybe not" as regards his seizure disorder.

Dr. Pollard's testimony about the possibility of a genetic aspect to Joseph's cerebral palsy was also offered in the context of his opinion that Joseph did not suffer from neonatal encephopathology at birth.

Plaintiffs argue that this testimony about the possibility of other causes for Joseph's cerebral palsy was inadmissible, on the grounds that it was speculative and not based on the medical record. However, plaintiffs do not articulate how the exclusion of this evidence would have been likely to change the outcome of the trial. Thus, even assuming, *arguendo*, that this testimony was inadmissible, plaintiffs have not shown prejudice. "The burden is on the appellant not only to show error, but to show prejudicial error, *i.e.*, that a different result would have likely ensued had the error not occurred. G.S. § 1A-1, Rule 61 [(2005)]." *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 271, 302 S.E.2d 204, 214 (1983) (citations omitted). N.C. Gen. Stat. § 1A-1, Rule 61 (2005), Harmless Error, provides that:

> No error in either the admission or exclusion of evidence and no error or defect in any ruling or order . . . is ground for granting a new trial or for setting aside a verdict or for . . . disturbing a judgment or order, unless refusal to take such action amounts to the denial of a substantial right.

We also observe that, based on our own review of the evidence, it is highly unlikely that this testimony had any significant effect on the jury's verdict.

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[7] Plaintiffs next argue that the trial court erred by excessively questioning witness Dr. Mertz, and that the court showed an apparent bias against plaintiffs by doing so. We disagree.

Under North Carolina Rule of Evidence Rule 614(b) (2005), the trial court "may interrogate witnesses, whether called by itself or by a party." Plaintiffs "concede[] the trial court has the authority to question a witness. . . . The court may question witnesses to clarify confusing or contradictory testimony." *State v. Carmon*, 169 N.C. App. 750, 757, 611 S.E.2d 211, 216 (2005) (citation omitted).

In the instant case, we have reviewed the entire transcript comprising twenty one volumes of testimony, and conclude that the trial court did not commit error or show bias in its questioning of Dr. Mertz or any other witness. This case involved complex medical issues regarding, *e.g.*, the stages of a normal labor and delivery; the measurements used by physicians to assess fetal status; the interpretation of a fetal heart monitor strip; parameters for use of pitocin; the criteria for neonatal encephopathology and the significance of this determination; the causes of cerebral palsy; and procedures such as the use of forceps that may be used in childbirth. The trial court's questions focused on the mechanics of these difficult scientific concepts, and were clearly for the purpose of clarifying testimony for the jury's benefit. Moreover, the court asked plaintiffs several times, out of the jury's presence, to put on the record any questions by the court that plaintiffs found prejudicial, but plaintiffs did not do so.

We conclude that the trial court exhibited fairness and poise during a long and difficult trial. This assignment of error is overruled.

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[8] Finally, plaintiffs argue that the trial court erred by awarding certain costs to defendants.

Plaintiffs assert, and defendants concede, that charges for expert witnesses' testimony are not recoverable where the expert witnesses were not placed under subpoena. *See*, *e.g.*, *Overton v. Purvis*, 162 N.C. App. 241, 250, 591 S.E.2d 18, 25 (2004). Because the record does not show that certain expert witnesses were placed under subpoena, and the trial court judge did not make a finding that the witnesses

were placed under subpoena, the trial court's judgment must be reversed to the extent that it awarded costs for the testimony of these persons. In a related argument, plaintiffs assert that the trial court erred by awarding costs to defendants for their expert witnesses' review, preparation and consultation with defense counsel. Consistent with this Court's opinion in *Morgan v. Steiner*, 173 N.C. App. 577, 584, 619 S.E.2d 516, 521 (2005), *disc. review denied*, 360 N.C. 648, 636 S.E.2d 808 (2006), we agree. Next, citing *Oakes v. Wooten*, 173 N.C. App. 506, 519-20, 620 S.E.2d 39, 48 (2005), plaintiffs assert that travel expenses for defendants' employees and expenditures associated with obtaining and displaying trial exhibits, are not recoverable. We agree.

After reviewing the record, we conclude that the trial court's award for costs must be reduced to $22,595.33, and direct the trial court to enter an order accordingly.

No error in part, reversed in part.

Judges BRYANT and STEELMAN concur.

IN THE MATTER OF: L.B.

No. COA06-1295

(Filed 3 July 2007)

1. Appeal and Error— appealability—subject matter jurisdiction—law of the case

The trial court possessed subject matter jurisdiction to enter the 28 February 2006 review order in a child neglect case, because: (1) in respondent's prior appeal, the Court of Appeals held that although the trial court did not have jurisdiction when the order for nonsecure custody was filed and summons was issued, the trial court nevertheless acquired subject matter jurisdiction once the juvenile petition was signed and verified in accordance with N.C.G.S. §§ 7B-403 and 7B-405; and (2) the holding in respondent's prior appeal with respect to this jurisdictional issue is the law of the case.

2. Child Abuse and Neglect— waiver of further review hearings—insufficient findings

The trial court erred in a child neglect case by failing to comply with N.C.G.S. § 7B-906(b)(1), (3), and (4) in its order waiving further review hearings, and the case is reversed on this issue and remanded for the issuance of a new order with written findings of fact with respect to whether: (1) the minor child was in the custody of a relative or suitable person for at least one year; (2) neither the minor child's best interests nor the rights of any other party, including respondent, required the continued holding of review hearings every six months; and (3) all parties are aware that a review may be held at any time by the filing of a motion for review or on the court's own motion.

3. Appeal and Error— appealability—mootness

Although respondent contends the trial court erred in a child neglect case by leaving her visitation rights to the discretion of the minor child's guardians, this issue will not be reviewed because respondent's appeal on the visitation issue has been rendered moot when the language in the instant review order concerning visitation is substantively identical to the portion of the 27 October 2005 permanency planning order which the Court of Appeals reversed in respondent's prior appeal.

4. Child Abuse and Neglect— consideration and incorporation of reports submitted by DSS and guardian ad litem—independent findings

The trial court did not err in a child neglect case by considering and incorporating reports submitted by DSS and the guardian ad litem, because: (1) the Court of Appeals addressed this identical argument in respondent's prior appeal; and (2) the trial court did not improperly delegate its factfinding duty when it made numerous independent findings in addition to incorporating reports submitted by DSS and the guardian ad litem in the 28 February 2006 review order.

5. Child Abuse and Neglect— findings of fact—recitation of testimony and statements

The trial court did not err in a child neglect case by its findings of fact that are recitations of statements made during the review hearing where the remaining findings of fact adequately support the trial court's conclusions.

6. Evidence— trial court calling witness on own motion— bench trial

The trial court did not abuse its discretion in a child neglect case by calling respondent as a witness at the review hearing, because: (1) N.C.G.S. § 8C-1, Rule 614 allows the trial court, on its own motion or at the suggestion of a party, to call witnesses and all parties are entitled to cross-examine witnesses thus called; and (2) there is no danger in the trial court suggesting an opinion as to the weight of the evidence or the credibility of certain witnesses in a bench trial when the trial court is the ultimate arbiter of such issues.

7. Child Abuse and Neglect— findings of fact—sufficiency of evidence

Competent evidence supported the trial court's findings of fact demonstrating the lack of concern and love respondent has shown for her child, the child's lack of interest in maintaining a relationship with respondent, and the nurturing home that the guardians continue to provide for the child and her half-siblings. In turn, those findings fully support the trial court's conclusion that the best interest of the child will be served by continuing custody with the present guardians.

8. Trials— recordation—tape recordings accidentally destroyed

Respondent has not been denied due process in a child neglect case even though the tape recordings of the 26 January 2006 hearing were accidentally destroyed, because: (1) it cannot be said that respondent has done all that she can do to reconstruct the transcript; and (2) assuming arguendo that respondent had done all that she could do, it was incumbent upon respondent to demonstrate prejudice, and the use of general allegations is insufficient to show reversible error resulting from the loss of specific portions of testimony.

Appeal by respondent-mother from order entered 28 February 2006 by Judge R. Les Turner in Wayne County District Court. Heard in the Court of Appeals 25 April 2007.

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

Jeremy B. Smith, for Guardian ad Litem.

Jeffrey L. Miller, for respondent-mother-appellant.

JACKSON, Judge.

Tracie B. ("respondent") is the mother of L.B., the juvenile who is the subject of this appeal.[1] For the following reasons, we affirm in part and reverse in part the trial court's order.

By nonsecure custody order dated 17 August 2004, L.B. was placed in the custody of the Wayne County Department of Social Services ("DSS"). The nonsecure custody order was based on a juvenile petition, signed and verified on 19 August 2004, alleging that L.B. was neglected and dependent. On 23 November 2005, the trial court filed a permanency planning order, and respondent appealed to this Court. *See In re L.B.*, 181 N.C. App. 174, 639 S.E.2d 23 (2007). As such, the facts of this case are stated in detail in the earlier opinion.

Subsequent to the trial court's 23 November 2005 order but before the 2 January 2007 filing of this Court's opinion in respondent's prior appeal, the trial court entered an order on 28 February 2006 following a review hearing on 26 January 2006. In that order, the trial court changed the permanent plan from reunification with respondent to guardianship with L.B.'s custodians, Steven and Doris Johnson ("the Johnsons"). The trial court left respondent's visitation to the Johnsons' discretion and determined that there was no need for further review hearings. Thereafter, respondent filed notice of appeal.

[1] In her first argument, respondent contends that because the initial juvenile petition was not signed and verified until 19 August 2004, two days after the order for nonsecure custody was filed and one day after the summons was issued, all subsequent orders, including the 28 February 2006 review order, should be vacated for lack of subject matter jurisdiction. In respondent's prior appeal, however, this Court held that although "the trial court did not have jurisdiction when the order for nonsecure custody was filed and summons was issued," the trial court nevertheless acquired subject matter jurisdiction once the juvenile petition was signed and verified in accordance with North Carolina General Statutes, sections 7B-403 and 7B-405. *L.B.*, 181 N.C. App. at 187, 639 S.E.2d at 29. "Therefore, the trial court had authority to enter its permanency planning order." *Id.* As the holding in respondent's prior appeal with respect to this jurisdictional issue is the law of the case, *see N.C. Nat'l Bank v. Va. Carolina Builders*, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983), we hold that the trial court possessed subject matter jurisdiction to enter

1. Respondent also is the mother of R.B. and A.M., juveniles who are the subject of a separate appeal in COA06-1296.

the 28 February 2006 review order. Accordingly, respondent's first assignment of error is overruled.

In her second argument, respondent contends that the trial court erred: (1) in failing to comply with the mandates of North Carolina General Statutes, section 7B-906 before waiving further review hearings; (2) in delegating judicial responsibility for visitation to L.B.'s custodians; (3) in considering and incorporating reports and summaries submitted by DSS and the guardian *ad litem*; (4) in making findings which recited testimony or statements of the court; (5) in calling respondent as a witness at the review hearing; and (6) in findings of fact numbers 19 and 21 through 25, on the grounds that they are not supported by competent evidence and, in turn, do not support the court's conclusions. We review these arguments in the order presented.

[2] First, respondent contends that the trial court failed to comply with North Carolina General Statutes, section 7B-906(b). We agree.

Pursuant to North Carolina General Statutes, section 7B-906(a), "[i]n 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." N.C. Gen. Stat. § 7B-906(a) (2005). The trial court, however, may dispense with review hearings if the court finds the following by clear, cogent, and convincing evidence:

> (1) The juvenile has resided with a relative or has been in the custody of another suitable person for a period of at least one year;
>
> (2) The placement is stable and continuation of the placement is in the juvenile's best interests;
>
> (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months;
>
> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion; and
>
> (5) The court order has designated the relative or other suitable person as the juvenile's permanent caretaker or guardian of the person.

N.C. Gen. Stat. § 7B-906(b) (2005). Failure to find all of these criteria constitutes reversible error. *See In re R.A.H.*, 182 N.C. App. 52, 62, 641 S.E.2d 404, 410 (2007).

Preliminarily, we note that the statute does not state whether the trial court must make the required findings in writing. "In matters of statutory construction, our task is to determine the intent of the General Assembly." *In re T.R.P.*, 360 N.C. 588, 600, 636 S.E.2d 787, 796 (2006). Written findings of fact will ensure that the trial court, before waiving the holding of further review hearings, carefully considers each of the five enumerated factors in section 7B-906(b). Such findings also will provide an opportunity for meaningful appellate review. *See Sain v. Sain*, 134 N.C. App. 460, 466, 517 S.E.2d 921, 926 (1999) (mandating that the "trial court must enter written findings of fact" when the controlling statute only required that "the court shall make findings of fact."). Accordingly, we hold that the trial court must make written findings of fact satisfying each of the enumerated criteria in section 7B-906(b).

In the instant case, the trial court complied with portions of section 7B-906. First, section 7B-906(b)(2) required that the trial court find that "[t]he placement is stable and continuation of the placement is in [L.B.'s] best interests." N.C. Gen. Stat. § 7B-906(b)(2) (2005). The trial court found as fact the following:

> 25. That the best interest of permanence for the children, even though this is not a permanency planning hearing, is to leave the children where they are safe.
>
> 26. That Steven and Doris Johnson continue to be fit and proper persons to have custody of the juvenile.

These findings were supported by competent evidence. Specifically, the guardian *ad litem's* report states that "[t]he Johnsons provide a loving, stable home for these children [including L.B.] and offer them love and parental guidance, which is what the children need." The DSS report echoed the guardian *ad litem's* statement, noting that "[t]he children continue to do well in their current placement" and "[t]he children . . . finally have some stability." Accordingly, the trial complied with section 7B-906(b)(2).

The trial court also complied with section 7B-906(b)(5), which required the trial court to find that the custody order designated L.B.'s "permanent caretaker or guardian of the person." N.C. Gen. Stat. § 7B-906(b)(5) (2005). Specifically, the trial court satisfied

section 7B-906(b)(5) with findings of fact numbers 2 and 3, in which the court found that the Johnsons were L.B.'s custodians and "[t]hat the custodians were designated as guardians of the juvenile on October 27, 2005."

The trial court, however, failed to make findings with respect to sections 7B-906(b)(1), (3), and (4). First, pursuant to section 7B-906(b)(1), the trial court was required to find that L.B. had resided with a relative or been in the custody of another suitable person for at least one year. *See* N.C. Gen. Stat. § 7B-906(b)(1) (2005). The trial court found that the juveniles continue to reside with the Johnsons, who were designated as their guardians. However, the statute expressly requires a finding that L.B. was in the custody of a relative or suitable person for *at least one year*, and the trial court failed to make such a finding.

Next, section 7B-906(b)(3) required the trial court to find that neither L.B.'s best interests nor the rights of any other party, including respondent, required the continued holding of review hearings every six months. *See* N.C. Gen. Stat. § 7B-906(b)(3) (2005). The trial court made the following findings of fact:

> 9. That [respondent] had an opportunity to call witnesses and did not do so.
>
> . . . .
>
> 12. That [respondent] was previously ordered to bring all the belongings of the juvenile and the half siblings . . . to the children but has not done so.
>
> 13. That [respondent] informed the Court that she does not have any of the possessions of the juveniles.
>
> . . . .
>
> 19. That [respondent] did not bring a Christmas present for this juvenile when she brought Christmas presents for the half siblings of the juvenile . . . .
>
> . . . .
>
> 21. That [respondent] calls on Tuesdays, but the juvenile and the half sister of the juvenile do not want to talk to [respondent].
>
> 22. That [respondent] refuses to go to the home of the custodians.
>
> 23. That . . . [respondent] refuses to go to Johnston County.

> 24. That the Court informed [respondent] that it was her responsibility to see her children and not the responsibility of the Johnsons to transport the children.

These findings were supported by competent evidence. Nevertheless, the trial court must make a written finding that neither L.B.'s best interests nor the rights of any other party, including respondent, require the continued holding of review hearings every six months. In the instant case, the trial court failed to do so as required by section 7B-906(b)(3).

Finally, section 7B-906(b)(4) requires the trial court to find that all parties are aware that a review may be held at any time by the filing of a motion for review or on the court's own motion. *See* N.C. Gen. Stat. § 7B-906(b)(4) (2005). The trial court made no such finding of fact and, indeed, the court sent the contrary signal to respondent by expressly relieving respondent's trial counsel of any further responsibility in the matter without explaining to respondent that she either could seek to have her counsel reappointed or could file motions *pro se* with the court. In sum, the record is devoid of any finding that respondent was aware that she was entitled to another review hearing by filing a motion for review.

As the trial court's order fails to satisfy the requirements of sections 7B-906(b)(1), (3), and (4), we reverse on this issue and remand the case to the trial court to issue a new order with written findings of fact consistent with this opinion and the requirements of section 7B-906(b).

[3] Respondent next contends that the trial court erred in leaving respondent's visitation rights to the discretion of the Johnsons. On 16 January 2007, the guardian *ad litem* filed a motion to dismiss this portion of respondent's brief on the grounds that the issue is moot. Specifically, the guardian *ad litem* noted that the language in the instant review order concerning visitation is substantively identical to the portion of the 27 October 2005 permanency planning order, which this Court reversed in respondent's prior appeal. *See L.B.*, 181 N.C. App. at 192, 639 S.E.2d at 32 ("[W]e hold that the trial court erred by leaving visitation within the discretion of the Johnsons."). On 31 January 2007, this Court granted the guardian *ad litem's* motion to dismiss respondent's brief in part, ruling that respondent's appeal as to the visitation issue has been rendered moot. Accordingly, we decline to review this argument.

[4] Next, respondent argues that the trial court erred in considering and incorporating reports submitted by DSS and the guardian *ad litem*. Respondent made this identical argument in her prior appeal, and this Court held that "the trial court properly incorporated DSS and guardian *ad litem* reports and properly made findings of fact . . . based on these reports." *Id.* at 193, 639 S.E.2d at 33. Similarly, in the trial court's 28 February 2006 review order, the court incorporated reports submitted by DSS and the guardian *ad litem*, but also made numerous independent findings of fact. As such, the trial court did not improperly delegate its fact-finding duty. Respondent's assignment of error is overruled.

[5] In her next argument, respondent challenges findings of fact numbers 13, 15 through 18, 20, and 24 on the grounds that the trial court simply recited respondent's statements and the court's statements at the hearing. We disagree.

Preliminarily, we note that two of the findings of fact to which respondent assigns error simply state that the trial court called a witness to testify. In finding of fact number 18, the court found "[t]hat the Court called the mother as a witness," and in finding of fact number 20, the court found "[t]hat the Court also called Doris Johnson as a witness." These findings do not constitute recitation of testimony or statements of the trial court.

As this Court has noted, "verbatim recitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented." *In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195 (1984) (emphasis in original). Respondent is correct that findings of fact numbers 13, 15, 16, 17, and 24 are recitations of statements made during the review hearing.[2] However, notwithstanding the five findings of fact that constitute recitation of testimony and statements by the trial court, the remaining findings of fact adequately support the trial court's conclusions. *See In re S.W.*, 175 N.C. App. 719, 724, 625 S.E.2d 594, 597 ("[W]e hold that the remaining findings of fact are more than sufficient to support the trial court's conclusions of law complained of by respondent."), *disc. rev. denied*, 360 N.C. 534, 635 S.E.2d 59 (2006). Accordingly, respondent's assignment of error is overruled.

2. These findings employ such language as "the mother informed the Court" and "the Court informed the mother."

[6] Next, respondent contends that the trial court erred in calling respondent as a witness at the review hearing. Respondent alleges that the trial judge acted as an adverse party in calling respondent as a witness,[3] and that as a result of the trial court's alleged impartiality, the review order should be reversed. We disagree.

Pursuant to Rule 614 of the North Carolina Rules of Evidence, "[t]he court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called." N.C. Gen. Stat. § 8C-1, Rule 614(a) (2005). Furthermore, "[t]he court may interrogate witnesses, whether called by itself or by a party." N.C. Gen. Stat. § 8C-1, Rule 614(b) (2005). A trial court's actions pursuant to Rule 614 are reviewed under an abuse of discretion standard. *See State v. Bethea*, 173 N.C. App. 43, 52, 617 S.E.2d 687, 693 (2005).

As this Court has noted, "[trial] [c]ourts . . . rarely call witnesses, and rightly so because it is hard for judges to maintain impartiality while becoming an active participant in summoning witnesses." *Grasty v. Grasty*, 125 N.C. App. 736, 740, 482 S.E.2d 752, 754-55 (internal quotation marks and citation omitted), *disc. rev. denied*, 346 N.C. 278, 487 S.E.2d 545 (1997). However, the danger of impartiality is relevant primarily in a jury trial. This is underscored by the commentary to Rule 614, which provides that "[t]he court may not in calling or interrogating a witness do so in a manner as to suggest an opinion as to the weight of the evidence or the credibility of the witness in violation of [North Carolina General Statutes, section] 15A-1222 or Rule 51(a) [of the Rules of Civil Procedure]." N.C. Gen. Stat. § 8C-1, Rule 614 cmt. (2005).[4] In a bench proceeding, such as the review hearing in the case *sub judice*, there is no danger in the trial court suggesting an opinion as to the weight of the evidence or the credibility of certain witness as the trial court is the ultimate arbiter of such issues. *See In re P.L.P.*, 173 N.C. App. 1, 14, 618 S.E.2d 241, 249 (2005), *aff'd*, 360 N.C. 360, 625 S.E.2d 779 (2006) (per

3. Respondent alleges that "[t]he court did not call any other party as a witness, nor did it call a DSS social worker, a guardian, a psychologist, a therapist, or a child." Respondent apparently overlooks finding of fact number 20, in which the trial court stated that it "also called Doris Johnson [a guardian] as a witness."

4. *See* N.C. Gen. Stat. § 15A-1222 (2005) (providing that the trial court 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." (emphasis added)); N.C. Gen. Stat. § 1A-1, Rule 51(a) (2005) ("*In charging the jury* in any action governed by these rules, a judge shall not give an opinion as to whether or not a fact is fully or sufficiently proved . . . ." (emphasis added)).

curiam). Therefore, we hold that the trial court did not abuse its discretion in calling respondent as a witness, and accordingly, respondent's assignment of error is overruled.

[7] Respondent next contends that the trial court erred in making findings of fact numbers 19 and 21 through 25, on the grounds that they are not supported by sufficient competent evidence and, in turn, do not support the court's conclusions of law. We disagree.

As stated *supra* with respect to respondent's argument concerning North Carolina General Statutes, section 7B-906(b), findings of fact numbers 19 and 21 through 25 are supported by competent evidence. In fact, respondent concedes in her brief that the DSS summary supports "the findings about the 2005 Christmas presents," *i.e.*, finding of fact number 19. Further, these findings of fact demonstrate: (1) the lack of concern and love respondent has shown for L.B.; (2) the lack of interest L.B. has in maintaining a relationship with respondent; and (3) the stable, safe, and nurturing home that the Johnsons continue to provide for L.B. and her half-siblings. As such, these findings fully support the trial court's conclusion "[t]hat the best interest of the juvenile will be promoted and served by continuing custody with Steven and Doris Johnson, who have been designated as guardians of the juvenile." Respondent's assignment of error, therefore, is overruled.

[8] In her final argument, respondent contends that she has been denied due process because the tape recordings of the 26 January 2006 hearing were destroyed. We disagree.

Pursuant to North Carolina General Statutes, section 7B-806, "[a]ll adjudicatory and dispositional hearings shall be recorded by stenographic notes or by electronic or mechanical means." N.C. Gen. Stat. § 7B-806 (2005). As this Court has held, "[a] party, in order to prevail on an assignment of error under section 7B-806, must also demonstrate that the failure to record the evidence resulted in prejudice to that party." *In re Clark*, 159 N.C. App. 75, 80, 582 S.E.2d 657, 660 (2003).

This Court has stated that in situations "[w]here a verbatim transcript of the proceedings is unavailable, there are 'means . . . available for [a party] to compile a narration of the evidence, *i.e.*, reconstructing the testimony with the assistance of those persons present at the hearing.' " *Id.* at 80, 582 S.E.2d at 660 (quoting *Miller v. Miller*, 92 N.C. App. 351, 354, 374 S.E.2d 467, 469 (1988)).

However, "where the appellant has done all that she can [] do [to reconstruct the transcript], but those efforts fail because of some error on the part of our trial courts, it would be inequitable to simply conclude that the mere absence of the recordings indicates the failure of appellant to fulfill that responsibility." *Coppley v. Coppley*, 128 N.C. App. 658, 663, 496 S.E.2d 611, 616, *disc. rev. denied*, 348 N.C. 281, 502 S.E.2d 846 (1998).

In the case *sub judice*, respondent filed a motion on 11 July 2006 for an extension of time to prepare the record on appeal. In her motion, respondent alleged that over two weeks prior, on 23 June 2006, the Wayne County Clerk's Office informed respondent's attorney on appeal that the electronic recordings of the 26 January 2006 review hearing had been destroyed by accident. Respondent alleged that "[b]ecause the tape recordings were erased, there can be no transcript of the hearing." Respondent sought to prepare a narrative of the review hearing, but anticipated that it would take at least thirty days to construct the narrative and approximately fifteen days thereafter to complete the proposed record on appeal. Ultimately, respondent requested until 30 August 2006 to serve a proposed record on appeal. On 14 July 2006, this Court extended the deadline to serve the proposed record on appeal until 15 August 2006 and stated that "[n]o further extensions of time shall be allowed in the absence of a showing of extraordinary cause." Four more weeks elapsed when on 11 August 2006, respondent's trial counsel sent a letter to respondent's appellate attorney, stating,

> I just returned from secured leave on August 9, 2006. I was in DSS court all day on August 10, 2006. At present, it is taking longer than I expected to recreate the record.
>
> Because of the above-referenced circumstances I will need an extension of time.

The record is devoid of any further action taken to reconstruct a narrative of the 26 January 2006 review hearing.

It is well-established that "[i]t is the appellant's responsibility to make sure that the record on appeal is complete and in proper form." *Miller*, 92 N.C. App. at 353, 374 S.E.2d at 468. Although respondent's trial attorney indicated the need for an additional extension of time, respondent made no attempt to request any further extensions of time from this Court, despite this Court's statement in its 14 July 2006 order that it may have permitted an additional extension of time with

"a showing of extraordinary cause." The record on appeal, without any transcript or narrative from the 26 January 2006 review hearing, was settled on 22 September 2006, filed on 26 September 2006, and docketed 6 October 2006. At no point did respondent make any further attempt to provide this Court with a narrative of the proceedings in the trial court. As such, it cannot be said that respondent "has done all that she can [] do [to reconstruct the transcript]." *Coppley*, 128 N.C. App. at 663, 496 S.E.2d at 616.

Nevertheless, assuming *arguendo* that respondent had "done all that she [could] do," *id.*, it is incumbent upon respondent to demonstrate prejudice. *See Clark*, 159 N.C. App. at 80, 582 S.E.2d at 660. In her brief, respondent makes the bald assertion that "[s]ome of the record would have included the trial judge's statements, questions, and assertions which would evidence his bias and lack of impartiality." Respondent further notes that she has challenged "several findings of the court as not being supported by any evidence presented at the hearing." "[A]lthough respondent has generally asserted that the failure to record all of the testimony . . . was prejudicial, *she points to nothing specific in the record* to support her argument." *Id.* at 83, 582 S.E.2d at 662 (emphasis added). This Court has held that "the use of general allegations is insufficient to show reversible error resulting from the loss of specific portions of testimony caused by gaps in recording." *Id.* at 80, 582 S.E.2d at 660. Regardless, we have held herein that numerous findings of fact in the trial court's review order are supported by competent evidence and that those findings, in turn, amply support the court's conclusions of law. Accordingly, respondent's assignment of error is overruled.

Respondent's remaining assignments of error not argued in her brief are deemed abandoned. *See* N.C. R. App. P. 28(b)(6) (2006).

Affirmed in part; Reversed and Remanded in part.

Judges McGEE and LEVINSON concur.

STRATES SHOWS, INC., A DELAWARE CORPORATION, PLAINTIFF v. AMUSEMENTS OF AMERICA, INC., A NEW JERSEY CORPORATION; ROCKY MOUNT FAIR, INC., A NORTH CAROLINA CORPORATION; FAIR MANAGEMENT INC., A FLORIDA CORPORATION; SMOKEY MOUNTAIN AMUSEMENTS, INC., A DELAWARE CORPORATION; POWERS GREAT AMERICAN MIDWAYS, A NORTH CAROLINA BUSINESS ENTITY; MORRIS J. VIVONA, SR.; MORRIS J. VIVONA, JR.; DOMINIC A. VIVONA, SR.; DOMINIC A. VIVONA, JR.; JOHN J. VIVONA; PHILIP A. VIVONA; SEBASTIAN J. VIVONA; CHRISTOPHER R. VIVONA; NORMAN Y. CHAMBLISS, III; MARGARET SCOTT PHIPPS; ROBERT E. PHIPPS; BOBBY C. MCLAMB; LINDA J. SAUNDERS; MICHAEL E. BLANTON; ROBIN LEE TURNER; DEANN S. TURNER; BILLY JOE CLARK; LESLIE E. POWERS; AND THE ESTATE OF RICHARD D. JANAS, DEFENDANTS

No. COA06-1363

(Filed 3 July 2007)

1. **Appeal and Error— appealability—collateral estoppel—substantial right**

   Rejection of the affirmative defenses of collateral estoppel and res judicata affects a substantial right and may be immediately appealed, as here.

2. **Collateral Estoppel and Res Judicata— prior federal RICO litigation—proximate cause determined—subsequent state unfair practices claim—estoppel**

   The trial court erred by denying defendants' motions to dismiss claims arising from the award of a contract to operate the midway at the State Fair. Plaintiff was collaterally estopped from relitigating the element of proximate cause as it relates to not receiving the midway contract.

Appeal by defendants from an order entered 26 June 2006 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 9 May 2007.

Blanchard, Miller, Lewis & Styers, P.A., by E. Hardy Lewis, for plaintiff-appellee.

Cheshire, Parker, Schneider, Bryan & Vitale, by John Keating Wiles, for Amusements of America, Inc. and the Vivonas, defendants-appellants.

Tharrington Smith, LLP, by F. Hill Allen, IV, for Margaret Scott Phipps and Robert E. Phipps, defendants-appellants.

Smith Moore LLP, by Alan W. Duncan, Shannon R. Joseph, and S. Montaye Sigmon, for Norman Y. Chambliss, III and Rocky Mount Fair, Inc., defendants-appellants.

JACKSON, Judge.

Strates Shows, Inc. ("Strates"), a Florida-based family business, performed the contract for provision of the midway at the annual North Carolina State Fair uninterrupted for more than fifty years. In 1999, Jim Graham, the long-time Commissioner of Agriculture, announced that he would not seek re-election for the 2000-2004 term. At some point after Commissioner Graham's announcement, defendant Amusements of America ("AOA"), a New Jersey based midway operator, including its principals, the individual Vivona family defendants ("Vivonas"), initiated a conspiracy with a long-time North Carolina-based business associate, defendant Norman Chambliss ("Chambliss"). The purpose of the conspiracy was to secure the State Fair midway operation contract for AOA. This conspiracy, and the illegal acts perpetrated in furtherance of it, culminated in a major public corruption scandal.

The criminal acts of defendants are numerous and complex, but include acts such as the making and accepting of bribes, money laundering, the structuring of transactions to avoid reporting requirements, state procurement conflict of interest violations, and potential election law violations. Defendant Meg Scott Phipps ("Phipps") was elected to replace Commissioner Graham, and in 2001 she set about forming a process by which the State of North Carolina would choose a midway operator for the 2002 State Fair.

Commissioner Phipps decreed the formation of a "Fair Advisory Committee" ostensibly to hear and vote on presentations made by various bidders for the midway operation. Strates presented a bid for the midway contract to the Fair Advisory Committee, along with seven other bidders, including AOA. According to an investigation of the vote taken by the committee, Strates was the choice to receive the midway contract. Commissioner Phipps did not attend any of the formal bid presentations. Rather, she was advised of the various presentations by Chambliss, and he recommended that the Commissioner choose AOA as the 2002 midway operator.

Commissioner Phipps ultimately awarded the midway contract to AOA, which was not the choice of the Fair Advisory Committee, but which had been deeply involved in the above described conspiracy. Strates challenged the Commissioner's award of the 2002 midway contract in the Office of Administrative Hearings ("OAH"), ultimately settling the action with entities who are not parties to the instant case. Based upon investigations performed by the State Bureau of

Investigation, and the Federal Bureau of Investigation, several of the individual defendants including Michael Blanton, Chambliss, Bobby McLamb, Meg Scott Phipps, Linda Saunders, and M. Vivona, Jr. faced prosecutions, and subsequently pled guilty to or were convicted of various state and federal offenses.[1]

On 23 August 2004, Strates filed a complaint in the United States District Court for the Eastern District of North Carolina. The basis for federal subject matter jurisdiction was a single federal claim, which Strates asserted under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq*. Plaintiff also asserted several state claims including fraud, tortious interference with business relations and prospective economic advantage, unfair competition and unfair and deceptive trade practices, conversion, civil conspiracy, and a claim for punitive damages. Specifically, Strates sought damages based upon an alleged deprivation of the 2002 midway contract and its lost business and profits as a result, the costs in preparing Strates' bid proposal, and the legal fees and costs associated with Strates' appeal to OAH.

In an order filed 25 July 2005, Chief Judge for the Eastern District Louise W. Flanagan dismissed Strates' RICO claim for a lack of standing. *Strates Shows, Inc. v. Amusements of America, Inc.*, 379 F. Supp. 2d 817 (E.D.N.C. 2005). The federal District Court specifically found that with respect to the RICO claim involving the 2002 midway

1. Michael Blanton pled guilty in federal court to one count of Conspiracy to Commit Obstruction of Justice and Tampering with a Witness. *United States v. Michael Eugene Blanton*, No. 5:03-CR-169-H (Sept. 23, 2003). Norman Chambliss, III, pled guilty in federal court to one count of Obstruction of Justice. *United States v. Norman Y. Chambliss, III*, No. 5:04-CR-59-H (Apr. 5, 2004). Bobby McLamb pled guilty in federal court to one count of Conspiracy to Commit Mail Fraud, Wire Fraud, and to Structure Deposits, and one count of Extortion Under Color of Official Right and Aiding and Abetting. *United States v. Bobby C. McLamb*, No. 5:03-CR-58-2H3 (Mar. 3, 2004). Meg Scott Phipps was found guilty of violating our state's election laws, along with other crimes including perjury, and she also plead guilty in federal court to one count of Conspiracy to Commit Offenses Against the United States, two counts of Scheme and Artifice to Deprive Others of Right of Honest Services through Wire Fraud and Aiding and Abetting, and two counts of Extortion Under Color of Official Right and Aiding and Abetting. *United States v. Meg Scott Phipps*, No. 5:03-CR-263-H (Mar. 2, 2004). Linda Saunders pled guilty in federal court to one count of Conspiracy to Commit Mail Fraud, Wire Fraud, and to Structure Deposits, two counts of Extortion Under Color of Official Right and Aiding and Abetting, two counts of Money Laundering and Aiding and Abetting, and one count of Structuring Transactions to Evade Reporting Requirements and Aiding and Abetting. *United States v. Linda Johnson Saunders*, No. 5:03-CR-58-1H3 (Mar. 3, 2004). M. Vivona, Jr. pled guilty in federal court to one count of Obstruction of Justice. *United States v. Morris Vivona, Jr.*, 5:04-CR-196-H (June 7, 2004).

contract, Strates "points to no property interest which it had in the 2002 midway contract . . . prior to" the illegal activity by defendants. *Id.* at 826. In addition, the court held that Strates had "not alleged an injury proximately caused by defendants' illegal activity." *Id.* at 828. Weighing against a finding of proximate cause was the existence of several intervening factors, including other bidders who were not involved in the conspiracy, the lack of a set procedure or criteria for the selection of the midway contract, and administrative discretion. *Id.* Ultimately the court held that the relationship between defendants' illegal conduct and the harm to Strates was indirect and speculative, and therefore Strates had failed to establish that any injury suffered by it was proximately caused by defendants' actions. *Id.* at 832. As such, plaintiff lacked standing to assert a RICO claim based upon the loss of the midway contract. *Id.* With respect to Strates' RICO claim seeking damages for its costs in preparing its bid, the district court held that the costs "do not meet even the cause-in-fact requirement for RICO injury[,]" and that Strates would have incurred these costs not withstanding defendants' wrongful conduct. *Id.* Similarly, the court held that Strates' legal fees and costs associated with appealing the contract award to OAH "do not satisfy the standing requirement of RICO." *Id.* at 833. The court held that "these legal fees and costs are not 'direct' injury flowing from defendants' illegal conduct, but rather, at best, 'indirect' injury which [Strates] did not automatically incur, but chose to incur, in mitigating the effect of defendants' conduct." *Id.* The district court went on to hold that "while the illegal conduct by defendants may have been the cause-in-fact of [Strates'] legal fees and costs, it was not the 'proximate cause' of such fees and costs." *Id.* With respect to the state claims alleged, however, the district court declined to exercise supplemental jurisdiction, and dismissed them without prejudice. *Id.* Strates initially appealed the dismissal of the RICO claim to the United States Court of Appeals for the Fourth Circuit. However, prior to briefing in the Court of Appeals, Strates elected to proceed only on its state law claims, and filed an unopposed motion to dismiss its appeal, which was granted on 25 October 2005.

On 28 November 2005, Strates filed the instant action in Wake County Superior Court. The factual allegations and claims alleged in the state action were almost identical to the federal action, with the exception of the RICO claim which had been alleged in the federal action. In the state action, Strates alleged claims for unfair competition and unfair and deceptive trade practices, tortious interference with business relations and prospective economic advantage, civil

conspiracy, fraud, as well as seeking punitive damages. On 1 February 2006, defendants AOA and the Vivonas filed a motion to dismiss based upon Rules 12(b)(1) and 12(b)(6) of our Rules of Civil Procedure, and collateral estoppel. The Phipps defendants filed a motion to dismiss on 14 March 2006, based upon a lack of standing, Rules 12(b)(1) and 12(b)(6), estoppel, and the ruling of the federal district court which held that Strates was unable to show causation and injury. Defendants Chambliss and Rocky Mount Fair, Inc. filed a motion to dismiss on 12 May 2006, based upon Rules 12(b)(1) and 12(b)(6). In an order filed 26 June 2006, the trial court denied defendants' motions. Defendants now appeal from the 26 June 2006 order denying their various motions.

[1] On appeal, defendants argue the trial court erred in denying the various motions to dismiss where, in a fully-argued action arising out of the same alleged facts, a court of competent jurisdiction decided that Strates has not sufficiently alleged any legally cognizable injury and that its alleged injuries could not have been proximately caused by the alleged conduct of defendants.

Generally, the denial of a party's motion to dismiss is interlocutory, and thus is not immediately appealable. *McCarn v. Beach*, 128 N.C. App. 435, 437, 496 S.E.2d 402, 404 (1998). "An order is interlocutory if it does not dispose fully of a case, but rather requires further action by the trial court in order to finally determine the rights of all the parties involved in the controversy." *Foster v. Crandell*, 181 N.C. App. 152, 160, 638 S.E.2d 526, 532 (2007) (citing *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). However, this Court has jurisdiction over an interlocutory appeal when the order appealed from affects a substantial right which would be lost absent an immediate appeal. *Id.*; *see also* N.C. Gen. Stat. § 1-277(a) (2005); N.C. Gen. Stat. § 7A-27(d)(1) (2005). We previously have held that "[w]hen a trial court enters an order rejecting the affirmative defenses of res judicata and collateral estoppel, the order 'can affect a substantial right and may be immediately appealed.' " *Foster*, 181 N.C. App. at 162, 638 S.E.2d at 533 (quoting *McCallum v. N.C. Coop. Extension Serv.*, 142 N.C. App. 48, 51, 542 S.E.2d 227, 231 (2001)). Thus, based upon the facts of the instant case, we hold defendants' appeal is properly before us, as the trial court denied their motions to dismiss based in part on a rejection of defendants' affirmative defense of collateral estoppel.

The standard of review on a motion to dismiss under Rule 12(b)(1) for lack of jurisdiction is *de novo*. *Fuller v. Easley*, 145 N.C.

App. 391, 395, 553 S.E.2d 43, 46 (2001). For a motion to dismiss based upon Rule 12(b)(6), the standard of review is whether, construing the complaint liberally, " 'the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.' " *Block v. County of Person*, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000) (citation omitted).

[2] Defendants contend Strates lacks standing, and now is collaterally estopped from bringing the claims in the instant action because the federal district court previously held that Strates lacked standing to bring its RICO claim due to a failure to establish that defendants' illegal activity was the proximate cause of Strates' alleged injuries. In order for a plaintiff to have standing to bring a claim, the plaintiff must establish three elements:

> "(1) 'injury in fact'—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Neuse River Found., Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 364 (1992)), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003). "Standing most often turns on whether the party has alleged 'injury in fact' in light of the applicable statutes or caselaw." *Id.*

" 'The companion doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) have been developed by the courts for the dual purposes of protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation.' " *Williams v. City of Jacksonville Police Dep't*, 165 N.C. App. 587, 591, 599 S.E.2d 422, 427 (2004) (quoting *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993)).

> "Where the second action between two parties is upon the same claim, the prior judgment serves as a bar to the relitigation of all matters that were or should have been adjudicated in the prior action. Where the second action between the same parties is upon a different claim, the prior judgment serves as a bar only as to issues actually litigated and determined in the original action."

Id. (quoting *Bockweg*, 333 N.C. at 492, 428 S.E.2d at 161). Under the doctrine of collateral estoppel,

> "also known as 'estoppel by judgment' or 'issue preclusion,' the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding."

Id. (quoting *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004)). "Collateral estoppel bars 'the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim.' " *Id.* at 591-92, 599 S.E.2d at 427-28 (quoting *Whitacre*, 358 N.C. at 15, 591 S.E.2d at 880). The doctrine also applies when "the first adjudication is conducted in federal court and the second in state court." *McCallum*, 142 N.C. App. at 52, 542 S.E.2d at 231 (citation omitted).

We begin our analysis by holding that Strates "enjoyed a full and fair opportunity to litigate" the issue of proximate cause in the prior federal action. In the federal action, Strates filed its complaint, defendants filed their motions to dismiss, and Strates responded to the motions. Strates initially appealed from the federal district court's dismissal of the action, however Strates chose to dismiss the appeal. Thus, the ruling of the federal district court is a final judgment as to the issues decided by it. Therefore, we must now determine whether the proximate cause element required for a RICO claim is the same as for a claim under our State's Unfair and Deceptive Practices Act and whether the federal district court's ruling collaterally estops Strates from pursuing the instant action.

In the prior federal action, the federal district court held that Strates failed to allege facts sufficient to satisfy the proximate cause element of its RICO claim. The federal RICO Act, 18 U.S.C. § 1961, *et seq.*, prohibits certain conduct involving "a pattern of racketeering activity." 18 U.S.C. § 1962(b) (2000 ed.). "One of RICO's enforcement mechanisms is a private right of action, available to '[a]ny person injured in his business or property by reason of a violation' of the Act's substantive restrictions." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 453, 164 L. Ed. 2d 720, 726 (2006) (quoting 18 U.S.C. § 1964(c)). In *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 268, 117 L. Ed. 2d 532, 544 (1992), the United States Supreme Court "held that a plaintiff may sue under § 1964(c) only if

the alleged RICO violation was the proximate cause of the plaintiff's injury." *Anza*, 547 U.S. at 453, 164 L. Ed. 2d at 726. The Court in *Holmes* explained that section 1964(c) "provides a civil cause of action to persons injured 'by reason of' a defendant's RICO violation." *Anza* at 456, 164 L. Ed. 2d at 728. The *Holmes* court held that "the phrase 'by reason of' could be read broadly to require merely that the claimed violation was a 'but for' cause of the plaintiff's injury." *Anza* at 456, 164 L. Ed. 2d at 728 (citing *Holmes*, 503 U.S. at 265-66, 117 L. Ed. 2d at 542-43). In *Anza v. Ideal Steel Supply Corp.*, the Supreme Court interpreted the holding of *Holmes*, and held that "[w]hen a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries." *Id.* at 461, 164 L. Ed. 2d at 731.

Our State's Unfair and Deceptive Practices Act ("UDP"), found in North Carolina General Statutes, section 75-1 *et seq.*, provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-1.1(a) (2005). Section 75-16 of the Act "creates a cause of action to redress injuries resulting from violations of Chapter 75 of the General Statutes and provides that any damages recovered shall be trebled." *Richardson v. Bank of Am., N.A.*, 182 N.C. App. 531, 539, 643 S.E.2d 410, 416 (2007) (citing N.C. Gen. Stat. § 75-16 (2005)). "These two statutes establish a private cause of action for consumers." *Id.* at 539, 643 S.E.2d at 416 (citing *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681, *reh'g denied*, 352 N.C. 599, 544 S.E.2d 771 (2000)). "An unfair and deceptive trade practice claim requires plaintiffs to show: (1) that defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) plaintiffs were injured thereby. Plaintiffs must also establish they 'suffered actual injury as a proximate result of defendants' [unfair or deceptive act].' " *Edwards v. West*, 128 N.C. App. 570, 574, 495 S.E.2d 920, 923 (1998) (citations omitted).

Our courts have defined "proximate cause" as

> "a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed."

Williamson v. Liptzin, 141 N.C. App. 1, 10, 539 S.E.2d 313, 319 (2000) (citation omitted); *accord Loftis v. Little League Baseball, Inc.*, 169 N.C. App. 219, 222, 609 S.E.2d 481, 484 (2005); *see also* Black's Law Dictionary 234 (8th ed. 2004) (proximate cause is "[a] cause that directly produces an event and without which the event would not have occurred").

Upon reviewing the elements required for both a RICO and an UDP claim, we are able to see that each claim requires a showing by the plaintiff that he or she suffered an injury that was a proximate result of the defendant's improper actions, whether the improper actions constitute racketeering or unfair or deceptive acts or practices. Both Acts require a showing that the plaintiff suffered an actual injury, and that the defendant's improper, or illegal conduct was a cause in fact of the plaintiff's injuries.

In both the prior federal action, and the instant state action, Strates seeks damages for the same injuries: the loss of the 2002 midway contract; its costs in preparing a bid for the 2002 midway contract; and the legal fees and costs associated with its appeal to OAH. The federal court previously determined that Strates' "claim that it was injured by not being awarded the midway contract . . . fails both because it is premised upon an expectancy interest and because the injury is *not* proximately connected" to the defendants' illegal conduct. *Strates*, 379 F. Supp. 2d at 826 (emphasis added). As the federal court has previously held that Strates failed to establish the element of proximate cause, as it relates to the alleged injury of not receiving the midway contract, we therefore hold Strates is collaterally estopped from relitigating this same issue in the instant state action.

The element of causation in Strates' federal RICO claim is the same as in the state UDP claim, and thus the state claims must fail based upon the federal court's prior ruling on the issue of causation. At no time was Strates actually awarded, or promised, the 2002 midway contract. Strates' state action fails to establish that but for defendants' illegal conduct, Strates would have been awarded the contract. Strates cannot show that it suffered any actual injury as a result of the illegal conduct, only that it was not awarded the midway contract. Complicating Strates' claim is the fact that Strates and AOA were not the only bidders vying for the 2002 midway contract—there were six other bidders in addition to Strates and AOA. The fact that defendants participated in an illegal conspiracy surrounding the 2002 midway contract does not create an automatic claim under our

State's UDP; Strates still must show a causal relationship between the alleged improper act and the injury claimed. Even assuming defendants' conduct constitutes actionable conduct pursuant to section 75-1.1 *et seq.*, Strates has failed to show that it suffered any actual injury as a matter of law that was proximately caused by the illegal conduct.

With respect to the damages Strates suffered as a result of preparing the bid for the midway contract and in pursuing the appeal through OAH, we hold the federal district court's ruling also finally determined this issue. With or without defendants' illegal conduct, Strates would have incurred the costs to prepare its bid for the midway contract. Thus, Strates cannot show that any costs incurred in preparing the bid were proximately caused by defendants' illegal conduct. With respect to the costs and fees incurred in pursuing the administrative hearing with OAH, we hold the federal district court's ruling also finally determined this issue. Strates chose to incur these costs as a result of not being awarded the midway contract. As the federal court determined, "while the illegal conduct by defendants may have been the cause-in-fact of plaintiff's legal fees and costs, it was not the 'proximate cause' of such fees and costs." *Strates*, 379 F. Supp. 2d at 833.

We therefore hold the trial court erred in denying defendants' motions to dismiss, as Strates was collaterally estopped from asserting claims based upon issues which were finally decided in a prior judicial proceeding between the same parties.

Reversed.

Judges McGEE and LEVINSON concur.

STATE OF NORTH CAROLINA v. RUBEN WRIGHT, JR.

No. COA06-1435

(Filed 3 July 2007)

1. Venue— motion for change—pretrial publicity

The trial court did not abuse its discretion in a first-degree murder case by denying defendant's motion for change of venue due to pretrial publicity, because: (1) defendant did not renew his

motion for change of venue after it was first denied by the trial court, and the trial court stated it would reconsider its decision should defendant choose to raise the issue again; (2) defendant has not shown any prejudice that would have required the trial judge to change venue; and (3) defendant was unable to show that any jurors were unable to render a verdict consistent with the evidence presented at trial.

2. Confessions and Incriminating Statements— motion to suppress—defendant not in custody

The trial court did not abuse its discretion in a first-degree murder case by denying defendant's motion to suppress a statement given to a sheriff on 14 January 2006 while defendant was inside Camp Lejeune's brig, because: (1) the trial court's findings of fact support its legal conclusions that defendant was not in custody during his discussion with the sheriff; (2) defendant was brought into an interview room without handcuffs and shackles; (3) the sheriff informed defendant that he had not come to interview him and that if he asked him a question, do not answer; and (4) defendant was free to leave the interview room at any time and return to the brig.

Judge JACKSON concurring in a separate opinion.

Appeal by defendant from judgment entered 20 January 2006 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 23 May 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Tiare B. Smiley, for the State.

James R. Parish, for defendant.

LEVINSON, Judge.

Defendant (Ruben Wright, Jr.) appeals judgment entered upon his conviction for the first degree murder of James Taulbee (Taulbee). We find no error.

The relevant facts may be summarized as follows: At 7:46 p.m. on 5 January 2004, Holly Ridge Police Officer Keith Whaley responded to a 911 call of a shooting at 107 Chestnut Court. At the scene, Whaley observed several people on the sidewalk, including the deceased's wife, Zenaida Taulbee (Zene), who was crying. On the second floor of 107 Chestnut Court, Whaley discovered Taulbee in the master bed-

room, lying in a bed surrounded with blood. Taulbee was shot twice in the face.

Whaley further observed that the doorjamb on the front door was broken and was laying face up to the right of the door, and that the nails facing up were unbent. A computer keyboard lay just inside the doorway. When Officers David Neuman, Thomas Robinson and Patrick Garvey investigated the scene, the back door was unlocked and nothing appeared to be missing. During a search of a Taulbee's Pontiac Grand Am, a cell phone was discovered under the driver's seat. Robinson turned the phone on and the display indicated that the phone belonged to Zene. As Robinson was holding the phone, a call came in from "Gunner, 329-2982[,]" and then "Gunner, 340-2353." A U.S. Cellular official testified that defendant purchased the phone on 26 October 2002 and secured his account with the password "Zene." Review of the Zene cell phone records revealed numerous calls and voice mails from "Gunner." The messages were eventually accessed, recorded, and transcribed.

Barbara Ann Marsh testified that, on 5 January 2004, she rose at 4:15 a.m. for work. At that time, Marsh observed the headlights of a vehicle shining into her bedroom window. She thought it was "out of the ordinary" because the earliest she recalled neighbors leaving in the morning was closer to 5:00 a.m. Shortly thereafter, she heard two noises—"a muted thuddy kind of noise"—from the direction of the Taulbees' house.

On 12 January 2004, defendant was ordered to return early from his military training in California. On 13 January 2004, Sheriff Colonel Mark Shivers interviewed defendant. Defendant told Shiver that he knew Taulbee and that Zene was "just a friend." Defendant said he believed Zene killed her husband. Later during the same interview, however, defendant admitted an affair with Zene, and to meeting her frequently at a Burger King restaurant and at a military barracks. He said he called Zene the morning of the murder, but did not go to the residence. During the interview, defendant stated, "if I were smart I would give up [Zene] Taulbee and the other person." He stated he did not talk Zene into killing her husband and that a white person killed the victim. Defendant admitted calling Zene the night of 5 January at 6:30, 7:00 and 10:30, and also at 12:30 a.m. on 6 January 2004. After a message on the cell phone was played for defendant, he stated, "I guess I'm going down, but I didn't pull the trigger."

Defendant was also interviewed by Naval Criminal Investigative Service (NCIS) Officer Scott Vousboukis on 15 January 2004. De-

fendant told Vousboukis that he had known Zene since August 2002 from a Burger King restaurant. When his relationship with Zene became sexual, he purchased a cell phone for Zene so he could call her during the day without raising her husband's suspicions. The two would work out at 4:45 a.m. each day, then shower and occasionally have sex at a barrack's room assigned to a friend who was attending training school. Zene told him her husband was physically abusive. Defendant also stated that, on 5 January, he and Zene met at the gym at the usual time to work out, and that he later spent most of the day working and preparing to leave for California. He remained at his residence until 1:30 a.m. He did not "plan to initiate or execute the plan to kill" Taulbee.

Based on an earlier request by defendant to see Sheriff Brown, Brown and Detective T. J. Cavanagh met defendant at the brig on 16 January 2004. Defendant was being held on charges of wrongful disposition of military property, larceny and wrongful appropriation, conduct unbecoming an officer and gentleman, and adultery. According to Cavanagh, defendant did not appear tired or impaired. While the sheriff was explaining some of the facts of the case and defendant's known involvement, defendant suddenly jumped up and stated, "I did not shoot him. Zene shot him and all [I] did was reload the gun." He repeated, "I did not shoot him; she shot him." He then said, "I shouldn't have said that" and sat back down. Cavanagh further testified that defendant stated that Zene told him that she "wanted her husband dead."

Zene testified. When she returned from the Phillippines in December 2003, defendant told her that Randy Linniman was making a silencer gun that Linniman was going to use to get rid of defendant's wife. She met defendant on 5 January 2004; defendant told her that he was leaving for California and asked her to meet him the next morning at the gym at 4:20 a.m. He told her that he had picked up a gun Linniman "made for him" that afternoon and on Monday morning he and Linniman would be at her house. If she saw them, Zene explained, she was to simply drive away.

The following day Zene awoke at 3:45 a.m. and left the house at approximately 4:20 a.m.; her husband remained in their bed. As she was getting in her car, she saw Linniman's car approach. The car went to the end of the cul-de-sac, and then turned around and parked beside her house. Zene observed a white arm sticking out of the driver side window. As she pulled out of the driveway, Zene saw

defendant get out of the car. He was wearing black spandex-type pants and a black shirt. He quickly walked toward her house.

She arrived at the gym at 4:30 a.m. and worked out. Defendant's car was in the parking lot, but she did not find him inside. Sometime after 5:00 a.m., defendant appeared and began his usual workout. Zene asked defendant why he was at her house that morning. Defendant responded, "don't worry about it[,]" and explained that Linniman gave him a ride to the gym. Defendant next took a shower and later sat next to Zene on a couch. He told her it was going to be a "good year" for them. Zene asked him again why he was at her house; defendant said, "we missed it." He told Zene to call her husband. Zene tried five or six times that day to call her husband, but he did not answer. Defendant called her three or four times that day. Each time she asked him what had happened. First defendant said he did not want to talk about it and that they would take care of the problem later. During one of the calls, defendant put Linniman on the phone. Zene did not normally talk to Linniman on the phone. Defendant also came to the back of the Burger King to see Zene that day. He told her, "you've got nothing to worry about no more[,]" and that they "took care of the problem." Defendant told her to "expect the worst" when she got home. When Zene arrived home in the early evening, the doors were open and a keyboard was in the driveway. The door was broken in and all the lights were turned off. She discovered her deceased husband upstairs.

A jury convicted defendant of first degree murder. Defendant now appeals.

[1] In his first argument, defendant contends that the trial court erred by denying his motion for change of venue due to pre-trial publicity. Defendant argues that he did not receive a fair trial consistent with the Fifth Amendment to the United States Constitution and Article I of the North Carolina Constitution. We disagree.

N.C. Gen. Stat. § 15A-957 (2005) provides, in pertinent part, that:

> If, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either:
>
> (1) Transfer the proceeding to another county in the prosecutorial district as defined in G.S. 7A-60 or to another county in an adjoining prosecutorial district as defined in G.S. 7A-60, or

(2) Order a special venire under the terms of G.S. 15A-958.

In applying Section 15A-957, the Supreme Court has stated:

> The test for determining whether pretrial publicity mandates a change of venue is whether it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed. Defendant has the burden of proving the existence of a reasonable likelihood that he cannot receive a fair trial in that county on account of prejudice from such pretrial publicity. To meet this burden defendant must show that jurors have prior knowledge concerning the case, that he exhausted peremptory challenges and that a juror objectionable to the defendant sat on the jury. In deciding whether a defendant has met his burden of showing prejudice, it is relevant to consider that the chosen jurors stated that they could ignore their prior knowledge or earlier formed opinions and decide the case solely on the evidence presented at trial.
>
> The determination of whether a defendant has carried his burden of showing that pretrial publicity precluded him from receiving a fair trial rests within the trial court's sound discretion.
>
> Only in the most extraordinary cases can an appellate court determine solely upon evidence adduced prior to the actual commencement of jury selection that a trial court has abused its discretion by denying a motion for change of venue due to existing prejudice against the defendant. The existence of pretrial publicity by itself does not establish a reasonable likelihood that defendant cannot receive a fair trial in the county where the crime was committed.

State v. Knight, 340 N.C. 531, 553-54, 459 S.E.2d 481, 495 (1995) (internal citations and quotation marks omitted); *see also State v. Burmeister*, 131 N.C. App. 190, 194, 506 S.E.2d 278, 280-81 (1998).

As a preliminary matter, we observe that defendant did not renew his motion for change of venue after it was first denied by the trial court. In addition, the record reflects that, in rendering his decision to deny the pretrial motion to change venue, the trial court stated he would reconsider his decision should defendant choose to raise the issue again. Here, defendant has not shown any prejudice that would have required the trial court judge to change venue. While the record

on appeal contains copies of local news articles regarding this matter, the record does not include a transcript of the jury selection. As a result, defendant has been unable to show that any jurors were unable to render a verdict consistent with the evidence presented at trial. *See Knight*, 340 N.C. at 554, 459 S.E.2d at 495 (no prejudice where defendant "made no showing that any of the prospective jurors in Forsyth County would be unable to set aside this pretrial publicity and decide the case solely on the evidence presented at trial"). On this record, defendant has not shown that the trial court abused its discretion in denying the motion to change venue. This assignment of error is overruled.

[2] Defendant next argues that the trial court erred by denying his motion to suppress a statement given to Onslow County Sheriff Ed Brown on 14 January 2006 while he was inside Camp LeJeuene's brig. He contends that his statement was obtained in violation of his right against self-incrimination under the Fifth Amendment to the U.S. Constitution and Article I of the North Carolina Constitution. We disagree.

It is well settled that Miranda warnings are only required when a person is being subjected to custodial interrogation. *State v. Patterson*, 146 N.C. App. 113, 121, 552 S.E.2d 246, 253 (2001) (citations omitted). "Custodial interrogation" was defined by the United States Supreme Court in Miranda as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966). In *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405 (1997), the North Carolina Supreme Court summarized the law regarding the application of Miranda in custodial interrogations and stated that "in determining whether a suspect [is] in custody, an appellate court must examine all the circumstances surrounding the interrogation; but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." An individual who is incarcerated is not:

> automatically in custody for the purposes of *Miranda*; rather, whether an inmate is in custody must be determined by considering his freedom to depart from the place of his interrogation. We recognize, however, that an inmate inherently has some restriction on his freedom of movement, and factors to consider when determining whether an inmate is free to depart from the place of his interrogation include whether: the inmate was free to refuse

> to go to the place of the interrogation, the inmate was told that participation in the interrogation was voluntary and that he was free to leave at any time, the inmate was physically restrained from leaving the place of interrogation, and the inmate was free to refuse to answer questions.

State v. Briggs, 137 N.C. App. 125, 129, 526 S.E.2d 678, 680-81 (2000). Additionally, " 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980).

In the present case, defendant has not assigned error to any of the trial court's findings of fact. The findings are therefore binding on appeal. *See State v. Jacobs*, 162 N.C. App. 251, 254, 590 S.E.2d 437, 440 (2004). We are therefore left to determine only whether the trial court's findings support its legal conclusions, which are fully reviewable on appeal. *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

The trial court, found in pertinent part, that:

> 15. Sheriff Brown would have made arrangements the next day to see the defendant at the sheriff's office, but he did not see him. He had Detective Cavanagh, a retired marine, make the arrangements with the brig to speak to the defendant. The sheriff was accompanied by Detective Cavanagh when he went to the brig to speak to the defendant at the brig around 1 p.m. on January 16, 2004. The defendant was escorted by a guard to a room that contained a table and chairs and a couch with room enough for two people. The defendant sat on the couch with the sheriff while Cavanagh sat at the table. Sheriff Brown made it clear to the defendant that he was not there to interrogate or interview him but to visit and advise him, in as much detail as he could, as to the status of the investigation. He advised the defendant that he did not want to question him and told him directly that "if I do ask a question, do not answer." The defendant was not advised of any Miranda rights, and the sheriff did not anticipate that the defendant would make any statements. The defendant was not in custody for, and had not been charged with, any civilian offenses related to the murder. The defendant was not restrained in any way. The sheriff felt that they were sitting down as friends who

shared a common religious faith. The defendant was not compelled to speak to the sheriff and was free to refuse to say anything and leave the room at any time.

16. During the interview on January 13, 2004 at the sheriff's office, the defendant indicated that he was "close to the fire, but he was not the one that did the act." In the conference room at the brig, the sheriff told the defendant, in as much detail as he could, the status of the investigation. He told the defendant that he was implicated at the house that early morning and that they knew about his relationship with Zenaida Taulbee. At some time during the conversation, the defendant unexpectedly jumped up from the couch and said that Zenaida Taulbee killed her husband and he had only reloaded the gun for her. Afterwards, the defendant remarked that he should not have said that. Their conversation also went into the religious aspects of this situation. The sheriff and the defendant spoke in the brig for about one hour.

17. During the period of time the defendant was in the room with the sheriff and detective Cavanagh, no promises, offers of reward, or inducements were made to the defendant to make a statement nor were there any threats, suggested violence or show of violence made. The defendant never expressed a desire to stop talking nor was there any indication that he desired to stop talking. The defendant never made a request for a lawyer, either civilian or military. There is no evidence that the defendant was confused, did not understand his situation, was under the influence of any drugs or narcotics, or was in any ill health.

Based upon these findings, the trial court concluded in relevant part that:

1. Although the defendant was incarcerated for charged violations of the Uniform Code of Military Justice, the defendant was free to leave the room, where he had been escorted, to return to his cell and free not to talk to law enforcement officers. A prison inmate is not "automatically always in 'custody' within the meaning of *Miranda*." *United States v. Conley*, 779 F.2d 970, 973 (4th Cir. 1985). The Supreme Court has held that "notwithstanding a 'coercive environment,' there is no custody for *Miranda* purposes unless the questioning takes place 'in a context where [the questioned person's] freedom to depart [is] restricted. . . [.]" *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L. Ed. 2d 714 (1977). "In determining whether a suspect [is] in

custody, an appellate court must examine all the circumstances surrounding the interrogations; but the definitive inquiry is whether there was a formal arrest or a restraint in freedom of movement of the degree associated with a formal arrest." *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405[,] *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997). Even though there was a change in the defendant's location within the brig, he still had the ability to leave the conference room and to not speak to Sheriff Brown. The defendant was not in custody for the purposes of *Miranda*. *State v. Briggs*, 137 N.C. App. 125, 526 S.E.2d 678 (2000).

. . . .

4. None of the defendant's constitutional rights, either Federal or State, were violated when he gave his oral statement to Sheriff Brown in the brig.

In the instant case, we conclude that the trial court's findings of fact support its legal conclusions that defendant was not in custody during his discussion with Sheriff Brown inside Camp Lejeune's brig. Defendant was brought into an interview room without handcuffs and shackles. Brown informed defendant that he had not come to interview him and that "if I do ask a question, do not answer." And defendant was free to leave the interview room at any time and return to the brig. *See State v. Fisher*, 158 N.C. App. 133, 146-47, 580 S.E.2d 405, 415-16 (2003) (defendant inmate not in custody for purposes of Miranda where he was at all times free not to talk and return to his cell). Because defendant was not in custody for the purposes of Miranda, we need not address whether he was subject to an interrogation. This assignment of error is overruled.

No error.

Judge McGEE concurs.

Judge JACKSON concurs with separate opinion.

JACKSON, Judge concurring.

I concur fully with the majority. However, assuming *arguendo* that defendant was in custody at the time of his conversation with Onslow County Sheriff Ed Brown, he had been given his *Miranda* warnings twice in the prior four days. Defendant first was read his *Miranda* rights upon arriving at the sheriff's office on the night of 12

January 2004, and he was again advised of his rights on 15 January 2004 prior to being interviewed by the NCIS agents at their office. Therefore, even if it was error for the trial court to admit defendant's statements to Sheriff Brown, any error was harmless as defendant had been adequately Mirandized.

IN THE MATTER OF: J.Z.M., R.O.M., R.D.M., AND D.T.F., MINOR CHILDREN

No. COA06-1242

(Filed 3 July 2007)

Termination of Parental Rights— failure to hold initial hearing within statutory time—prejudicial error

Respondent mother was prejudiced by the trial court's failure to conduct the initial termination of parental rights hearing within the 90-day period prescribed by N.C.G.S. § 7B-1109(a) where respondent's three children were under five years old when removed from respondent's care; respondent was initially granted visitation, but when the permanent plan was changed from reunification to adoption, petitioner ceased visitation between respondent and her children; and respondent was denied the company and familial relationship with her children for the fourteen months between the filing of the termination petition and the initial hearing.

Judge LEVINSON concurring in result.

Judge STEELMAN dissenting.

Appeal by respondent from an order dated 18 April 2006 by Judge Louis A. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 29 March 2007.

Mecklenburg County Attorney's Office, by Tyrone C. Wade, for petitioner-appellee.

Charlotte Gail Blake for respondent-appellant.

Womble Carlyle Sandridge & Rice, PLLC, by Sarah A. Motley, for the guardian ad litem.

BRYANT, Judge.

P.A.H.[1] (respondent-mother) appeals from an order dated 18 April 2006 terminating her parental rights to her minor children, J.Z.M., R.O.M., and R.D.M. The order dismissed the petition to terminate parental rights as to her minor child, D.T.F. The respondent-father, W.M., is not a party to this appeal. For the reasons below, we reverse the order of the trial court.

Facts and Procedural History

Respondent-mother and respondent-father lived together since February of 1994, were married in May of 1997, and were divorced in late 2003. Charlotte-Mecklenburg Youth and Family Services' (YFS/petitioner) first referral of inappropriate discipline by respondent-mother against one of her older children in 1994 was substantiated. In 1997, YFS substantiated a second referral for unstable housing and improper supervision of the children. Another referral in late 1998 similarly alleged that the family was homeless. Subsequent referrals were made in 1999, 2000, and 2003 for allegations of domestic violence between the respondent-parents.

R.O.M. was born in 1999, J.Z.M. was born in 2002 and R.D.M. was born in 2003; all were born in Mecklenburg County. All three are children of respondent-mother and respondent-father. On 5 December 2003, YFS removed the three children from the home of their mother. The trial court, on 3 February 2004, adjudicated the children as neglected and dependent juveniles. On 10 January 2005, YFS filed petitions to terminate respondent's parental rights. The hearing to terminate parental rights was continued on 27 October 2005 to 27 January 2006 and again to 7 March 2006. On 7 March 2006, the hearing to terminate parental rights as to J.Z.M., R.O.M., R.D.M., and D.T.F. was held. The order dated 18 April 2006 terminated parental rights as to J.Z.M., R.O.M., and R.D.M. and dismissed the petition as to D.T.F. Respondent-mother appeals.

The dispositive issue before this Court is whether the trial court erred in failing to hold the initial hearing on the petition within the mandated time frame. Under North Carolina General Statute § 7B-1109, the trial court must hold the initial adjudicatory hearing on a petition to terminate parental rights "no later than 90 days from the filing of the petition or motion unless the judge pursuant to section (d) of this section orders that it be held at a later time."

1. Initials have been used throughout to protect the identity of the juveniles.

N.C. Gen. Stat. § 7B-1109(a) (2005). Further, "[c]ontinuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice, and the court shall issue a written order stating the grounds for granting the continuance." N.C. Gen. Stat. § 7B-1109(d) (2005).

This Court has repeatedly held that "a trial court's violation of statutory time limits in a juvenile case is not reversible error *per se*." *In re S.N.H.*, 177 N.C. App. 82, 86, 627 S.E.2d 510, 513 (2006) (citing *In re C.J.B.*, 171 N.C. App. 132, 614 S.E.2d 368 (2005)). "Rather, we have held that the complaining party must appropriately articulate the prejudice arising from the delay in order to justify reversal." *Id.* (citing *In re As.L.G.*, 173 N.C. App. 551, 619 S.E.2d 561 (2005)). However, this Court "has gravitated towards a pattern resembling a *per se* rule of reversal in all cases wherein the delay was approximately six months or longer." *In re J.N.S.*, 180 N.C. App. 573, 579, 637 S.E.2d 914, 918 (2006) (Levinson, J., concurring) (citations omitted); *see also In re D.M.M. & K.G.M.*, 179 N.C. App. 383, 633 S.E.2d 715 (2006) (reversing an order terminating parental rights where the trial court failed to hold the termination hearing for over one year after the filing of the petition to terminate and entered its order an additional seven months after the statutorily mandated time period). In addition, this Court has held that the same logic we have determined to be applicable to the failure of trial courts to file a written termination order within the time provided in N.C.G.S. § 7B-1109(e) "must be applied to the timeliness of the termination hearing after the filing of the termination petition under [N.C.G.S. §] 7B-1109(a)." *In re S.W.*, 175 N.C. App. 719, 722, 625 S.E.2d 594, 596, *disc. review denied*, 360 N.C. 534, 635 S.E.2d 59 (2006).

In the instant case, the juvenile petitions to terminate respondent's parental rights as to J.Z.M., R.O.M., and R.D.M. were filed on 11 January 2005. The initial hearing on the merits of the petitions was set for 27 October 2005, 289 days after the filing of the juvenile petition and 199 days (over six and a half months) after the deadline mandated by N.C.G.S. § 7B-1109(a). By an order dated 14 November 2005, the trial court continued this matter from the 27 October 2005 hearing date until 27 January 2006 after making the following findings:

> 3. . . . [W.M] was served by publication beginning August 26, 2005.
>
> 4. This matter was previously scheduled for hearing on the petitions to terminate parental rights for today; however due to

other matters on the court's calendar there is insufficient time to hear the case today. The court has therefore conducted a pretrial hearing.

5. Mr. Clifton has made a motion to withdraw citing a lack of contact with his client. The Court has denied that motion; however, will reconsider it at a later time.

6. Mr. Fuller has made a motion to continue this matter as his client was not brought over from the Mecklenburg County Jail.

7. There appear to be no other issues to be resolved prior to a hearing on the petition to terminate parental rights.

This matter was further continued from the 27 January 2006 court date by a Notice of Hearing dated 27 January 2006, setting the hearing date to 7 March 2006. While a motion to continue was filed by petitioner on 26 January 2006, no order granting the motion appears in the record before this Court, and the Notice of Hearing rescheduling the hearing date to 7 March 2006 contains no findings by the trial court as any grounds for granting a continuance as required by N.C.G.S. § 7B-1109(d). The hearing on this matter was finally held on 7 March 2006, 420 days after the filing of the juvenile petition and 330 days (almost eleven months) after the deadline mandated by N.C.G.S. § 7B-1109(a). This combined delay is an egregious violation of both N.C.G.S. § 7B-1109(a) and § 7B-1109(d) and thus we must reverse the order of the trial court. *See In re D.M.M. & K.G.M.*, 179 N.C. App. at 389, 633 S.E.2d at 718 ("The trial court erred and prejudiced respondent and her children when it failed to hold the termination hearing for over one year after DSS filed its petition to terminate and by entering its order an additional seven months after the statutorily mandated time period.").

Further, respondent sets forth with specificity exactly how she was prejudiced by the failure of the trial court to comport with the statutory mandate as to holding the initial adjudicatory hearing on a petition to terminate parental rights. Respondent notes that R.D.M. was only five months old when removed from respondent's care; while J.Z.M. was not quite two-years old and R.O.M. was four and a half years old. Initially respondent was granted visitation with her children. On 1 November 2004, the trial court changed the permanent plan for J.Z.M, R.O.M., and R.D.M. to adoption and ended reasonable efforts to reunify them with respondent. Even though the trial court found as fact that "[v]isitation between [R.O.M.] and [respondent] is desirable based on the therapist's recommendations," petitioner

ceased all visitation between respondent and her children. At this point, when respondent was no longer able to visit her children, R.D.M. was sixteen months old, J.Z.M. was not quite three years old, and R.O.M. was just over five years old.

The egregious delay in conducting the hearing in this matter constituted a *de facto* termination of her parental rights fourteen months prior to this matter actually coming before the trial court. For fourteen months, respondent was denied the company and familial relationship with her children solely through the inaction of petitioner and the trial court. Respondent has thus established that she was prejudiced by the delay in hearing the petition seeking the termination of her parental rights. In light of our holding, it is unnecessary to consider respondent's remaining assignments of error. The trial court's order is reversed.

Reversed.

Judge LEVINSON concurs in the result only in a separate opinion.

Judge STEELMAN dissents in a separate opinion.

STEELMAN, Judge, dissenting.

I must respectfully dissent from the majority opinion. In these matters, petitions to terminate parental rights were filed on 11 January 2005, and served upon respondent-mother on 17 January 2005. Because the fathers could not be located, they were served by publication, commencing on 8 April 2005 and 26 August 2005. (R p. 121) No hearing could proceed until the fathers of the children were served. These matters were scheduled for hearing on 27 October 2005 by notice of hearing dated 16 September 2005. (R p. 116) This hearing was continued based upon two factors. First, due to other matters on the docket, there was not time to hear the case; and second, attorney for one of the fathers moved to continue the case. The matter was set for hearing on 27 January 2006. It was again rescheduled because the social worker involved with the case gave birth to a child on 21 January 2006 and was unavailable for trial. The case was rescheduled and heard on 7 March 2006.

The hearing was thus outside of the ninety (90) day time period prescribed by North Carolina General Statute § 7B-1109. The majority correctly recites the law of this State that a violation of the statutory

time limits in a juvenile case is not reversible error *per se*. However, it goes on to find prejudice in this case based solely upon the length of the delay, with no analysis of the prejudice asserted by respondent-mother. I submit that such an analysis amounts to the adoption of a *per se* prejudice rule. It should be noted that the case relied upon by the majority, *In re D.M.M. & K.G.M.*, 179 N.C. App. 383, 633 S.E.2d 715 (2006), there was a detailed analysis of the appellant's assertions of prejudice, apart from the discussion of the length of the delay. 179 N.C. App. at 389, 633 S.E.2d at 717-18. It is ultimately the nature of the prejudice shown, not the length of the delay which must control in these cases.

This appeal must be decided upon whether respondent-mother has shown sufficient prejudice suffered as a result of the delay to merit reversal. I would hold that she has not. Respondent-mother argues:

> Because the children were not allowed to visit with their mother, they necessarily became more comfortable with their foster parents during this extending time period prior to the termination hearing. The children were deprived of the company of their mother, their siblings and other family members. The foster parents were not able to pursue adoption, if that became appropriate. Despite the clear legislative intent, these children were deprived from the timely implementation of a permanent plan for them.

Respondent-mother's argument ignores several crucial matters. The reason for the intervention by DSS was substance abuse and domestic violence. A plan was adopted to assist respondent-mother in rectifying these problems. The trial court found:

> 25. The respondent mother has not complied with the case plan or resolved any of the issues which led to placement of these children in custody. The respondent mother has not demonstrated the ability to provide consistent care and supervision for any of her children. After the respondent mother was discharged from the NOVA program, she contacted them and they consistently told her to go to individual therapy. She did not do that.

This finding of fact is not challenged on appeal, and thus is binding upon this Court. *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962) ("Where no exceptions have been taken to the findings of fact, such findings are presumed to be supported by compe-

tent evidence and are binding on appeal."). This finding supports the trial court's conclusion of law that a basis for termination existed under North Carolina General Statute § 7B-1111(a)(2).

Respondent-mother's asserted prejudice in no manner negates this finding and conclusion. She merely asserts that she was deprived of the right to visit with the children. No assertion is made that had she been allowed visitation that she would have been able to demonstrate that she had rectified her substance abuse and domestic violence issues. The evidence presented was clearly to the contrary. Although respondent-mother had the benefit of additional time to correct the problems that led to the removal of the children, she failed to take advantage of this opportunity. (See *In re C.M.*, *V.K.*, *Q.K.*, 183 N.C. App. ——, ——, ——S.E.2d ——, —— (2007) (finding no prejudice when delay in violation of N.C. Gen. Stat. § 7B-1109(a) inured to respondent's benefit).

The majority opinion confuses personal prejudice with legal prejudice and cannot show that the delay in any manner affected the outcome of her case.

Respondent-mother has not showed prejudice that would support reversal in this matter. The order of the trial court should be affirmed.

LEVINSON, Judge concurring in the result in a separate opinion.

LEVINSON, Judge concurring.

I only agree to reverse the order on appeal because I am compelled to do so. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989). In the following discussion, I refer to the opinion by Judge Wanda Bryant as the "lead" opinion and Judge Steelman's opinion as the "dissent."

I have previously expressed my disagreement with this Court's "prejudice" line of authorities that resolve assignments of error made to failures of our trial courts to adhere to Juvenile Code deadlines. *See*, *e.g.*, *In re B.M.*, 183 N.C. App. ——, ——, —— S.E.2d ——, —— (2007); *In re J.N.S.*, 180 N.C. App. 573, 637 S.E.2d 914 (2006). Like the orders in *B.M.* and *J.N.S.*, it is my view that we should resolve the substantive merits of whether the order on appeal should be reversed because of legal error, or affirmed because of the absence of legal error. Nonetheless, I am compelled to agree with the lead opinion that, based upon the application of the "standard" this Court utilizes

to examine "prejudice" for delays, respondent has articulated sufficient prejudice to warrant reversal.

I respectfully disagree with the lead opinion to the extent it concludes this Court "must" reverse the order on appeal because of the passage of time; the opinion apparently concludes we "must" reverse the order without first examining prejudice as an essential part of the analysis. This Court is not, as a matter of law, required to reverse the subject order merely because of the failure of the trial court to adhere to time standards in the Juvenile Code. I also disagree with the lead opinion to the extent it states that the delay here constituted a "*de facto* termination of parental rights." And I disagree with the lead opinion to the extent it assigns "sole" responsibility for the delays on the petitioner and the trial court. On the contrary, as expressed in the dissent, there are reasons unassociated with either petitioner or the trial court for the delays.

IN THE MATTER OF: S.E.P. AND L.U.E., MINOR CHILDREN

No. COA06-1662

(Filed 3 July 2007)

Termination of Parental Rights— lack of subject matter jurisdiction—improper or no signature

The Court of Appeals determined ex mero motu that the trial court's order terminating respondents' parental rights should be vacated based on its lack of subject matter jurisdiction to enter the orders first granting DSS nonsecure custody of the two minor children, because: (1) the alleged signature on DSS's petition with respect to S.E.P. was not in fact the director's signature; (2) DSS's amended petition regarding L.U.E. on 8 April 2004 showed no signature in the verification section; and (3) DSS was not an agency awarded custody of the minor children by a court of competent jurisdiction as required by N.C.G.S. § 7B-1103(a), and DSS did not have standing to file the termination petitions.

Appeal by Respondents from orders entered 16 October 2006 by Judge Wayne L. Michael in Iredell County District Court. Heard in the Court of Appeals 14 May 2007.

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

Holly M. Groce for Guardian ad Litem-Appellee.

Jeffrey L. Miller for Respondent-Appellant Mother N.P.

Richard Croutharmel for Respondent-Appellant Father S.P.

STEPHENS, Judge.

Before June 2002, N.P. had given birth to two children, both of whom had been removed from her custody and permanently placed with relatives due to N.P.'s domestic violence, anger control issues, and her inability to keep from being incarcerated. In June 2002, N.P. gave birth to S.E.P. N.P. was married to S.P., and S.P. was S.E.P.'s father. On 24 September 2002, N.P. was incarcerated in the Iredell County jail for violating the terms of her intensive probation.[1] N.P. left S.E.P. in the care of Ms. Faye Miller, S.E.P.'s godmother. On 25 September 2002, N.P. informed an Iredell County Department of Social Services ("DSS") social worker that S.P., who was also incarcerated at that time, was being released from prison and was planning to take S.E.P. from Ms. Miller upon his release. On 26 September 2002, Ms. Miller contacted DSS to say that she had given S.E.P. to S.P. A DSS social worker discovered that, in turn, S.P. had left S.E.P. in the care of S.E.P.'s aunt and uncle. The aunt's own child had previously been removed from her care due to neglect. The uncle was a registered sex offender who, according to DSS, was not supposed to reside with or care for a child. That same day, a juvenile petition was filed alleging that S.E.P. was neglected and dependent, and, pursuant to the trial court's order, DSS obtained nonsecure custody of S.E.P.

On 30 September 2002, S.P. was again incarcerated after being sentenced to prison for a term of sixteen to twenty months for distributing cocaine and violating probation.

On 1 October 2002, a seven-day hearing was held on the nonsecure custody order. Following the hearing, the court entered an order continuing nonsecure custody with DSS. After a series of review hearings, an adjudicatory hearing was held 26 November 2002. At the hearing, DSS amended its 26 September 2002 petition to remove the allegations of neglect, and the trial court adjudicated S.E.P. dependent. DSS was relieved of efforts to reunify S.E.P. with S.P., and the plan of care for N.P. was reunification.

1. The record does not reveal why N.P. was on probation.

On 1 November 2002, N.P. was released from prison but she remained on intensive probation. Upon her release, she moved into Ms. Miller's home. On 31 December 2002, N.P. was arrested on charges of possession with intent to sell and deliver cocaine and simple assault stemming from an incident which occurred on 11 April 2002. N.P.'s pastor posted bond, and N.P. was released from jail. At some point while living with Ms. Miller, N.P. became pregnant, purportedly by Ms. Miller's son. N.P. told a DSS social worker that she got pregnant so that she would be able to take care of a baby. "You keep taking them, I keep making them[,]" N.P. said. Later in her pregnancy, N.P. told a social worker that "as long as [DSS] takes my babies away, I will continue to get pregnant."

DSS and Guardian *ad litem* reports prepared for a 20 May 2003 review hearing indicated that in late February or March 2003, N.P. moved into the home of her boyfriend, Mr. Eberhart. On 1 April 2003, N.P. was arrested after she allegedly went to Mr. Eberhart's ex-girlfriend's house and fired two shots inside the occupied residence. In its review order filed after the 20 May 2003 hearing, however, the trial court made a finding that it "has not verified and presently does not have the ability to verify the status of [N.P.'s] pending charges [from the 1 April 2003 incident]."

On 26 June 2003, N.P. was charged with assault with a deadly weapon after she threw bricks at Mr. Eberhart. N.P. was again arrested for assault with a deadly weapon in September 2003 after she attacked Mr. Eberhart with a razor blade, but the charges were dismissed.

After a review hearing on 21 October 2003, the court entered an order changing the permanent plan to "TPR/Adoption[,]" and scheduled another review hearing for 18 November 2003. Sometime after the 21 October 2003 hearing, while she was eight months pregnant, N.P. was admitted to Frye Regional Hospital after she allegedly attempted to commit suicide. N.P. told a social worker that she was upset the permanent plan had been changed to adoption. In an order filed after the 18 November 2003 hearing, the trial court changed the permanent plan to "a concurrent plan of adoption/termination of parental rights and/or reunification with either parent."

N.P. gave birth to L.U.E. in December 2003. At that time, N.P. indicated that L.U.E.'s father was Mr. Eberhart. On 4 January 2004, N.P. took a taxi to Mr. Eberhart's home where she got into a verbal and physical altercation with him. When the police arrived, both N.P. and

Mr. Eberhart had bricks in their hands. The taxi driver, meanwhile, had left the scene of the altercation with L.U.E. in the cab, but returned once the altercation ceased.

On 23 January 2004, DSS filed a juvenile petition alleging that L.U.E. was neglected. On 12 February 2004, the trial court appointed a guardian *ad litem* and an attorney to represent L.U.E. On 24 February 2004, the trial court continued adjudication until 9 March 2004. L.U.E. continued to live with N.P. On 9 March 2004, the trial court continued the matter until 23 March 2004, and a summons was issued to N.P. to appear on that date. The matter was again continued when N.P. insisted on hiring her own attorney. Also on 23 March 2004, N.P. told a DSS social worker that Rick Eckles was the father of L.U.E. N.P. also told the social worker that she was pregnant with her fifth child.

S.P., meanwhile, was released from prison on 11 March 2004. On 25 March 2004, N.P. entered S.P.'s home without permission and assaulted him with a razor blade. S.P. was seriously injured and spent several days at a hospital. N.P. was subsequently charged with assault with a deadly weapon with intent to kill and first-degree burglary, and was incarcerated under a $40,000.00 bond. N.P. left L.U.E. in the care of Marlene Eckles, presumably a relative of Mr. Eckles. On 6 April 2004, Mr. Eckles posted bond for N.P., and she was released from prison. On 7 April 2004, N.P. tried unsuccessfully to take L.U.E. from Marlene Eckles.

On 8 April 2004, DSS filed an amended petition regarding L.U.E. in which it included the facts of the 25 March 2004 incident. DSS obtained nonsecure custody that same day. Respondents waived nonsecure custody hearings and the matter came on for adjudication on 20 April 2004. The trial court adjudicated L.U.E. neglected. Also on that date, the trial court changed the permanent plan for S.E.P. to "TPR/Adoption."

The trial court reviewed both children's cases on 19 May 2004. On that date, when asked why she had not been complying with DSS directives, N.P. stated, "I'm not crazy, just emotionally disturbed[.]" The court scheduled its next hearing for S.E.P. on 23 November 2004. As for L.U.E., the court found that Mr. Eckles had been excluded as L.U.E.'s father and that "[n]o other father has been identified for possible placement." N.P. continued to be married to S.P., and the court found that S.P. was L.U.E.'s legal father. The court ceased reunification efforts with both parents, changed the permanent plan to "TPR/Adoption[,]" and scheduled review for 22 June 2004. The hear-

ing was held as scheduled and the matter was scheduled for further review on 4 January 2005.

On 19 August 2004, DSS filed a motion to terminate N.P.'s and S.P.'s parental rights as to S.E.P. Although both parents filed replies to the motion, the trial court never ruled on the motion.

On 13 October 2004, DSS filed a motion for review in the case of L.U.E. after DNA testing established that Bryant Howell was the father of L.U.E. Mr. Howell had indicated to a DSS social worker that he was scheduled to appear in federal court on drug charges and that he was facing ten years in prison. Mr. Howell subsequently relinquished his parental rights to L.U.E.

S.E.P.'s case was reviewed as planned on 23 November 2004. In its order filed after that hearing, the trial court ordered "[t]hat the termination of parental rights be calendared as soon as possible[.]"

Both children's cases were reviewed on 4 January 2005. In its orders in both cases following that hearing,[2] the trial court found that since its last hearing, N.P. had been incarcerated for a probation violation and was scheduled for release in 2006.[3] The court also found that S.P. had been incarcerated and was scheduled for release in 2010. In its permanency planning hearing report filed before the 4 January 2005 hearing, DSS noted that S.E.P., now two and a half years old, had been in foster care for two years and two months, and stated that "S.E.P. is needing permanence." Nevertheless, the court scheduled its next review hearing on both children for 5 July 2005.

On 5 July 2005, the court entered an order continuing the matter until 9 August 2005 because the guardian *ad litem* attorney was on secured leave. On 9 August 2005, the court apparently issued two orders continuing the matter until 16 August 2005 due to the attorney's continued secured leave. Inexplicably, one of the orders was signed 12 May 2006 and filed 15 May 2006. The other order was signed 13 October 2005 and filed that same day.

The court reviewed both children's cases on 16 August 2005. After the hearings, the court ordered DSS to schedule termination hearings as soon as possible. It further ordered that a termination hearing was to be held before the next review hearings scheduled for 21 February

2. Notably, these orders were signed 2 November 2005 and filed 3 November 2005.

3. N.P. gave birth to her fifth child while incarcerated.

2006. On 20 February 2006, DSS filed a petition to terminate N.P.'s and S.P.'s parental rights to S.E.P. and a petition to terminate N.P.'s parental rights to L.U.E.[4] On 22 February 2006, the trial court entered an order continuing its review of the matters until 25 April 2006. After that hearing, the trial court entered a review order scheduling termination hearings for 11 July 2006. The trial court then continued the matter until 30 August 2006 when it discovered that the father's attorney "had [a] conflict[.]" The trial court terminated Respondents' parental rights after the termination hearing on 30 August 2006. Respondents appeal.

All of the evidence in the record suggests that throughout all of these proceedings, S.E.P. and L.U.E. have been doing well in their foster care placements.

SUBJECT MATTER JURISDICTION

Although the issue was not raised by either Respondent, we conclude that the trial court lacked subject matter jurisdiction to enter the orders first granting DSS nonsecure custody of S.E.P. and L.U.E., and thus we vacate the orders terminating Respondents' parental rights.

"This Court recognizes its duty to insure subject matter jurisdiction exists prior to considering an appeal." *In re E.T.S.*, 175 N.C. App. 32, 35, 623 S.E.2d 300, 302 (2005) (citing *In re N.R.M.*, 165 N.C. App. 294, 296-98, 598 S.E.2d 147, 148-49 (2004)). "[A] court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking." *In re S.D.A.*, 170 N.C. App. 354, 358, 612 S.E.2d 362, 364 (2005) (quotations and citation omitted).

The provisions of our Juvenile Code "establish one continuous juvenile case with several interrelated stages[.]" *In re T.R.P.*, 360 N.C. 588, 593, 636 S.E.2d 787, 792 (2006). "A trial court's subject matter jurisdiction over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified petition." *Id.* "[V]erification of the petition in an abuse, neglect, or dependency action as required by N.C.G.S. § 7B-403 is a vital link in the chain of proceedings carefully designed to protect children at risk on one hand while avoiding undue interference with family rights on the other." *Id.* at 591, 636 S.E.2d at 791. "[I]n the absence of [a] verification . . . [a] trial court's order [is] void *ab initio*." *Id.* at 588, 636 S.E.2d at 789.

4. Like Mr. Howell, S.P. relinquished his rights to L.U.E. in 2005.

A petition to terminate parental rights "may only be filed" by a person or agency given standing by section 7B-1103(a) of our General Statutes. N.C. Gen. Stat. § 7B-1103(a) (2005). One such agency is "[a]ny county department of social services . . . to whom custody of the juvenile has been given *by a court of competent jurisdiction*." N.C. Gen. Stat. § 7B-1103(a)(3) (2005) (emphasis added). "Standing is jurisdictional in nature and '[c]onsequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved.' " *In re T.M.*, 182 N.C. App. 566, 570, 643 S.E.2d 471, 474 (2007) (quoting *In re Miller*, 162 N.C. App. 355, 357, 590 S.E.2d 864, 865 (2004)).

DSS filed a petition for adjudication with respect to S.E.P. on 26 September 2002. The verification section of that petition shows the "Signature of Petitioner" as: "Don C. Wall by Pam Frazier" with the "Director" box checked. It is obvious from the record that the alleged signature which appears on the petition was not in fact the director's signature. *See* N.C. Gen. Stat. § 10B-3(25) (2005) (defining signature as "the act of personally signing one's name in ink by hand").[5] DSS filed an amended petition regarding L.U.E. on 8 April 2004. The verification section of the amended petition shows no signature in the "Signature of Petitioner" space.

Neither the 26 September 2002 adjudication petition nor the 8 April 2004 amended petition conferred subject matter jurisdiction upon the trial court.[6] *In re A.J.H-R. & K.M.H-R.*, 184 N.C. App. 177, 179, 645 S.E.2d 791, 792 (2007) (holding that where a person signing a juvenile petition purports to sign as "Director," the purported signatures "[Director] by MH" and "[Director] by MHenderson" are insufficient to confer subject matter jurisdiction upon the trial court); *T.R.P.*, 360 N.C. at 589, 636 S.E.2d 789 (concluding that a trial court does not have subject matter jurisdiction where a petition alleging abuse, neglect, or dependency is "neither signed nor verified by the Director of [DSS] or any authorized representative thereof"). As such, the trial court never obtained jurisdiction in this action, and the orders awarding DSS custody of S.E.P. and L.U.E. were void *ab initio*.

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5. If Pam Frazier was an authorized representative of the DSS director, she should have signed her own name and checked the "Authorized Representative" box. In that circumstance, we likely would reach a different result in the matter of S.E.P.

6. Even were we to determine that, in the case of L.U.E., the court was proceeding under the 23 January 2004 petition, we would reach this same conclusion. The 23 January 2004 petition is clearly "signed" by someone other than the director who purported to sign on the director's behalf and checked the "Director" box.

Thus, DSS was not an agency awarded custody of the minor children by a court of competent jurisdiction, DSS did not have standing to file the termination petitions, and the trial court did not have subject matter jurisdiction to enter the orders terminating Respondents' parental rights.

In making this determination, we are cognizant of the fact that S.E.P. has been in foster care since he was three months old and that he is now five years old. We are also aware that DSS informed the trial court that S.E.P. "has been lingering in the foster care system and is needing permanence" in July 2004, and that DSS informed the trial court that L.U.E. "is needing permanence" as early as October 2004. Our holding is certain to disagree with those DSS workers who have labored over both of these cases for so many years. We take this opportunity to suggest that properly verifying a petition is likely to be the easiest part of DSS's job. Similarly, we remind the trial court that " '[a] universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity.' " *T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790 (quoting *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964)). "Subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act[.]" *T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790.

Because we vacate the trial court's orders for lack of subject matter jurisdiction, we need not address Respondents' assignments of error.

VACATED.

Judges JACKSON and STROUD concur.

IN THE MATTER OF: C.M.S.

No. COA07-108

(Filed 3 July 2007)

1. Termination of Parental Rights— Americans with Disabilities Act—mental retardation

Title II of the Americans with Disabilities Act (ADA) did not preclude the State from terminating respondent's parental rights even though respondent contends she is mentally retarded, be-

cause: (1) a parent may not raise violations of the ADA as a defense to termination of parental rights proceedings; (2) Congress enacted the ADA to eliminate discrimination against people with disabilities and to create causes of action for qualified people who have faced discrimination, but did not intend to change the obligations imposed by unrelated statutes; and (3) our state requires that any order placing or continuing the placement of a child in the custody of DSS must include findings that DSS has made reasonable efforts to prevent or eliminate the need for placement of the juvenile.

2. Termination of Parental Rights— findings of fact—willfully leaving juvenile in foster care without reasonable progress—sufficiency of evidence

Competent evidence supported the trial court's findings of fact in a termination of parental rights case, and the findings supported the termination of respondent's parental rights under N.C.G.S. § 7B-1111(a)(2) on the ground that respondent willfully left the juvenile in foster care more than 12 months without showing reasonable progress in correcting the conditions that led to the removal of the child from the home, because: (1) the trial court found the minor child had been in custody of DSS since 13 February 2004 through 27 October 2006, the date of the termination proceeding; (2) the trial court found that respondent has the capabilities to correct the conditions that led to the removal of the minor child, but has willfully failed to do so; and (3) clear, cogent, and convincing evidence was presented that respondent had completed a forensic psychological exam, but she had failed to follow through with any of the other required activities regarding parenting, therapy, anger management, or medication management.

Appeal by respondent from an order entered 27 October 2006 by Judge Kevin M. Bridges in Stanly County District Court. Heard in the Court of Appeals 4 June 2007.

Mark T. Lowder for petitioner-appellee Stanly County Department of Social Services; Vita Pastorini for appellee Guardian ad Litem.

Janet K. Ledbetter for respondent-appellant.

HUNTER, Judge.

Donna S. ("respondent-mother") appeals the termination of her parental rights as to C.M.S. After careful consideration, we affirm.

At the age of five, C.M.S. lived with respondent-mother and respondent-mother's boyfriend, Roger Jernigan, Jr. ("Jernigan"). During her time living with them, on 11 February 2004, the evidence presented at the hearing tended to show the following: C.M.S. witnessed an incident wherein respondent-mother held a gun to someone's head and Jernigan stabbed two men. During the course of this incident, C.M.S. was injured when she was struck in the head by a third party with the butt of a gun. As a result of this affray, C.M.S. was taken into the custody of Stanly County Department of Social Services ("DSS") and placed in the Christian Foster Home where she remains to date. A trial court adjudicated C.M.S. abused and neglected on 8 July 2004.

After being placed in the foster home, C.M.S. disclosed to Stacey McCroskey ("McCroskey"), a DSS social worker, acts of sexual abuse committed by Jernigan against her. The acts included holding C.M.S. down, kissing her genitalia, kissing her on the mouth, inserting his tongue in her mouth, kissing her buttocks while she was undressed, and placing his finger inside her vagina. C.M.S. also had scarring in her vagina and notching to her hymenal ring consistent with sexual abuse.

On 29 October 2004, a second petition was filed by DSS alleging sexual abuse of C.M.S. by Jernigan. C.M.S. testified at this hearing regarding the acts by Jernigan. Dr. Conroy, who conducted the physical examination on C.M.S., corroborated much of C.M.S.'s testimony. C.M.S. also testified that she had informed respondent-mother about the sexual abuse, and that respondent-mother failed to protect her from those acts. On 14 July 2005, C.M.S. was adjudicated abused by the trial court for a second time.

On 18 November 2004, respondent-mother entered into an out-of-home family service agreement in which she agreed to: (1) locate appropriate, safe housing; (2) have a stable source of income adequate to meet all needs; (3) provide proof the utility and rent bills are being met each month; (4) have no contact with Jernigan; (5) allow no contact between Jernigan and C.M.S. and have no conversations with C.M.S. about Jernigan; (6) complete a series of parenting classes; (7) participate in anger management treatment and follow through with

any recommended medication and therapy programs; (8) maintain regular contact with McCroskey; and (9) have regular supervised weekly visitation with C.M.S. An additional out-of-home family services agreement was entered into by respondent-mother on 11 February 2006 that again barred contact between her and Jernigan and required her to complete a psychological evaluation.

At the permanency planning hearing held on 3 March 2005, the trial court found that respondent-mother had made some progress toward achieving the permanent plan of reunification. On 14 July 2005, however, C.M.S. was adjudicated an abused juvenile because respondent-mother failed to supervise and stop the sexual abuse by Jernigan.

On 15 December 2005, the trial court entered an order changing C.M.S.'s permanent plan from reunification with respondent-mother to adoption and ordered DSS to file a petition terminating respondent-mother's parental rights. Respondent-mother's parental rights were terminated on 27 October 2006 after a five day hearing. The findings made by the trial court relative to the disposition of this appeal are discussed below.

Respondent-mother presents, in essence, two issues for this Court's review: (1) whether Title II of the Americans with Disabilities Act ("ADA" or "Act") precludes the state from terminating appellant's parental rights, and (2) whether the trial court's findings of fact were supported by competent evidence.

This Court's review of a trial court's order terminating parental rights involves two inquiries: Whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence, and whether those findings support its conclusions of law. *In re Allred*, 122 N.C. App. 561, 565, 471 S.E.2d 84, 86 (1996). A finding by the trial court of any one of the grounds enumerated in N.C. Gen. Stat. § 7B-1111 is sufficient to support an order of termination. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990).

I.

[1] Respondent-mother first argues the ADA precludes the State from terminating her parental rights because she is mentally retarded. This is an issue of first impression for this Court, and after careful review we hold that the ADA does not prevent the termination of parental rights in the instant case. The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be

excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 USCS § 12132 (2003).

In this case, respondent-mother argues that the ADA requires the state to make reasonable accommodations and provide services to assist a person with mental retardation to exercise their constitutionally protected parental rights. A similar argument was advanced in *In re Terry*, 610 N.W.2d 563, 569 (Mich. Ct. App. 2000). While the *In re Terry court* first concluded that "mental retardation is a 'disability' within the meaning of the ADA," it then agreed with the "[s]everal courts [that] have concluded that termination proceedings are not 'services, programs or activities' under the ADA, and the ADA does not apply in termination proceedings as a defense to the termination of parental rights." *Id.* (citing 28 C.F.R. 35.104; *In re Antony B.*, 735 A.2d 893, 899 (Conn. App. Ct. 1999); *State in Interest of B.K.F.*, 704 So.2d 314, 317-18 (La. Ct. App. 1997); *In re B.S.*, 693 A.2d 716, 720 (Vt. 1997); *Stone v. Daviess Co. Div. Child Serv.*, 656 N.E.2d 824, 829-30 (Ind. Ct. App. 1995); *In Interest of Torrance P.*, 522 N.W.2d 243, 245 (Wis. Ct. App. 1994)); *see also People ex rel. v. T.B.*, 12 P.3d 1221, 1223 (Colo. Ct. App. 2000). Accordingly, the *In re Terry* court held that "a parent may not raise violations of the ADA as a defense to termination of parental rights proceedings." *In re Terry*, 610 N.W.2d at 570.

The majority of jurisdictions have adopted the following reasoning for this rule: "Congress enacted the ADA to eliminate discrimination against people with disabilities and to create causes of action for qualified people who have faced discrimination. *See* 42 U.S.C. § 12101(b). Congress did not intend to change the obligations imposed by unrelated statutes." *In re Torrance P.*, 522 N.W.2d at 246; *see also Stone*, 656 N.E.2d at 829-30; *In re B.S.*, 693 A.2d at 720; *In re Anthony P.*, 101 Cal. Rptr. 2d 423, 425 (Cal. Ct. App. 2000) (noting that an all-states search for authority as to this issue established complete agreement amongst the jurisdictions that termination proceedings are not services, programs, or activities within the meaning of title II of the ADA). We agree with the majority of jurisdictions and adopt this rule of law.

The *In re Terry* court, however, did hold that Michigan's Family Independence Agency ("FIA") must comply with the ADA. *In re Terry*, 610 N.W.2d at 570. Under Michigan law, a "court must determine whether the FIA has made 'reasonable efforts' to rectify the conditions that led to its involvement in the case." *Id.* This requirement,

the court held, put FIA in compliance with the ADA's directive that disabilities be reasonably accommodated. Similarly, our state requires that "[a]ny order placing or continuing the placement of a child in the custody of the department of social services must include findings that the department of social services 'has made reasonable efforts to prevent or eliminate the need for placement of the juvenile.' " *In re Dula*, 143 N.C. App. 16, 19, 544 S.E.2d 591, 593 (2001) (quoting N.C. Gen. Stat. § 7B-507(a)(2) (1999)). The court made such a finding in this case. Thus, the ADA does not prevent the state from terminating respondent-mother's parental rights in this case. Respondent-mother's assignment or error as to this issue is overruled.

II.

[2] The trial court terminated respondent-mother's parental rights on grounds found in N.C. Gen. Stat. § 7B-1111(a)(1), (a)(2), and (a)(6). Under N.C. Gen. Stat. § 7B-1111(a)(1) (2005), parental rights may be terminated when a trial court finds that "[t]he parent has abused or neglected the juvenile." *Id.* Under N.C. Gen. Stat. § 7B-1111(a)(2), rights may be terminated upon a finding that "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing . . . that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." This finding may not be made, however, solely because the parent was impoverished. *Id.* Under N.C. Gen. Stat. § 7B-1111(a)(6), the trial court may terminate parental rights upon a finding "[t]hat the parent is incapable of providing for the proper care and supervision of the juvenile" and will be unable to do so in the foreseeable future because of, *inter alia*, mental illness or mental retardation. *Id.*

Respondent-mother challenges nearly every finding of fact made by the trial court in reaching its decision to terminate her parental rights under the three statutes referenced above. As previously stated, however, a finding by the trial court of any one of the grounds enumerated in N.C. Gen. Stat. § 7B-1111 is sufficient to support an order of termination so long as that conclusion of law is supported by findings of fact which are in turn supported by clear, cogent, and convincing evidence. *In re Taylor*, 97 N.C. App. at 64, 387 S.E.2d at 233-34; *In re Allred*, 122 N.C. App. at 565, 471 S.E.2d at 86. Because we find that the trial court made sufficient findings of fact which were supported by clear, cogent, and convincing evidence as to N.C. Gen. Stat. § 7B-1111(a)(2), we limit our discussion to that issue.

N.C. Gen. Stat. § 7B-1111(a)(2) permits termination of parental rights if the "parent has willfully left the juvenile in foster care . . . for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." *Id.* To terminate rights on this ground, the court must determine two things: (1) whether the parent willfully left the child in foster care for more than twelve months, and if so, (2) whether the parent has not made reasonable progress in correcting the conditions that led to the removal of the child from the home. *In re O.C. & O.B.*, 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396, *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005).

"A finding of willfulness does not require a showing of fault by the parent." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996). Voluntarily leaving a child in foster care for more than twelve months or a failure to be responsive to the efforts of DSS are sufficient grounds to find willfulness. *Id.* at 440, 473 S.E.2d at 398. Similarly, a parent's prolonged inability to improve his or her situation, despite some efforts and good intentions, will support a conclusion of lack of reasonable progress. *In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93 (2004).

In the instant case, findings of fact nos. 18, 34, 49, 50, 51, 52, 53, 56, and 57 all relate to a finding of willfulness and/or reasonable progress. Respondent-mother challenges each of these findings of fact on the grounds that they are not supported by clear, cogent, and convincing evidence.

At the outset we note that the trial court made a conclusion of law that respondent-mother had willfully left C.M.S. in foster care for more than twelve months without showing reasonable progress in correcting those conditions that led to the child's placement in foster care. We further note that this conclusion of law is adequately supported by findings of fact. Specifically, the trial court found that C.M.S. had been in custody of DSS since 13 February 2004 through 27 October 2006, the date of the termination proceeding. This satisfies the twelve month requirement in N.C. Gen. Stat. § 7B-1111(a)(2). As to whether the mother made reasonable progress, the trial court found:

> 34. That the Respondent biological mother has been certified as a member of the Willie M. Class, and has a longstanding pattern of impulsive and rebellious behavior. That she has been diag-

nosed with Intermittent Explosive Disorder and *has failed to follow through with treatment or benefit from any such treatment provided.*

. . .

52. . . . That the Respondent biological mother has not acquired, provided or maintained a stable home or residence for placement of the Juvenile, and has failed to complete said activity as addressed in the . . . Out of Home Family Services Agreement.[1]

. . .

56. That since the removal on the Juvenile from her custody of February 13, 2004, the Respondent biological mother has attended four (4) different mental health care centers . . . to receive mental health treatment and to Court ordered anger management and parenting classes. That the Respondent biological mother has not completed or been discharged from a mental health care center's recommended therapy, or from Court ordered anger management treatment and parenting classes. That the Respondent biological mother has failed to complete mental health care treatment, specifically individual counseling, group counseling, anger management treatment and parenting classes, has failed to offer any reason to this Court, at any point in time, for her failure to complete this mental health care treatment, and has failed to complete said activity as addressed in the aforementioned Out of Home Family Services Agreement.

(Emphasis added.) Finally, in finding of fact no. 57, the trial court concluded that respondent-mother has the capabilities to correct the conditions that led to the removal of C.M.S. but has willfully failed to do so. Having determined that the trial court's conclusion of law relating to willful abandonment is supported by the findings of fact we may now turn to respondent-mother's argument: That the findings of fact are not supported by clear, cogent, and convincing evidence. We disagree.

Evidence presented at the termination hearing included McCroskey's testimony that the court relieved DSS from reunification efforts with respondent-mother on 15 December 2005, but that she had been involved with the case since its inception on 13 February

1. The details of this agreement are discussed in the fact section above.

2004. McCroskey had supervised C.M.S. while she was in foster care and had developed all of the family services case plans with respondent-mother with the goal and objective of creating a safe home environment for C.M.S. McCroskey testified further that the behaviors respondent-mother needed to address prior to regaining custody of C.M.S. were her explosive behaviors and her need to display appropriate parenting skills. McCroskey also testified that she explained every item of the family services case plan to respondent-mother in such a way so that it would be easy to understand, and that respondent-mother was informed that she could call McCroskey anytime should she need clarification of the services being provided to her. In summation, McCroskey made a notation on 14 October 2005 that respondent-mother had completed the forensic psychological exam, but she had failed to follow through with any of the other activities regarding parenting, therapy, anger management, or medication management. We hold this to be clear, cogent, and convincing evidence that respondent-mother violated N.C. Gen. Stat. § 7B-1111(a)(2). Accordingly, we reject respondent-mother's assignments of error as to this issue.

III.

In summary, we hold that the ADA does not bar this state from terminating respondent-mother's parental rights in this case and that the trial court did not err in terminating respondent-mother's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). We have reviewed respondent-mother's remaining arguments and find them to be without merit.

Affirmed.

Chief Judge MARTIN and Judge BRYANT concur.

THE ESTATE OF LEWARD BENMACK GAINEY, DECEASED, EMPLOYEE, PLAINTIFF v. SOUTHERN FLOORING AND ACOUSTICAL CO., INC., EMPLOYER, USF&G AND KEMPER INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA06-785

(Filed 3 July 2007)

1. Workers' Compensation— finding of fact—stopped working as result of disease—insufficiency of evidence

The Industrial Commission erred in a workers' compensation case by its finding of fact that plaintiff stopped working in 1995 as a result of his disease and plaintiff's asbestos-related condition continued to deteriorate until his death because plaintiff stated unequivocally in answer to an interrogatory regarding this issue that his retirement was in no way related to any medical problem, but that he was age 60 and decided it was time to retire; and there was no evidence before the Commission as to plaintiff's condition after a doctor's last note in evidence dated 12 October 2004 until plaintiff's death on 9 May 2005. Although this finding of fact was erroneous, it was not reversible error since it did not affect the Commission's conclusions of law.

2. Workers' Compensation— finding of fact—asbestosis as result of employment—unable to perform gainful employment

Competent evidence supported the Industrial Commission's finding of fact that plaintiff had suffered from asbestosis as a result of his employment with defendant employer and the disease had rendered him unable to perform gainful employment since 3 December 1999. The possibility that one doctor's statements could support a contrary finding are of no consequence.

3. Workers' Compensation— totally and permanently disabled—asbestosis

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff was totally and permanently disabled, and entitled to benefits under N.C.G.S. § 97-29 starting 3 December 1999 based on its findings that: (1) plaintiff had received medical treatment for asbestosis-related problems; (2) plaintiff suffered from breathing problems as a result of asbestosis; (3) plaintiff had suffered from asbestosis as a result of his employment with defendant-employer and the disease had rendered him unable to perform gainful employment since 3 December 1999; (4) plaintiff's breathing problems severely

impaired his daily activities; and (5) as a result of asbestosis, it was difficult, if not impossible, for plaintiff to do any job that required any amount of physical activity.

Appeal by defendants from Opinion and Award entered 2 March 2006 by the Industrial Commission of North Carolina. Heard in the Court of Appeals 5 February 2007.

Wallace and Graham, P.A., by Edward L. Pauley, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorman, L.L.P., by Thomas M. Clare and Courtney C. Britt, for defendant-appellants.

STROUD, Judge.

Defendants appeal from the Opinion and Award of the Industrial Commission filed on 2 March 2006, which granted workers' compensation benefits and attorney's fees to plaintiff's estate for permanent and total disability due to asbestosis. We affirm.

I. Factual Background

Plaintiff testified under oath as follows: He began work for defendant-employer in 1969 as a field installer, which primarily involved the installation of asbestos tiles in ceilings. He later became a superintendent for approximately three to four years, worked as a salesman, and was a part owner for the last four or five years of his employment with Southern Flooring and Acoustical Co., Inc. ("Southern Flooring"). Plaintiff retired from his position with defendant-employer in 1983 and started his own company, Gainey Acoustical.

As owner of Gainey Acoustical, plaintiff's primary duty was soliciting contractors in order to procure orders for his company. He retired from Gainey Acoustical in November 1995, because he "just got tired and didn't want to work." He was having breathing problems at the time of his retirement, although he admitted that no doctor ever advised him to stop working. Plaintiff alone made the decision to retire because it was what he wanted to do. In addition, plaintiff's interrogatory answers state that his "retirement was in no way related to any medical problem. Plaintiff was age 60 in 1995 and decided it was time to retire." Plaintiff testified that at the time of the 30 November 2000 hearing he was having difficulty breathing, and that he "gave out" when climbing steps or walking. He also testified

that he continued to play golf, could walk a mile on level ground and had been walking for exercise for approximately ten years. Plaintiff testified that he was first diagnosed with asbestosis "five or six years" before the 30 November 2000 hearing.

Additional record evidence was offered by physicians who treated plaintiff. Dr. Robert A. Rostand was the panel physician appointed by the North Carolina Industrial Commission to examine plaintiff. Dr. Rostand testified that plaintiff had asbestosis. A letter written by Dr. Rostand on 3 December 1999 stated that plaintiff had "classic asbestos related disease," proximately caused by "occupational exposure to asbestos while employed by Southern Flooring and Acoustical," and that plaintiff was "not anticipated [to] return to gainful employment." However, the letter stated that Dr. Rostand was "unable to date the onset of [plaintiff's] pulmonary problem."

Furthermore, the record includes deposition testimony from Drs. Frederick U. Vorwald and Sever Surdulescu. Dr. Vorwald testified that plaintiff had asbestosis, and that plaintiff was "physically disabled from gainful employment." Dr. Surdulescu testified that "it would be very difficult, if not impossible [for plaintiff] to do any job that require[d] any amount of physical activity" and that he recommended plaintiff use oxygen whenever he walked. Plaintiff died on 9 May 2005.

II. Procedural History

On 8 April 1999, plaintiff filed Form 18B with the Industrial Commission, seeking benefits for an occupational disease resulting from exposure to asbestos during his employment with defendant Southern Flooring, where he was employed from 1969 to April, 1983. Defendants denied that plaintiff was entitled to benefits, contending that he did "not have a compensable occupational disease, and that he was not last injuriously exposed to the hazards of any such disease while employed by defendant-employer." The claim was initially heard before Deputy Commissioner W. Bain Jones on 30 November 2000. By an Opinion and Award filed on 30 March 2001 ("2001 Opinion and Award"), the deputy commissioner concluded that "plaintiff [had] failed to prove by the greater weight of the evidence that he [had] contracted asbestosis as a result of his employment with defendant-employer," and his claim was therefore denied.

Plaintiff appealed the 2001 Opinion and Award to the Full Commission. The Full Commission reviewed plaintiff's claim on 12 March 2003. On 2 September 2003, the Commission reversed the 2001

Opinion and Award and entered an Opinion and Award ("2003 Opinion and Award") which concluded that "plaintiff was last injuriously exposed to asbestos during his employment with Southern Flooring and that plaintiff had contracted asbestosis as a result of that exposure." The Commission concluded that plaintiff was entitled to medical compensation as a result of his asbestosis and remanded the matter to a deputy commissioner for immediate hearing and Opinion and Award regarding the disability of plaintiff as a result of his asbestosis.

On 22 September 2004, plaintiff's claim as to disability was heard by Deputy Commissioner George T. Glenn, II, upon remand by the Full Commission. At the 2004 hearing no additional lay testimony was offered, and the only new evidence presented was the deposition testimony of plaintiff's treating physicians, Dr. Sever Surdulescu and Dr. Frederick Vorwald. After the hearing, Deputy Commissioner Glenn entered an Opinion and Award on 16 June 2005 ("2005 Opinion and Award") which concluded that plaintiff had been totally disabled since January 1995 and that he was entitled to compensation from that date forward at the rate of $481.24 per week. On 28 June 2005, defendants filed notice of appeal to the Full Commission from the 2005 Opinion and Award.

The Full Commission reviewed plaintiff's claim on 8 November 2005. In its Opinion and Award filed 2 March 2006 ("2006 Opinion and Award"), the Commission found that (1) plaintiff had received medical treatment for asbestosis-related problems; (2) plaintiff suffered from breathing problems as a result of asbestosis; (3) plaintiff had suffered from asbestosis as a result of his employment with defendant-employer and the disease had rendered him unable to perform gainful employment since 3 December 1999; (4) plaintiff's breathing problems severely impaired his daily activities; (5) as a result of asbestosis, it was difficult, if not impossible, for plaintiff to do any job that required any amount of physical activity; and (6) plaintiff stopped working in 1995 as a result of his disease and plaintiff's asbestos-related condition continued to deteriorate until his death. The Commission concluded that as a result of his asbestosis, plaintiff was entitled to permanent and total disability compensation at the weekly rate of $481.24 from 3 December 1999, the date of the panel examination by Dr. Rostand, through the date of his death, 9 May 2005. Defendants were ordered to pay the compensation awarded to plaintiff's estate in a lump sum, along with attorney's fees in the amount of 25% of the compensation awarded. Defendants filed notice

of appeal to this Court from the 2006 Opinion and Award. On appeal, defendants assign error to two findings of fact in the 2006 Opinion and Award[1] and to the conclusion of law and the award of the 2006 Opinion and Award.

III. Findings of Fact

Defendants assign error to the following findings of the Commission: (1) plaintiff had suffered from asbestosis as a result of his employment with defendant-employer and the disease had rendered him unable to perform gainful employment since 3 December 1999; and (2) plaintiff stopped working in 1995 as a result of his disease and plaintiff's asbestos-related condition continued to deteriorate until his death. We determine that the first contested finding of fact is supported by competent evidence, and is therefore binding on appeal, but the second contested finding is not supported by competent evidence, and therefore not binding on appeal.

Except for jurisdictional questions, failure to assign error to the Commission's findings of fact renders them binding on appellate review. *Cornell v. Western & S. Life Ins. Co.*, 162 N.C. App. 106, 110-11, 590 S.E.2d 294, 297 (2004). Likewise, the Commission's findings of fact are binding on appeal if they are supported by competent evidence, even if there is evidence to support a contrary finding. *Morrison v. Burlington Industries*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981). Put another way, 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." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000) (citation omitted). Further, on appeal of an award of the Industrial Commission, "the evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Adams v. AVX Corp.*, 349 N.C. 679, 681, 509 S.E.2d 411, 414 (1998).

[1] Defendants are correct that the evidence does not support a finding that plaintiff stopped working in 1995 because of his medical condition, or that plaintiff's condition continued to worsen until his death. There is evidence of plaintiff's declining health leading up to

1. Defendant assigns error to a finding of fact in the 2003 Opinion and Award. Though we could exercise our discretion to review that intermediate decision because it is on the merits and necessarily affects the judgment, N.C. Gen. Stat. § 1-278 (2005), we decline to do so because the 2006 Opinion and Award contained an almost identical finding which was also assigned as error.

1995, but neither plaintiff's testimony nor his answers to interrogatories support a finding that he stopped working for this reason. In fact, in answer to an interrogatory regarding this issue, plaintiff stated unequivocally that his "retirement was in no way related to any medical problem. Plaintiff was age 60 in 1995 and decided it was time to retire." Further, there was no evidence before the Commission as to plaintiff's condition after Dr. Surdulescu's last note in evidence dated 12 October 2004 until plaintiff's death on 9 May 2005.

[2] However, there is competent evidence to support the other challenged finding of fact. The purpose of Dr. Rostand's examination of plaintiff was to determine if he suffered from asbestosis and to determine the extent of his disease. Defendants quibble in their brief over the wording of portions of Dr. Rostand's report, but considering his report and testimony in its entirety, Dr. Rostand's evidence does support the Commission's finding of fact that plaintiff suffered from asbestosis as a result of his employment with defendant-employer. The possibility that some of Dr. Rostand's statements could support a contrary finding is of no moment, because the Commission's findings based on its evaluation of Dr. Rostand's testimony and report are entitled to deference in our review of the findings of fact.

In addition, Dr. Vorwald began treating plaintiff in 1996, prior to Dr. Rostand's panel examination of plaintiff, and the history of plaintiff's actual treatment with Dr. Vorwald also supports the findings of Dr. Rostand's examination. Likewise, although plaintiff did not begin his treatment with Dr. Surdulescu until 2003, the history of this treatment also supports Dr. Rostand's 1999 findings, since plaintiff's medical course did in fact continue after 1999 as Dr. Rostand had predicted that it would based on his diagnosis. For example, Dr. Rostand concluded in 1999 that plaintiff would in the future "require continued medical surveillance for his asbestos related pulmonary condition," a conclusion affirmed by the testimony and medical records of Drs. Vorwald and Surdulescu, which both demonstrate that plaintiff's condition continued to worsen from 1999 until the date of their last documented contact with him, 12 October 2004. Defendant presented no evidence at all to contradict any of plaintiff's evidence on any issue, including Dr. Rostand's opinion as to plaintiff's disability.

The foregoing is competent evidence to support the Commission's finding that plaintiff had suffered from asbestosis as a result of his employment with defendant-employer and the disease had rendered him unable to perform gainful employment since 3 December

1999. Additionally, the Commission's other findings are binding on this Court, because they are not jurisdictional and defendant did not assign error to them.

IV. Conclusion of Law

[3] The Commission found as fact that plaintiff was "permanently and totally disabled." However, "whether an employee is disabled [for purposes of workers' compensation] is a question of law." *Heffner v. Cone Mills Corp.*, 83 N.C. App. 84, 87, 349 S.E.2d 70, 73 (1986). The Commission's legal conclusions are reviewable by the appellate courts *de novo*. *Grantham v. R. G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998). But, "where there are sufficient findings of fact based on competent evidence to support the [tribunal's] conclusions of law, the [decision] will not be disturbed because of other erroneous findings which do not affect the conclusions." *Black Horse Run Ppty. Owners Assoc. v. Kaleel*, 88 N.C. App. 83, 86, 362 S.E.2d 619, 622 (1987), *cert. denied*, 321 N.C. 742, 366 S.E.2d 856 (1988).

In order to support a conclusion that a claimant is totally and permanently disabled by exposure to asbestos, and entitled to benefits under N.C. Gen. Stat. § 97-29 (2005),[2] the Commission must find that the claimant is totally unable, *Frazier v. McDonald's*, 149 N.C. App. 745, 752, 562 S.E.2d 295, 300 (2002), *cert. denied*, 356 N.C. 670, 577 S.E.2d 117 (2003), "as a result of the injury arising out of and in the course of his employment," 149 N.C. App. at 752, 562 S.E.2d at 300 (citation omitted), "to earn, in the same or any other employment, the wages which the employee was receiving at the time of his last injurious exposure to asbestosis or silicosis," N.C. Gen. Stat. § 97-54 (2005).

The Commission's findings that (1) plaintiff had received medical treatment for asbestosis-related problems; (2) plaintiff suffered from breathing problems as a result of asbestosis; (3) plaintiff had suffered from asbestosis as a result of his employment with defendant-employer and the disease had rendered him unable to perform gainful employment since 3 December 1999; (4) plaintiff's breathing problems severely impaired his daily activities; and (5) as a result of asbestosis, it was difficult, if not impossible, for plaintiff to do any job that required any amount of physical activity were sufficient to support the Commission's conclusion that plaintiff was totally and permanently disabled, and entitled to benefits under N.C.

2. N.C. Gen. Stat. § 97-29 fixes compensation rates for total incapacity.

Gen. Stat. § 97-29 starting 3 December 1999. The findings that plaintiff stopped working in 1995 as a result of his disease, and that plaintiff's asbestos-related condition continued to deteriorate until his death, though erroneous, did not affect the Commission's conclusions of law, and are therefore not reversible error. Accordingly, we affirm the 2 March 2006 Opinion and Award of the Industrial Commission.

Affirmed.

Chief Judge MARTIN and Judge HUNTER concur.

CITIBANK, SOUTH DAKOTA, N.A., PLAINTIFF-APPELLEE v. NICOLE J.B. PALMA, DEFENDANT-APPELLANT

No. COA06-1386

(Filed 3 July 2007)

1. Creditors and Debtors— choice of law—no state law claim of usury—exception to lex loci contractus

The trial court did not err by denying defendant's motion to amend her answer and by granting summary judgment in favor of plaintiff in an action to recover on a credit card account based on its determination that North Carolina law did not apply, because: (1) there is no state law claim of usury against a national bank based on the fact that the National Bank Act under 12 U.S.C. § 85 preempts any state usury laws; (2) whether the interest charged by plaintiff is lawful in the state in which its customer resides is irrelevant, and instead the law of the state in which plaintiff is located can be applied to determine the lawfulness of plaintiff's actions; (3) although North Carolina adheres to the general rule of lex loci contractus, the express or implied contrary intent of the parties rebuts the parties' presumed intent; (4) the parties intended federal law and South Dakota law to govern, and plaintiff did not rebut the presumption of lex loci contractus by simply citing the North Carolina provision for attorney fees in its complaint; and (5) in light of plaintiff's attachments to its motion, plaintiff never intended to waive its contractual choice-of-law rights.

2. Creditors and Debtors— unconscionability—usury

The trial court did not err by denying defendant's motion to amend her answer and by granting summary judgment in favor of plaintiff in an action to recover on a credit card account even though South Dakota recognizes the doctrine of unconscionability, because: (1) in the present case, plaintiff charged interest that was expressly permitted by South Dakota law, thus establishing that the terms of the agreement were not unconscionable; and (2) although defendant attempted to assert the defense of unconscionability, this defense was actually in the nature of a defense of usury.

Appeal by Defendant from order entered 11 July 2006 by Judge Catherine C. Eagles in Superior Court, Guilford County. Heard in the Court of Appeals 9 May 2007.

Maupin Taylor, P.A., by Camden R. Webb and Carrie Anne Orlikowski, for Plaintiff-Appellee.

Charles Winfree for Defendant-Appellant.

McGEE, Judge.

Nicole J.B. Palma (Defendant) appeals from an order denying her motion to amend her answer and granting summary judgment in favor of Citibank South Dakota, N.A. (Plaintiff). We affirm.

Plaintiff filed a complaint on 25 April 2005 to recover on a credit card account. Plaintiff alleged that Defendant used a credit card obtained from Plaintiff, and that Defendant failed to pay the amount owed to Plaintiff when Plaintiff demanded payment. Plaintiff sought $19,955.03, plus interest. Plaintiff also sought attorney's fees pursuant to N.C. Gen. Stat. § 6-21.2.

Defendant filed a *pro se* answer on 23 May 2005, generally denying the allegations. Plaintiff filed a motion for summary judgment on 8 June 2006. In support of its motion, Plaintiff filed an affidavit and attached the account agreement (the agreement), as well as the account statements detailing Defendant's alleged default. The agreement states: "The terms and enforcement of this Agreement shall be governed by federal law and the law of South Dakota, where [Plaintiff] [is] located."

Defendant filed a motion on 12 June 2006 to amend her answer. Defendant proposed to raise the defenses of usury and unconscion-

ability. Specifically, in support of her proposed defense of unconscionability, Defendant stated: "The fees and charges which . . . Plaintiff seeks to recover are unconscionable under applicable law." Defendant also filed an affidavit of Dr. Mark Burkey, an economist who had studied issues related to predatory lending. In his affidavit, Dr. Burkey stated "that [Plaintiff] more than doubled the credit limit on [Defendant's] account from $6,100 to $17,270 during a three-year period of time when there were 15 late payments." Dr. Burkey further stated that "[a]fter the balance significantly increased, [Plaintiff] then reduced the credit limit and approximately doubled the interest rate."

The trial court held a hearing on both motions. In an order entered 11 July 2006, the trial court denied Defendant's motion to amend and granted Plaintiff's motion for summary judgment. The trial court denied Plaintiff's motion with respect to attorney's fees. The trial court made the following findings of fact and conclusions of law:

> 1. The fees and interest rates allowed under the terms and conditions [of] Plaintiff's contract with Defendant are usurious and unconscionable under North Carolina law, as a matter of law. However, North Carolina law is preempted by federal law, 12 U.S.C. 85 and 12 C.F.R. 7.4001, and this Court is without discretion to rule otherwise. Therefore, the fees and interest rates shall be enforced against . . . Defendant as a matter of law.
>
> 2. Allowing . . . Defendant to amend her Answer [would] be futile.
>
> 3. Plaintiff is entitled to judgment as a matter of law.

Defendant appeals.

I.

[1] Defendant argues the trial court erred by finding that North Carolina law did not apply. We disagree.

The National Bank Act (NBA) provides that a national bank may charge interest on loans "at the rate allowed by the laws of the State . . . where the bank is located[.]" 12 U.S.C. § 85 (2000). Section 85 "sets forth the substantive limits on the rates of interest that national banks may charge." *Beneficial National Bank v. Anderson*, 539 U.S. 1, 9, 156 L. Ed. 2d 1, 9 (2003). 12 U.S.C. § 86 "sets forth the elements of a usury claim against a national bank, provides for a 2-year statute of limitations for such a claim, and prescribes the reme-

dies available to borrowers who are charged higher rates and the procedures governing such a claim." *Id.* "In actions against national banks for usury, these provisions supersede both the substantive and the remedial provisions of state usury laws and create a federal remedy for overcharges that is exclusive, even when a state complainant, as here, relies entirely on state law." *Id.* at 11, 156 L. Ed. 2d at 10. In fact, "[b]ecause [Sections] 85 and 86 provide the exclusive cause of action for such claims, there is, in short, no such thing as a state-law claim of usury against a national bank." *Id.*

12 C.F.R. § 7.4001 (2007) provides: "The term 'interest' as used in 12 U.S.C. 85 includes any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended." Moreover, 12 C.F.R. § 7.4008 identifies the types of state laws that are preempted with respect to national banks' lending and other operations. With respect to non-real estate lending activities, 12 C.F.R. § 7.4008 (2007) provides, in pertinent part, as follows:

> (a) *Authority of national banks.* A national bank may make, sell, purchase, participate in, or otherwise deal in loans and interests in loans that are not secured by liens on, or interests in, real estate, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law.
>
> . . .
>
> (d) *Applicability of state law.*
>
> (1) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers are not applicable to national banks.
>
> (2) A national bank may make non-real estate loans without regard to state law limitations concerning:
>
> . . .
>
> (iv) The terms of credit, including the schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and

> payable upon the passage of time or a specified event external to the loan; [and]
>
> . . .
>
> (x) Rates of interest on loans.

Thus, it seems clear that the NBA entirely preempts any state usury laws.

In the present case, Defendant attempted to raise a usury defense alleging that Plaintiff, a national bank, assessed usurious interest rates in violation of North Carolina law. However, based on the Supreme Court's holding in *Beneficial National Bank*, a usury claim under North Carolina law does not exist against Plaintiff as a matter of law. *See Beneficial National Bank*, 539 U.S. at 11, 156 L. Ed. 2d at 10. Unless Plaintiff waived this right, only the law of the state in which Plaintiff is located can be applied to determine the lawfulness of Plaintiff's actions. It appears undisputed that Plaintiff's home state is South Dakota. Whether or not the interest charged by Plaintiff is lawful in the state in which its customer resides is irrelevant. For example, in *Marquette Nat. Bank v. First of Omaha Corp.*, 439 U.S. 299, 58 L. Ed. 2d 534 (1978), the Supreme Court held that the NBA authorized a national bank based in one state to charge its out-of-state credit card customers an interest rate on unpaid balances allowed by its home state, even though that rate was greater than that permitted by the state of the bank's nonresident customers. *Id.* at 313, 58 L. Ed. 2d at 545. Thus, the NBA completely preempts North Carolina state usury laws, and Defendant's only remedy exists under the laws of South Dakota, the state in which Plaintiff is located.

Defendant argues that Plaintiff, by citing North Carolina law regarding attorney's fees in its complaint, either elected to apply North Carolina law to the agreement, or waived its right to apply federal law or South Dakota law. We disagree.

Defendant cites *Morton v. Morton*, 76 N.C. App. 295, 332 S.E.2d 736, *disc. review denied*, 314 N.C. 667, 337 S.E.2d 582 (1985), in support of her argument that Plaintiff elected North Carolina law. In *Morton*, a husband and wife executed a separation agreement in Maryland. *Id.* at 298, 332 S.E.2d at 738. Our Court acknowledged that "North Carolina has long adhered to the general rule that 'lex loci contractus,' the law of the place where the contract is executed governs the validity of the contract." *Id.* However, North Carolina recognizes an important exception to this general rule. *Id.* at 299, 332

S.E.2d at 738. "North Carolina case law stresses that the express or implied contrary intent of the parties rebuts the parties' presumed intent, *i.e.*, the 'lex loci contractus' rule." *Id.*

In *Morton*, our Court found the parties' implied intent to apply North Carolina law to be clear based on the caption of the separation agreement that read: "North Carolina Guilford County." *Id.* Additionally, the husband "complied with the North Carolina statutory law on execution and acknowledgment of separation agreements[,]" which was more demanding than the corresponding Maryland law. *Id.* at 299, 332 S.E.2d at 738-39. Thus, the parties in *Morton* clearly intended to apply North Carolina law.

In the instant case, however, it is clear the parties intended federal law and South Dakota law to govern. The agreement expressly states: "The terms and enforcement of this Agreement shall be governed by federal law and the law of South Dakota, where [Plaintiff] [is] located." Thus, it is clear that at the time of the agreement's execution, the parties intended to apply federal law and South Dakota law. Moreover, as demonstrated by the account statements detailing Defendant's default, Plaintiff charged Defendant interest and fees in accordance with federal law and South Dakota law. We hold that simply by citing the North Carolina provision for attorney's fees in its complaint, Plaintiff did not rebut the presumption of *lex loci contractus*.

Defendant also argues Plaintiff waived its right to apply federal law or South Dakota law. "A waiver is sometimes defined to be an intentional relinquishment of a known right." *Guerry v. Trust Co.*, 234 N.C. 644, 648, 68 S.E.2d 272, 275 (1951). To constitute a waiver, "[t]he act must be voluntary and must indicate an intention or election to dispense with something of value or to forego some advantage which the party waiving it might at his option have insisted upon." *Id.* "The waiver of an agreement or of a stipulation or condition in a contract may be expressed or may arise from the acts and conduct of the party which would naturally and properly give rise to an inference that the party intended to waive the agreement." *Id.*

Although Plaintiff cited the North Carolina provision for attorney's fees in its complaint, we hold that Plaintiff did not "intentional[ly] relinquish[] . . . a known right[,]" and thus did not waive its rights under federal law or South Dakota law. *See Guerry*, 234 N.C. at 648, 68 S.E.2d at 275. In support of Plaintiff's motion for summary judgment, Plaintiff attached a copy of the agreement to its affidavit.

The agreement expressly stated that the agreement would be governed by federal law and South Dakota law. Plaintiff also attached to its affidavit all of Defendant's account statements which reflected interest and late fees calculated in accordance with federal law and South Dakota law. In light of Plaintiff's attachments to its motion, it is clear that Plaintiff never intended to waive its contractual choice-of-law rights. Thus, the trial court correctly applied federal law and South Dakota law in this matter.

Defendant also argues that North Carolina's public policy demands that we should apply North Carolina law in the present case. However, as we have already held, this matter is preempted by federal law. Therefore, we are without authority to require the application of North Carolina law. Moreover, Plaintiff neither elected to apply North Carolina law nor waived the application of federal law or South Dakota law. Therefore, this argument lacks merit. The trial court did not err by finding that North Carolina law did not apply.

II.

[2] In the alternative, Defendant argues the trial court erred by entering summary judgment for Plaintiff because South Dakota recognizes the doctrine of unconscionability. We disagree.

Defendant argues that South Dakota recognizes the doctrine of unconscionability in consumer contracts and, therefore, Defendant's proposed defense of unconscionability was not futile. Defendant cites *Durham v. Ciba-Geigy Corp.*, 315 N.W.2d 696 (S.D. 1982), as an example of the doctrine of unconscionability as it applies under South Dakota law. In *Durham*, a South Dakota farmer sued, *inter alia*, the manufacturer of an allegedly defective herbicide that had allegedly damaged his crops. *Id.* at 697. The jury determined that the defendant had breached an express warranty. *Id.* at 699. The trial court found the defendant's disclaimer of warranty and limitation of consequential damages to be unconscionable. *Id.* The Supreme Court of South Dakota affirmed, recognizing that "[o]ne-sided agreements whereby one party is left without a remedy for another party's breach are oppressive and should be declared unconscionable." *Id.* at 700-01. Therefore, the South Dakota Supreme Court held the defendant's disclaimer of warranty and limitation of consequential damages to be unconscionable and contrary to public policy. *Id.* at 701.

Durham is distinguishable from the instant case. Although in *Durham*, the defendant's disclaimer of warranty and limitation of

consequential damages were unconscionable, in the present case Plaintiff charged interest that was expressly permitted by South Dakota law. S.D. Codified Laws § 54-3-1.1 (Supp. 2003), provides:

> Unless a maximum interest rate or charge is specifically established elsewhere in the code, there is no maximum interest rate or charge, or usury rate restriction between or among persons, corporations, limited liability companies, estates, fiduciaries, associations, or any other entities if they establish the interest rate or charge by written agreement.

In the present case, the agreement provides that Plaintiff "may increase [Defendant's] annual percentage rates (including any promotional rates) on all balances to a default rate of up to 19.99% plus the applicable Prime Rate." Because the interest rates charged by Plaintiff were expressly permitted by the agreement and were in compliance with South Dakota law, the terms of the agreement were not unconscionable.

Moreover, in the present case, although Defendant attempted to assert the defense of unconscionability, we hold that this defense was actually in the nature of a defense of usury. Defendant characterizes her unconscionability defense as a challenge to a "pattern of systematic manipulation" by Plaintiff. However, Defendant's proposed defense only challenged the fees and charges Plaintiff sought to recover. Because it merely challenged the fees and charges, this claim was in the nature of a usury claim, which, as we have already stated, is preempted by federal law. *See* 12 U.S.C. § 85. Accordingly, the trial court did not err by denying Defendant's motion to amend or by entering summary judgment for Plaintiff.

Affirmed.

Judges LEVINSON and JACKSON concur.

THE NEWS REPORTER CO., INC., D/B/A THE NEWS REPORTER AND ATLANTIC CORPORATION, D/B/A THE TABOR-LORIS TRIBUNE, PLAINTIFFS v. COLUMBUS COUNTY AND JAMES VARNER, IN HIS OFFICIAL CAPACITY AS COLUMBUS COUNTY MANAGER, DEFENDANTS

No. COA06-616

(Filed 3 July 2007)

Public Records— letter from county employee—county medical director contract—personnel file exemption—redaction

A letter written by a county employee, who was required to work with the county medical director, an independent contractor, and sent to the board of commissioners in connection with its decision regarding the county medical director contract was a public record under the Public Records Act. However, portions of the letter discussing the county employee's experiences in working with the current medical director constitute personnel file information gathered by the county with respect to the letter writer and are exempt from disclosure pursuant to N.C.G.S. § 153A-98(a) so that those portions must be redacted before the letter is disclosed to plaintiff newspapers. Portions of the letter regarding a recommendation for medical director and describing the employee's interaction with the board were not exempt from disclosure under the Public Records Act.

Appeal by plaintiffs from order entered 20 February 2006 by Judge Gary L. Locklear in Columbus County Superior Court. Heard in the Court of Appeals 16 November 2006.

Everett Gaskins Hancock & Stevens, LLP, by Hugh Stevens and C. Amanda Martin, for plaintiffs-appellants.

Womble Carlyle Sandridge & Rice, PLLC, by Mark A. Davis and James R. Morgan, Jr.; and Columbus County Attorney's Office, by Steve Fowler, for defendants-appellees.

GEER, Judge.

This appeal arises from the refusal of defendant Columbus County and its County Manager, defendant James Varner, to make available to plaintiff newspapers, under the Public Records Act, N.C. Gen. Stat. §§ 132-1 *et seq.* (2005), a letter prepared by a county employee and sent to the Columbus County Board of Commissioners

regarding the Columbus County medical director contract. Based upon our review of the letter, we hold that the trial court erred in concluding that the entire letter was protected from disclosure under exceptions to the Public Records Act as applicable to counties. While portions of the letter are protected from disclosure, those portions can be redacted, and the remainder—falling within the Public Records Act—provided to plaintiffs.

Facts

In 2004, Ronald Hayes was employed as the Director of Emergency Services for Columbus County and reported directly to Varner. Hayes was required, in his job, to work with Dr. Fred Obrecht, who had a contract with the County to serve as the County's medical director. That contract expired on 1 July 2004, and, in 2005, the Columbus County Board of Commissioners ("the Board") was considering whether to renew the contract. In September 2005, Hayes wrote a letter to the Board and its personnel committee, discussing in part his experience working with Dr. Obrecht. The letter also recommended Dr. Peggy Barnhill for the position of medical director. On 19 September 2005, the Board announced that it was extending Dr. Obrecht's contract.

Plaintiffs' request for a copy of Hayes' letter was denied by defendants. On 21 October 2005, plaintiffs filed suit against the County and Varner, seeking a declaratory judgment that the letter was a public record as defined by N.C. Gen. Stat. § 132-1 (2005) and an order compelling defendants to allow plaintiffs to view and copy the letter. Defendants filed an answer denying that the letter was a public record and, on 30 January 2006, moved for summary judgment.

On 20 February 2006, the trial court entered summary judgment in favor of defendants in a summary decision, concluding only "that there is no genuine issue of material fact and Defendants are entitled to judgment as a matter of law." Plaintiffs timely appealed from this order.

Discussion

The parties do not, on appeal, point to any issues of material fact for trial. Indeed, the pertinent facts are undisputed. The questions before this Court are: (1) is the letter sent by Hayes to the Board a "public record" within the meaning of the Public Records Act, N.C. Gen. Stat. § 132-1, and (2) if so, is the letter exempted from disclosure as a personnel record under N.C. Gen. Stat. § 153A-98

(2005)? These questions present issues of law regarding the interpretation of §§ 132-1 and 153A-98 as applied to the undisputed facts. This case is, therefore, "a proper case for summary judgment." *Knight Publ'g Co. v. Charlotte-Mecklenburg Hosp. Auth.*, 172 N.C. App. 486, 488, 616 S.E.2d 602, 604, *disc. review denied*, 360 N.C. 176, 626 S.E.2d 299 (2005).

"Under the Public Records Act, the public generally has liberal access to public records." *Id.* at 489, 616 S.E.2d at 605. The parties, however, first dispute whether Hayes' letter constitutes a "public record" under that Act. N.C. Gen. Stat. § 132-1 defines "public record" as meaning:

> all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, *made or received pursuant to law or ordinance in connection with the transaction of public business* by any agency of North Carolina government *or its subdivisions*. Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, *board*, commission, bureau, council, department, authority or other unit of government of the State *or of any county*, unit, special district or other political subdivision of government.

N.C. Gen. Stat. § 132-1(a) (emphases added).

It is undisputed that Hayes' letter was written by a county employee, who was required to work with the medical director, and was received by the Board in connection with its decision regarding whom to hire as medical director, an independent contractor of the County. We hold that, under these circumstances, the Hayes letter constituted a public record. *See Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 462, 515 S.E.2d 675, 685 (1999) ("The term 'public records,' as used in N.C.G.S. § 132-1, includes all documents and papers made or received by any agency of North Carolina government in the course of conducting its public proceedings.").

Our Supreme Court has held that "in the absence of clear statutory exemption or exception, documents falling within the definition of 'public records' in the Public Records Law must be made available for public inspection." *News & Observer Publ'g Co. v. Poole*, 330 N.C. 465, 486, 412 S.E.2d 7, 19 (1992). N.C. Gen. Stat. § 132-6(a) (2005)

specifically provides: "Every custodian of public records shall permit any record in the custodian's custody to be inspected and examined at reasonable times and under reasonable supervision by any person, and shall, as promptly as possible, furnish copies thereof upon payment of any fees as may be prescribed by law."

Defendants, however, contend that the Hayes letter falls within the statutory exemption provided by N.C. Gen. Stat. § 153A-98, which provides in pertinent part:

> (a) *Notwithstanding the provisions of G.S. 132-6* or any other general law or local act concerning access to public records, personnel files of employees . . . maintained by a county are subject to inspection and may be disclosed only as provided by this section. For purposes of this section, an employee's personnel file consists of any information in any form gathered by the county with respect to that employee and, by way of illustration but not limitation, relating to his application, selection or nonselection, performance, promotions, demotions, transfers, suspension and other disciplinary actions, evaluation forms, leave, salary, and termination of employment. . . .
>
> . . . .
>
> (c) All information contained in a county employee's personnel file, other than the information made public by subsection (b) of this section, is confidential and shall be open to inspection only in the following instances . . . .

(Emphasis added.) Our Supreme Court has held that if a document falls within the scope of N.C. Gen. Stat. § 153A-98(a), then it is "not governed by N.C.G.S. § 132-6 of the Public Records Act because N.C.G.S. § 153A-98 provides such inspection and disclosure may only be done as provided by that section." *Elkin Tribune, Inc. v. Yadkin County Bd. of County Comm'rs*, 331 N.C. 735, 736, 417 S.E.2d 465, 466 (1992).

Hayes' letter addresses in part his experiences working with Dr. Obrecht, as well as providing information about another possible candidate for medical director. Because Dr. Obrecht was an independent contractor, defendants appropriately do not argue that the letter is entitled to protection under § 153A-98 as a personnel record of Dr. Obrecht. Instead, defendants contend that the letter constitutes a "personnel record" because it relates to Hayes' performance as a county employee and it was placed in his personnel file.

Initially, plaintiffs argue that § 153A-98 does not apply because Hayes' letter was not "gathered" by the Board, but rather was voluntarily sent by Hayes to the Board. This argument has previously been rejected by both the Supreme Court and this Court. *See Elkin Tribune*, 331 N.C. at 737-38, 417 S.E.2d at 467 (rejecting contention that county employee's application for employment was not included in personnel file because applications were sent to the county rather than "gathered" by the county); *Knight Publ'g*, 172 N.C. App. at 492-93, 616 S.E.2d at 607 ("Contrary to plaintiff's argument in this case, the documents it requested from defendant were 'gathered' by defendant if the documents were amassed or assembled in an employee's personnel file.").

On the other hand, we disagree with defendants' suggestion that the fact defendant Varner chose to place the letter in Hayes' personnel file has any bearing on whether that letter falls within the scope of § 153A-98. Whether a document is part of a "personnel file," within the meaning of § 153A-98(a), depends upon the nature of the document and not upon where the document has been filed. *See Poole* 330 N.C. at 476, 412 S.E.2d at 14 ("Under the plain meaning of the statutory language, *any information* satisfying the definition of 'personnel file' is excepted from the Public Records Law." (emphasis added)). As plaintiff points out, a contrary holding would transform a newspaper clipping discussing an employee's performance into a confidential record if that clipping happened to be filed in the employee's official personnel file.

Further, defendants' contention would allow governmental officials to avoid disclosure of a document under the Public Records Act simply by placing a document in an employee's file. Our Supreme Court has held that "[a] custodian of such 'public records' has no discretion to prevent public inspection and copying of such records." *Virmani*, 350 N.C. at 465, 515 S.E.2d at 686. Focusing on where the document is stored would, however, grant the custodian precisely the discretion precluded by the Public Records Act. Indeed, this Court has previously held that the Public Records Act may not be interpreted in a way that allows "municipalities and other governmental agencies [to] skirt[] the public records disclosure requirements" by lodging public records "that municipalities and agencies [choose] to shield from public scrutiny" in a particular location not generally subject to disclosure. *Womack Newspapers, Inc. v. Town of Kitty Hawk*, 181 N.C. App. 1, 13-14, 639 S.E.2d 96, 105 (2007) (holding that town could not place public records with independent contractor in order to escape public records disclosure requirements).

After examining the letter at issue, we believe that the portions discussing Hayes' interactions with Dr. Obrecht constitute "any information in any form gathered by the county with respect to that employee . . . relating to his . . . performance . . . ." N.C. Gen. Stat. § 153A-98(a). The letter does not comment on Dr. Obrecht's qualifications, skill, or reputation as a physician or on whether Dr. Obrecht's medical skills and training were a good match for the County's needs, but rather discusses Hayes' ability to work with Dr. Obrecht. We believe that the letter, to the extent it discusses Dr. Obrecht, also relates to Hayes' performance as a county employee.

Plaintiffs, however, point to *Poole*, 330 N.C. at 476, 412 S.E.2d at 14, as requiring that the letter "relate to at least one of the enumerated activities *by the employer* with respect to the individual employee." (Emphasis supplied by plaintiffs.) The Supreme Court in *Poole* was, however, construing a different statute: N.C. Gen. Stat. § 126-22 (1987). That statute provided that the information constituting a personnel file must "relate[] to the individual's application, selection or nonselection, promotions, demotions, transfers, leave, salary, suspension, *performance evaluation forms*, disciplinary actions, and termination of employment" (emphasis added)—all areas involving action by the employer, as the Supreme Court held. *See id.* at 476, 412 S.E.2d at 14. In contrast, N.C. Gen. Stat. § 153A-98(a) specifically references "performance" generally and, in any event, contains a list that is "merely illustrative," *Knight Publ'g*, 172 N.C. App. at 495, 616 S.E.2d at 608, as indicated by the qualification that the list is "by way of illustration but not limitation," N.C. Gen. Stat. § 153A-98(a). We, therefore, hold that the portions of the letter addressing Hayes' experience with Dr. Orbecht fall within § 153A-98(a).

The Hayes letter is not, however, limited to discussing Dr. Orbecht, but also addresses Hayes' recommendation of Dr. Peggy Barnhill for the position of county medical director. In addition, it contains a paragraph describing Hayes' interactions with the Board regarding its process in making decisions relating to the medical director contract. This paragraph explains how Hayes came to write the letter.

N.C. Gen. Stat. § 153A-98(a) does not protect all information "with respect to" an employee. Instead, it requires both (1) that the information be "with respect to" the employee, and (2) that it "relat[e] to" a list of subjects arising out his employment, although that list is

"by way of illustration but not limitation." *Id.* Thus, although the precise test articulated in *Poole* does not apply, § 153A-98(a) still requires, at least, that the information relate to the employee's employment with the governmental body.[1]

We can perceive no basis for considering the Barnhill portion of the letter or the description of the Board's conduct to be "any information" gathered by the County "with respect to" the types of matters governed by § 153A-98(a) regarding Hayes' employment with the County. *Id.* Thus, a portion of the letter is covered by § 153A-98(a), but a portion of the letter is not. N.C. Gen. Stat. § 132-6(c) specifies that "[n]o request to inspect, examine, or obtain copies of public records shall be denied on the grounds that confidential information is commingled with the requested nonconfidential information." The statute specifically provides that a governmental body may be required "to separate confidential from nonconfidential information in order to permit the inspection . . . ." *Id.*

Accordingly, defendants may redact those portions of the Hayes letter protected from disclosure by § 153A-98, but must produce the remaining portions. Based upon our review of the letter, defendants are directed to redact the last sentence of the first paragraph of the letter (beginning "However . . . .") and the entirety of the letter's second paragraph (beginning "We have . . . ."), third paragraph (beginning "There have . . . ."), and sixth paragraph (beginning "I feel . . . ."). The first sentence of the fourth paragraph (beginning "As you gentlemen are aware . . . .") must also be redacted. The remainder of the first paragraph, together with the remainder of the fourth paragraph (beginning "As you are also aware . . . .") and the fifth paragraph (beginning "At this time . . . .") must be provided to plaintiffs.

Affirmed in part and reversed in part.

Judges LEVINSON and JACKSON concur.

1. We are not required by this appeal to examine the precise scope of this second requirement of § 153A-98(a).

STATE OF NORTH CAROLINA v. RUSSELL HARMAN WHITE

No. COA06-1264

(Filed 3 July 2007)

Search and Seizure— knock and announce search warrant— motion to suppress evidence

The trial court erred in a drug case by granting defendant's motion to suppress evidence under N.C.G.S. § 15A-979(c) that was obtained during law enforcement's search of defendant's home under a valid search warrant even though there was no evidence as to why the law enforcement team was given the command to execute a forced entry into defendant's dwelling, because: (1) the trial court's findings fail to support its conclusion of law that law enforcement's substantial violation when executing a knock and announce warrant under N.C.G.S. § 15A-251 requires suppression of the evidence seized as fruit of the poisonous tree to deter future violations; (2) as long as the evidence at issue was not discovered as a direct result of the entry but as a result of the later search conducted under the valid search warrant, the evidence is admissible despite a substantial violation of N.C.G.S. § 15A-251; and (3) the search in the instant case was conducted sometime after the forced entry, and only after the occupants were secured and defendant was read a copy of the warrant and his Miranda rights.

Appeal by the State from order entered 26 July 2006 by Judge Carl R. Fox in Chatham County Superior Court. Heard in the Court of Appeals 25 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant.

LEVINSON, Judge.

The State appeals an order granting defendant's motion to suppress evidence pursuant to N.C. Gen. Stat. § 15A-979(c) (2005). We reverse.

The evidence presented at the evidentiary hearing on defendant's motion to suppress tended to show the following: During June

2006, Phillip Cook, a narcotics unit investigator with the Chatham County Sheriff's Department, sent individuals designated as "confidential reliable sources" (CRS) to a mobile home located at 2135 Staley Snow Camp Road to make "controlled purchases" of cocaine on three separate occasions. On each of the occasions, the CRS reported that they had entered the residence through a side door and that they had purchased a quantity of cocaine from a man later identified as defendant.

Based on the controlled purchases, Cook obtained a warrant on 29 June 2005 to search defendant's residence for illegal narcotics. Before executing the warrant, Cook briefed his team of law enforcement officers (SIRT Team) regarding information received from the CRS pertaining to the residence and its occupants. Cook informed the team that there might be multiple people in the house; that firearms had been seen in the house; and that there was a large dog at the side of the residence held by a chain.

At approximately 10:00 p.m. on 29 June, the law enforcement team executed the search warrant. The team assembled in a line of five persons, with Deputy Jay Calendine in the lead. Calendine knocked and announced law enforcement's presence, and the team waited approximately five seconds. After not receiving any response, Calendine gave the signal for entry and the team executed a forced entry. Calendine was not present at the suppression hearing in Superior Court to testify regarding, *inter alia*, the rationale for giving the signal to break and enter into the premises. Ballard, who was second in line, used a battering ram to break down the door. Following entry, the residence was secured and defendant was read a copy of the search warrant. Defendant was also read his *Miranda* rights.

Upon entry, the officers observed several adults and one teenager inside the residence. After securing defendant and the other occupants of the residence, a search was conducted pursuant to the warrant. Crack cocaine in a cellophane bag was located in the bottom of a deep fryer located in the kitchen. Inside of another deep fryer, located next to the first, two semi-automatic pistols, ammunition, digital scales and razor blades were found. Additionally, $1,000.00 was found in a deep fryer underneath the grease pan. When confronted with the crack cocaine, defendant stated that the cocaine "belonged" to him. Defendant was searched and $457.00 was seized, including $15.00 that matched money used during the earlier controlled purchases.

At the conclusion of the hearing, the trial court entered a written order granting the motion to suppress. The court made the following pertinent findings of fact:

> 1. Deputy Brandon Jones was working on June 30, 2005, at 2145 as Commander of the SIRT Team for the Chatham County Sheriff's Department for the service of a search warrant and developing an entry plan of the search of the residence.
>
> 2. The residence was a double-wide trailer (modular home) and the search was for purpose of discovering drugs. Officers were concerned about the possible destruction of evidence, drugs, but Deputy Jones gave no specific reasons as to why they were concerned about the destruction of the drugs.
>
> 3. Deputy Jones assigned another Deputy, Jay Calendine, to knock and announce an entry. The normal entry point for occupants and visitors to the residence was the side door.
>
> 4. Deputy Jay Calendine went to the front door of the residence, knocked on the door, and announced the presence of the Sheriff's Department Deputies for the purpose of searching the premises.
>
> 5. Deputy Jones did not know whether the front door was locked or unlocked and he could not remember how long they waited before they gained entry by force.
>
> 6. Deputy Jones was fourth in a stack of five officers when Deputy Jay Calendine gave the signal and entry was made to the premises using a breaching tool or battering ram and shield as authorized for entry to the residence.
>
> 7. Deputy Calendine was unavailable to testify and Deputy Jones did not know why Deputy Calendine gave the signal to forcibly enter the premises. Deputy Jones was unable to hear what was going on in the residence. He also did not make any personal observations about "the officers admittance being denied or any unreasonable delay or the premises being unoccupied or evidence being destroyed." Jones testified they may have waited five second or more.
>
> 8. Russell H. White was in the dwelling with other individuals. However, Deputy Jones was unaware of where the other people were after they gained entry to the residence.
>
> . . . .

13. No nuisance calls had been received about the residence, no one had ever answered the door armed with a weapon and the home was not fortified in any way.

14. After obtaining a search warrant, the officers discussed an operations plan for service of the search warrant. The officers were aware that they could encounter multiple subjects, but no children, at the residence. According to the confidential informant, there were firearms inside the residence.

. . . .

16. A large dog was chained near the side door, but was not aggressive and could not reach the side door. However, the dog barked when visitors approached the residence.

The trial court made the following conclusions of law:

1. The entry by force of the Defendant's residence violated the Fourth Amendment to the United States Constitution against unreasonable searches and seizures and the entry by force was a "substantial violation" of N.C.G.S. 15A-251, because there was no evidence before the Court that "the officer' admittance was being denied or unreasonably delayed, or that the premises were unoccupied" at the time of forced entry to execute the search warrant.

2. The entry by force of the Defendant's residence was a violation of the Defendant's Fourth Amendment Right under the U.S. Constitution against unreasonable searches and seizures and the entry was a "substantial violation" of N.C.G.S 15A-251 that "protects the Defendant and other occupants of his residence, the Defendant's residence, real property, and personal property as well as the law enforcement officers searching the Defendant's residence from injury and bodily harm." This "substantial violation" requires suppression of the evidence seized as "fruit of the poisonous tree" to deter future violations.

The trial court suppressed the evidence discovered during the execution of the warrant, and suppressed the inculpatory statement made by defendant that the cocaine belonged to him. The State now appeals.

On appeal, the State contends that the trial court erred by granting defendant's motion to suppress evidence obtained during law enforcement's search of defendant's home pursuant to the valid search warrant. It does not challenge the court's conclusions that

the entry by police constituted a violation of the Fourth Amendment and a substantial violation of N.C. Gen. Stat. § 15A-251 (2005). Instead, the State contends that there was an insufficient "nexus" between the improper entry to the residence and the evidence to support the suppression of the evidence, and that the evidence was not obtained "as a result of" a substantial violation of G.S. § 15A-251. Defendant concedes that law enforcement's actions would not require suppression of the evidence under the Fourth Amendment to the federal constitution, citing *Hudson v. Michigan*, —— U.S. ——, 165 L. Ed. 2d 56 (2006), but argues that the manner of entry constitutes a violation of G.S. § 15A-251 and must be suppressed by operation of G.S. § 15A-974.

> Generally, an appellate court's review of a trial court's order on a motion to suppress is strictly limited to a determination of whether its findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion. Where, however, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. . . . Accordingly, we review the trial court's order to determine only whether the findings of fact support the legal conclusion[s]. . . .

State v. Roberson, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36 (2004) (internal quotation marks and citations omitted).

In the instant case, the State has not challenged any of the trial court's findings of fact. The findings are therefore deemed supported by competent evidence and binding on appeal. We are therefore left to determine whether the findings support the trial court's legal conclusions. After careful review, we conclude that the trial court's findings fail to support its conclusion of law that law enforcement's " 'substantial violation' [of G.S. § 15A-251] requires suppression of the evidence seized as 'fruit of the poisonous tree' to deter future violations." (underlining added).

Section 15A-251 codified the manner in which knock and announce warrants are to be executed in North Carolina. The statute provides:

> An officer may break and enter any premises or vehicle when necessary to the execution of the warrant if:
>
> (1) The officer has previously announced his identity and purpose as required by G.S. 15A-249 and reasonably believes either

> that admittance is being denied or unreasonably delayed or that the premises or vehicle is unoccupied; or
>
> (2) The officer has probable cause to believe that the giving of notice would endanger the life or safety of any person.

Section 15A-251(1) "lists the circumstances under which an officer, after announcing his identity and purpose, may break and enter the premises to execute a warrant." *State v. Marshall*, 94 N.C. App. 20, 29, 380 S.E.2d 360, 366 (1989). "The officer must reasonably believe admittance is being denied or unreasonably delayed or that the premises is unoccupied." *Id.* (citation omitted). This Court has stated that "[w]hat is a reasonable time between notice and entry depends on the particular circumstances in each case." *Id.* at 30, 380 S.E.2d at 366. "If the method of entry by police officers renders a search illegal, the evidence obtained thereby is not competent evidence at defendant's trial." *Id.* at 29, 380 S.E.2d at 366 (citing *State v. Mitchell*, 22 N.C. App. 663, 207 S.E.2d 263 (1974)).

In the present case, the State and defendant both agree that a substantial violation of G.S. § 15A-251 occurred because there was no evidence as to why the SIRT team was given the command to execute a forced entry into defendant's dwelling. However, not all infringements of G.S. § 15A-251 require the suppression of evidence.

G.S. § 15A-974 provides, in pertinent part, that evidence must be suppressed if:

> (2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:
>
> a. The importance of the particular interest violated;
>
> b. The extent of the deviation from lawful conduct;
>
> c. The extent to which the violation was willful;
>
> d. The extent to which exclusion will tend to deter future violations of this Chapter.
>
> Our Supreme Court has articulated that:
>
> G.S. 15A-974(2) provides that evidence obtained as a result of a substantial violation of the provisions of Chapter 15A must, upon

> timely motion, be suppressed. The use of the term result in this statute indicates that a causal relationship must exist between the violation and the acquisition of the evidence sought to be suppressed. . . . [E]vidence will not be suppressed unless it has been obtained as a consequence of the officer's unlawful conduct . . . . The evidence must be such that it would not have been obtained but for the unlawful conduct of the investigating officer.

State v. Richardson, 295 N.C. 309, 322-23, 245 S.E.2d 754, 763 (1978) (internal quotation marks and citations omitted). As long as "[t]he evidence at issue was not discovered as a direct result of the entry but as a result of the later search conducted pursuant to the valid search warrant", the evidence is admissible despite a substantial violation of G.S. § 15A-251. *State v. Knight*, 340 N.C. 531, 548, 459 S.E.2d 481, 492 (1995).

Here, the search was conducted sometime after the forced entry, and only after the occupants were secured and defendant was read a copy of the warrant and his *Miranda* rights. It was only then that the search of the premises revealed contraband inside two deep fryers in a room not connected to the point of entry. Defendant does not challenge the search warrant as unsupported by probable cause. And the cocaine would have likely been located even in the absence of the forced entry. *See State v. Vick*, 130 N.C. App. 207, 219, 502 S.E.2d 871, 879 (1998).

We conclude that the contraband was not subject to suppression because it was not obtained "as a result of" the improper entry. The trial court erred by suppressing the contraband and defendant's inculpatory statement.

Reversed.

Judges McGEE and JACKSON concur.

CORNELIUS CLAWSER AND WIFE, MARLENE CLAWSER, PLAINTIFFS v. CORALEE CAMPBELL D/B/A MASON'S RUBY AND SAPPHIRE MINE, CHRISTINE L. MASON, AN INCOMPETENT PERSON, BY AND THROUGH HER GUARDIAN, CORA LEE CAMPBELL. DEFENDANTS

No. COA06-1192

(Filed 3 July 2007)

1. Process and Service— guardian of person—failure to appoint guardian ad litem

The trial court erred in a negligence, ultra-hazardous activity, and loss of consortium case arising out of an injury while gem mining on the incompetent defendant's real property by concluding that defendant was properly sued and served through her guardian of the person, because: (1) the legislature's decision to confer power to maintain an action on a general guardian but not a guardian of the person implies that the latter lacks such power; (2) N.C.G.S. § 1A-1, Rule 17(b)(2) requires appointment of a guardian ad litem where no general or testamentary guardian has been appointment; and (3) defendant was neither properly sued nor served in the absence of a guardian ad litem or general guardian.

2. Discovery— failure to appear at deposition—sanctions—failure to consider lesser sanctions before striking defenses—abuse of discretion

The trial court abused its discretion in a negligence, ultra-hazardous activity, and loss of consortium case arising out of an injury while gem mining on defendant's real property by granting plaintiffs' motion for sanctions against defendants for failure to appear at a deposition by barring defendants from denying liability and limiting the trial to damages because the trial court did not consider any lesser sanctions before striking defendants' defenses on the issue of liability.

Appeal by defendants from judgment entered 22 March 2005 and order entered 19 October 2005 by Judge Zoro Guice, Jr. in Macon County Superior Court. Heard in the Court of Appeals 27 March 2007.

Melrose, Seago & Lay, P.A., by Randal Seago, for plaintiffs-appellees.

Collins & Hensley, P.A., by Robert E. Hensley, for defendants-appellants.

MARTIN, Chief Judge.

Defendants appeal from a judgment entered upon a jury verdict in favor of the plaintiffs totaling $187,500. For the reasons below, we vacate the trial court's judgment and remand for further proceedings after appointment of a proper guardian for defendant Mason.

The evidence before the trial tended to show that defendant Mason was, on the date this action was filed, approximately 90 years old and resided in a nursing facility for the elderly in Macon County. On 11 July 2002, the Clerk of Superior Court for Macon County determined that she lacked sufficient capacity to manage her own affairs or make important decisions concerning her person, family or property, and adjudicated her incompetent. Her daughter and co-defendant, Cora Lee Campbell, was appointed guardian of her person on 1 August 2002.

Plaintiff Cornelius Clawser was injured on 12 September 2002 while gem mining on real property owned by defendant Mason. On 5 June 2003, plaintiffs filed suit against defendant Campbell, alleging negligence, ultra-hazardous activity and loss of consortium. Defendant Campbell filed an Answer on 17 August 2003 through James R. Anderson, her attorney. Plaintiffs filed an amended complaint to add defendant Mason on 21 November 2003. The Amended Complaint was served by mail addressed to "John R. Anderson . . . For Defendant Cora Lee Campbell." On 13 March 2004, Mr. Anderson filed an answer purportedly on behalf of both Ms. Mason and Ms. Campbell denying negligence but conceding personal jurisdiction over both defendants. Mr. Anderson was subsequently allowed to withdraw as counsel due to his relocation to Fayetteville. In the interim, plaintiffs had sought and obtained an entry of default on 21 January 2004.

Defendant Campbell subsequently sought to retain the services of another local attorney, Andrew Patterson. On the first day of trial, prior to jury selection, Mr. Patterson advised the court that he had not agreed to represent defendant Campbell, and did not represent her. At the same time, the trial court addressed the plaintiffs' motion for sanctions against defendants for defendant Campbell's failure to appear at a deposition. Defendant Campbell told the court that Mr. Patterson had advised her not to go to the deposition since he would not be able to appear. The trial court allowed plaintiffs' motion to strike defendants' answer with respect to liability, and to proceed to trial solely on damages. During the course of the trial, the trial court

became aware that Mr. Patterson had not returned the defendants' case file to Ms. Campbell after deciding not to represent defendants. The trial court expressed its concern over the situation, but continued the trial with defendant Campbell representing herself and her mother *pro se*. After deliberation, the jury awarded Cornelius Clawser $185,000 for his injuries, and Marlene Clawser $2,500 for loss of consortium.

On 19 August 2005, defendants filed a Motion Pursuant to Rule 60 and a Motion for Temporary and Preliminary Injunction. On 22 August 2005, the Macon County Superior Court entered an order temporarily restraining and enjoining the Macon County Sheriff's Department from taking any action to execute on the judgment. The order was periodically extended. Defendants' Rule 60 motion came for a hearing before the Macon County Superior Court on 9 September 2005. On 19 October 2005, the court ruled that defendants had failed to plead or prove any grounds for relief under Rule 60. The motion was denied. This appeal follows.

[1] We first address the issue of whether defendant Mason was properly sued and served through her Guardian of the Person. Plaintiffs argue that she was properly served and defended, and that furthermore, any objection to service has been waived by the failure of defendants to raise it as a threshold defense. Defendants contend that since defendant Mason was never served appropriately and that her Guardian of the Person was not authorized to undertake a defense on her behalf, any service and consequent waiver was ineffective. Whether a Guardian of the Person may sue or be sued on behalf of a ward appears to be an issue of first impression in North Carolina. None of the authority cited by the parties in their briefs speaks directly to the issue, and our own research has failed to unearth any. However, our Supreme Court has held that if a defendant is *non compos mentis*, he must defend by "general or testamentary guardian if he has one within the state, and, if he has none, by a guardian ad litem to be appointed by the court." *Hood v. Holding*, 205 N.C. 451, 453, 171 S.E. 633, 634 (1933). We note that defendant Mason had no general or testamentary guardian, and no guardian ad litem was ever appointed by the court.

We further note that the *Hood* holding is supported by the current statutory scheme. The statutes governing general guardians specifically grant general guardians the power to undertake and defend legal actions on behalf of their wards:

> In the case of an incompetent ward, a general guardian or guardian of the estate has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, and use of the ward's estate to accomplish the desired result of administering the ward's estate legally and in the ward's best interest, including but not limited to the following specific powers: . . .
>
> (3) To maintain any appropriate action or proceeding to recover possession of any of the ward's property, to determine the title thereto, or to recover damages for any injury done to any of the ward's property; also, to compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle any other claims in favor of or against the ward.

N.C. Gen. Stat § 35A-1251 (2005). By contrast, the statute dealing with Guardians of the Person confers no power to maintain action, only stating that such a Guardian may confer such consent as necessary to maintain a service:

> § 35A-1241. Powers and duties of guardian of the person
>
> (a) To the extent that it is not inconsistent with the terms of any order of the clerk or any other court of competent jurisdiction, a guardian of the person has the following powers and duties: . . . .
>
> (3) The guardian of the person may give any consent or approval that may be necessary to enable the ward to receive medical, legal, psychological, or other professional care, counsel, treatment, or service. The guardian shall not, however, consent to the sterilization of a mentally ill or mentally retarded ward unless the guardian obtains an order from the clerk in accordance with G.S. 35A-1245. The guardian of the person may give any other consent or approval on the ward's behalf that may be required or in the ward's best interest. The guardian may petition the clerk for the clerk's concurrence in the consent or approval.

Under the doctrine *inclusio unius est exclusio alterius* ("The inclusion of one is the exclusion of another." *Black's Law Dictionary* 763 (6th ed. 1990)), the legislature's decision to confer the power to maintain an action on a general guardian, but not a guardian of the person, implies that the latter lacks such power. This is also an implied requirement of our Rules of Civil Procedure which impose the

requirement of appointment of a guardian *ad litem* where no general or testamentary guardian has been appointed. *See* N.C. Gen. Stat. § 1A-1, Rule 17(b)(2) (2005) ("In actions or special proceedings when any of the defendants are infants or incompetent persons, . . . they must defend by general or testamentary guardian, if they have any within this State or by guardian ad litem appointed as hereinafter provided.") Therefore, we must conclude that defendant Mason was neither properly sued nor served in the absence of a guardian *ad litem* or general guardian, and set aside the verdict against her on that basis.

[2] Turning to defendant Campbell, defendants argue that the trial court erred in granting the plaintiffs' motion for sanctions against defendants by barring defendants from denying liability, and limiting the trial to damages. We agree.

Plaintiffs argue that the entry of default against the defendants was based on their failure to file a responsive pleading to the Amended Complaint. However, the transcript clearly reveals that the issue of liability was decided based on defendant Campbell's failure to attend her scheduled discovery deposition. At the time in question, plaintiffs' counsel told the trial court:

> Plaintiff Counsel: We would ask the court to enter a judgment against her [defendant] as to liability and proceed only on damages. That would be our request for—*an appropriate response for not participating in her deposition*. . . .
>
> Trial Court: The Court will allow the motion of the plaintiff as to liability and will try this matter on the question of damages, and finds that the plaintiff [sic] received notice of the deposition and for whatever reason chose not to appear at the deposition and made no appearance at the deposition following due and proper notice of the deposition. So we'll try the matter only on the question of damages. . . . Ma'am, I don't know if you understand what's going on or not, but liability is no longer an issue, the Court having decided that that *is a proper determination for the Court to make as sanctions for your failure to appear for the deposition.*

(Emphasis added). The above exchange makes clear that defendants' denial of liability was stricken based solely for defendant Campbell's discovery violations, and not by reason of the earlier entry of default. Having asserted only that ground in their arguments to the trial court,

plaintiffs are estopped from raising an alternative argument before this Court. "Our Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (citation omitted).

Therefore, we review the propriety of striking the defendants' defenses as a sanction for the discovery violation. This Court has recently reaffirmed "that trial courts are not without the power to sanction parties for failure to comply with discovery orders." *Harrison v. Harrison*, 180 N.C. App. 452, 456, 637 S.E.2d 284, 288 (2006). Striking of defenses or counterclaims is an appropriate remedy, and is within the province of the trial court. *Jones v. GMRI, Inc.*, 144 N.C. App. 558, 565, 551 S.E.2d 867, 872 (2001). This Court will not disturb a dismissal absent a showing of abuse of discretion by the trial judge. *Benton v. Hillcrest Foods, Inc.*, 136 N.C. App. 42, 524 S.E.2d 53 (1999). However, if the trial court chooses to exercise the option of striking a party's defenses or counterclaims, it must do so after considering lesser sanctions. *See In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 251, 618 S.E.2d 819 (2005); *Goss v. Battle*, 111 N.C. App. 173, 176, 432 S.E.2d 156, 159 (1993).

An examination of the transcript reveals that the trial court did not consider any lesser sanctions before striking the defendants' defenses on the issue of liability. The trial then proceeded on the sole issue of damages. Therefore, we are compelled to set aside the trial court's order striking defendants' defenses. The judgment is thus vacated, and the case remanded to the trial court for proceedings consistent with this opinion.

Judgment vacated; Remanded.

Judges WYNN and GEER concur.

INTEGON NATIONAL INSURANCE COMPANY, PLAINTIFF v. BRANDON LEE WARD, BY AND THROUGH HIS GUARDIAN AD LITEM, FRANKIE J. PERRY; BRAGG AUTO & MUFFLER, INC. D/B/A BRAGG AUTO AND MUFFLER SHOP; GEORGE REDIN SMITH; AND THOMAS DWAYNE TAYLOR, DEFENDANTS

No. COA06-1200

(Filed 3 July 2007)

Insurance— automobile—repair shop—injury to child—coverage under customer's liability policy

A minor child's injuries at an automobile repair shop when an employee of the shop backed a vehicle into the child as the child and a customer were walking to the office while waiting for the customer's automobile to be repaired arose out of the ownership, maintenance or use of the customer's automobile so that the customer's automobile liability policy provided coverage for the customer's alleged liability for the child's injuries.

Judge STEELMAN concurring.

Appeal by plaintiff from a judgment entered 25 May 2006 by Judge Richard W. Stone in Forsyth County Superior Court. Heard in the Court of Appeals 29 March 2007.

Bennett & Guthrie, P.L.L.C., by Rodney A. Guthrie, Joshua H. Bennett, and Jason P. Burton, for plaintiff-appellant.

Pulley, Watson, King & Lischer, P.A., by Guy W. Crabtree, for defendant-appellees Brandon Lee Ward and Frankie J. Perry.

BRYANT, Judge.

Integon National Insurance Company (plaintiff) appeals from an order entered 25 May 2006 granting summary judgment in favor of Brandon Lee Ward (Ward) and denying, in part, plaintiff's Motion for Summary Judgment. We affirm the order of the trial court.

Facts and Procedural History

In February 2002, Thomas Dwayne Taylor obtained a personal automobile liability insurance policy with Integon National Insurance Company for the policy period beginning 9 February 2002, and ending 9 August 2002. On 9 March 2002, Taylor, accompanied by Brandon Lee Ward, drove in Taylor's insured vehicle to the Bragg Auto and Muffler Shop in Spring Lake, North Carolina, to have some exhaust

work done on Taylor's insured vehicle. Ward was two years old at the time. While they were waiting for the repair work to be completed on Taylor's car, Taylor and Ward walked around the premises of Bragg Auto.

As Taylor and Ward were walking back to the office, George Redin Smith, backed another vehicle out one of the maintenance bays and struck Ward, causing Ward bodily injuries. At the time of the accident, Smith was an employee of Bragg Auto and operated the automobile in the course and scope of his employment with Bragg Auto and with the knowledge and consent of Bragg Auto. The automobile driven by Smith at the time of the accident was not owned by Taylor and was not listed on his policy.

On 4 March 2005, Ward, by and through his *Guardian ad Litem* Frankie J. Perry, filed a lawsuit in Durham County Superior Court against Bragg Auto & Muffler, Inc. d/b/a Bragg Auto and Muffler Shop, George Redin Smith, and Thomas Dwayne Taylor. In that suit, Ward seeks to recover damages he allegedly sustained in the March 9 March 2002 accident, which he claims was caused by the negligence of Bragg Auto, Smith, and Taylor. On 11 August 2005, plaintiff filed a Complaint for Declaratory Judgment seeking a determination of coverage for Taylor, its insured, under his personal automobile liability insurance policy. On 1 May 2006, plaintiff filed a Motion for Summary Judgment. Ward similarly filed a Motion for Summary Judgment on 8 May 2006. By Order entered 25 May 2006, the trial court granted Ward's Motion for Summary Judgment and denied plaintiff's Motion for Summary Judgment, in part. The trial court held that the automobile insurance policy issued to Taylor by plaintiff does not provide medical payments coverage for Ward; however the policy does provide liability coverage to Taylor for the claims raised by Ward against Taylor in the suit currently pending in Durham County. Plaintiff appeals.

Plaintiff raises the issue of whether the trial court erred in denying, in part, its motion for summary judgment. Under Rule 56(c) of the North Carolina Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). "The burden is upon the moving party to show that no genuine issue of material fact exists and that the mov-

ing party is entitled to judgment as a matter of law." *McGuire v. Draughon*, 170 N.C. App. 422, 424, 612 S.E.2d 428, 430 (2005) (citing *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982)). On appeal, this Court reviews an order granting summary judgment *de novo*. *McCutchen v. McCutchen*, 360 N.C. 280, 285, 624 S.E.2d 620, 625 (2006).

Plaintiff argues the trial court erred in denying its motion for summary judgment because there is no liability coverage under the terms and conditions of Taylor's insurance policy for the claims raised by Ward against Taylor. Plaintiff contends the accident in which Ward was injured did not arise out of the ownership, maintenance or use of Taylor's vehicle insured with plaintiff. We disagree.

"[I]t is well established in North Carolina that as a matter of law the provisions of the Financial Responsibility Act are written into every automobile liability policy." *Nationwide Mut. Ins. Co. v. Webb*, 132 N.C. App. 524, 525, 512 S.E.2d 764, 765 (citing *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 538-39, 350 S.E.2d 66, 69 (1986)), *disc. review denied*, 350 N.C. 834, 538 S.E.2d 198 (1999). Pursuant to the Financial Responsibility Act, an owner's policy of liability insurance, "[s]hall insure the person named therein . . . against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle[.]" N.C. Gen. Stat. § 20-279.21(b)(2) (2005).

Our Supreme Court has further held that "provisions of insurance policies and compulsory insurance statutes which extend coverage must be construed liberally so as to provide coverage, whenever possible by reasonable construction." *State Capital Ins. Co.*, 318 N.C. at 538, 350 S.E.2d at 68. The Court held:

> The words 'arising out of' are not words of narrow and specific limitation but are broad, general, and comprehensive terms affecting broad coverage. They are intended to, and do, afford protection to the insured against liability imposed upon him for all damages caused by acts done in connection with or arising out of such use. They are words of much broader significance than 'caused by.' They are ordinarily understood to mean . . . 'incident to,' or 'having connection with' the use of the automobile[.]

Id. at 539, 350 S.E.2d at 69 (quoting *Fidelity & Cas. Co. of N.Y. v. N.C. Farm Bureau Mut. Ins. Co.*, 16 N.C. App. 194, 198, 192 S.E.2d 113, 118, *cert. denied*, 282 N.C. 425, 192 S.E.2d 840 (1972)). "[T]he test

for determining whether an automobile liability policy provides coverage for an accident is not whether the automobile was a proximate cause of the accident. Instead, the test is whether there is a causal connection between the use of the automobile and the accident." *Id.* at 539-40, 350 S.E.2d at 69.

Here, Taylor drove his insured vehicle to Bragg Auto for some maintenance work. Ward accompanied Taylor and they were both walking around the repair shop while waiting for the repairs to be completed. While walking back to the office of the repair shop, Ward was struck by a vehicle backing out of a repair bay and driven by an employee of Bragg Auto. While the use of Taylor's vehicle cannot be said to have been the direct cause of Ward's injuries, a sufficient causal connection between the use and the injuries does exist. *See Nationwide Mut. Ins. Co. v. Davis*, 118 N.C. App. 494, 497-98, 455 S.E.2d 892, 894-95, (holding an automobile liability insurance policy covered damages arising out of the "use" of a vehicle where the insured driver parked across the street from a store, and a six-year-old child who was a passenger in the insured vehicle was subsequently stuck by another vehicle while attempting to cross the road), *disc. review denied*, 341 N.C. 420, 461 S.E.2d 759 (1995). Thus, Taylor's automobile liability insurance policy with plaintiff does provide liability coverage for the claims raised by Ward against Taylor in the lawsuit currently pending in Durham County.

Affirmed.

Judge LEVINSON concurs.

Judge STEELMAN concurs in a separate opinion.

STEELMAN, Judge, concurring in separate opinion.

I concur in the majority opinion, but write separately to emphasize that our holding that Integon's policy provides coverage in no way should be construed to imply that Taylor was negligent in causing the injuries to the plaintiff.

STATE OF NORTH CAROLINA v. RICKY JACKSON HENNIS, SR.

No. COA06-1134

(Filed 3 July 2007)

Criminal Law— final argument—witness drawing diagram during cross-examination—not the introduction of evidence

The trial court erroneously denied defendant the final argument based on offering evidence where defendant asked a detective during cross-examination to draw a diagram of the arrest scene and cross-examined the detective about changes to an incident report he had filed. The exhibits related directly to the detective's testimony on direct examination, did not constitute substantive evidence, and were not "offered" into evidence by defendant.

Appeal by defendant from judgment entered 9 May 2006 by Judge Judson D. DeRamus in Rockingham County Superior Court. Heard in the Court of Appeals 21 May 2007.

Roy Cooper, Attorney General, by Derrick C. Mertz, Assistant Attorney General, for the State.

J. Clark Fischer for defendant-appellant.

MARTIN, Chief Judge.

Defendant was convicted by a jury of felonious possession of cocaine and possession of drug paraphernalia and subsequently entered a plea of guilty to habitual felon status pursuant to a plea agreement. He appeals from a judgment sentencing him to a term of imprisonment for a minimum of 80 months and a maximum of 105 months.

The State's evidence at trial tended to show that three detectives of the Rockingham County Vice Narcotics Unit conducted "knock and talk" operations in defendant's neighborhood on 8 July 2005. Defendant's residence was an area of investigative interest based on several anonymous complaints of drug activity. The detectives drove past defendant's residence, observed a truck pull into the driveway, and pulled in behind the truck. As the detectives approached the truck, they noticed a crack pipe on the seat between the driver and defendant, who was in the passenger seat. Defendant

exited the vehicle, and Detective Vaughn asked him to step to the rear of the truck. Detective Vaughn found another crack pipe on defendant's person, crack cocaine crumbs on the passenger seat, and a rock of crack cocaine on the ground where defendant exited the truck.

Detective Vaughn testified during the State's direct examination to the facts described above. On cross-examination, defense counsel requested that Detective Vaughn draw a diagram of the arrest scene, which was marked as Defendant's Exhibit A. Detective Vaughn stepped down from the witness stand to diagram the scene where defendant was arrested. The diagram illustrated that the crack rock was found on the ground directly beside the truck where defendant exited the vehicle.

Defense counsel also questioned Detective Vaughn about the incident report that he filed on 8 July 2005. The State requested that the report be marked as an exhibit since it was being used to cross-examine the witness. Defense counsel complied with this request and continued questioning Detective Vaughn about the changes and additions to the report that were added months after it was initially written. The report, however, was never published to the jury.

Defendant did not testify or call witnesses in his behalf. The trial court, however, ruled that defendant had offered evidence through his cross-examination of Detective Vaughn and had thereby forfeited his right to make the final jury argument. Defendant's sole contention on appeal is that the trial court erred in denying him the final closing argument to the jury. We agree and grant defendant a new trial.

Rule 10 of the North Carolina General Rules of Practice for the Superior and District Courts provides "if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him." N.C. Super. and Dist. Ct. R. 10 (2006). In *State v. Shuler*, 135 N.C. App. 449, 520 S.E.2d 585 (1999), this Court determined that evidence is "introduced," within the meaning of Rule 10, when the cross-examiner either formally offers the material into evidence, or when the cross-examiner presents new matter to the jury that is not relevant to the case. *Id.* at 453, 520 S.E.2d at 588; *see also State v. Wells*, 171 N.C. App. 136, 138, 613 S.E.2d 705, 706 (2005) (quoting *Shuler*, 135 N.C. App. at 453, 520 S.E.2d at 588). However, "[n]ew matters raised during the cross-examination, which are relevant, do not constitute the 'introduction' of evidence within the meaning of Rule 10." *Shuler*, 135 N.C. App. at 453, 520 S.E.2d at 588. Most recently, in *State v. Bell*, 179 N.C. App. 430, 633 S.E.2d 712,

(2006), this Court stated that evidence is introduced during cross-examination when: "(1) it is 'offered' into evidence by the cross-examiner; or (2) the cross-examination introduces new matter that is not relevant to any issue in the case." *Id.* at 431, 633 S.E.2d at 713 (citing *Shuler*, 135 N.C. App. at 452-53, 520 S.E.2d at 588).

In this case, the State does not contend that the matters about which defendant cross-examined Detective Vaughn concern a new and irrelevant issue under the second test articulated in *Bell*. Rather, the issue presented in this appeal is whether, under the first test in *Bell*, the defendant "offered" the diagram and incident report into evidence during his cross-examination.

In *State v. Hall*, 57 N.C. App. 561, 291 S.E.2d 812 (1982), this Court set forth the following test to determine whether evidence is "offered" within the meaning of Rule 10: "whether a party has offered [an object] as substantive evidence or so that the jury may examine it and determine whether it illustrates, corroborates, or impeaches the testimony of the witness." *Id.* at 564, 291 S.E.2d at 814. This test has been adopted by our Supreme Court in *State v. Macon*, 346 N.C. 109, 113, 484 S.E.2d 538, 540 (1997).

While Defendant's Exhibits A and B were not formally received into evidence, the State contends that defendant "offered" such exhibits as substantive evidence. The State cites *Macon* in support of this argument. In *Macon*, during the State's direct examination, a police officer gave testimony regarding the investigation of the victim's death and the search of the defendant's home. *Id.* On cross-examination, defense counsel asked the police officer to read notes made by another officer from the defendant's post-arrest interview, which had not been discussed in the State's case. *Id.* Defense counsel marked the notes as an exhibit but neither offered the notes into evidence nor published the notes to the jury. *Id.* Our Supreme Court concluded the notes were actually offered into evidence and held that defendant had introduced evidence within the meaning of Rule 10. *Id.* at 114, 484 S.E.2d at 541. The Court stated that, while the writing was not introduced into evidence by the defense, Rule 10 was satisfied because the witness read the notes to the jury. *Id.* The Court's decision was based on the fact that "[t]he jury received the contents of defendant's statement as substantive evidence without any limiting instruction, not for corroborative or impeachment purposes, as defendant did not testify at trial and the statement did not relate in any way to [the witness]." *Id.*

The instant case is distinguishable from *Macon*. Here, defendant's exhibits related directly to Detective Vaughn's testimony on direct examination. Moreover, such exhibits did not constitute substantive evidence. Although the jury received the diagram (Exhibit A) without any limiting instruction, the record shows it was used to merely illustrate Detective Vaughn's prior testimony. *See State v. Sledge*, 297 N.C. 227, 235-36, 254 S.E.2d 579, 585 (1979) ("A witness may use sketches and diagrams, on a blackboard or otherwise, to *illustrate* his testimony." (emphasis added) (citing *State v. Lee*, 293 N.C. 570, 238 S.E.2d 299 (1977); *State v. Cox*, 271 N.C. 579, 157 S.E.2d 142 (1967))). The record also shows the incident report (Exhibit B) was not published to the jury as substantive evidence, nor was it given to the jury to examine whether it illustrated, corroborated, or impeached Detective Vaughn's testimony.

Accordingly, we hold that defendant did not "offer" evidence under either test articulated in *Bell*, and therefore, he did not "introduce" evidence within the meaning of Rule 10. As in *Bell* and *Wells*, we must conclude the trial court's error in denying defendant the final argument entitles defendant to a new trial. *Bell*, 179 N.C. App. at 433, 633 S.E.2d at 714; *Wells*, 171 N.C. App. at 140, 613 S.E.2d at 708; *see also State v. Eury*, 317 N.C. 511, 517, 346 S.E.2d 447, 450 (1986) ("The right to closing argument is a substantial legal right of which a defendant may not be deprived by the exercise of a judge's discretion.").

New trial.

Judges STEELMAN and STEPHENS concur.

STATE OF NORTH CAROLINA v. ANTONIO BROWN, DEFENDANT

No. COA06-553

(Filed 3 July 2007)

Larceny— indictment—entity capable of owning property

The trial court erred by denying defendant's motion to dismiss the charge of felony larceny at the close of evidence on the grounds that the State failed to adequately allege ownership of the property, because: (1) the indictment did not specify that "Smoker Friendly Store, Dunn, North Carolina" was a legal

entity capable of owning property, nor did the name suggest a natural person; (2) although the State contends that both counts of the indictment read together show the store was a legal entity capable of owning property, each count of an indictment containing several counts should be complete in itself; and (3) although allegations in one count may be incorporated by reference in another count, the defective first count does not incorporate by reference any language used in the second count.

Appeal by defendant from judgment entered 16 August 2005 by Judge John R. Jolly in Harnett County Superior Court. Heard in the Court of Appeals 6 December 2006.

Attorney General Roy Cooper, by Assistant Attorney General John W. Congleton, for the State.

John T. Hall for defendant-appellant.

ELMORE, Judge.

Antonio Brown (defendant) was convicted by a jury of felony larceny on 16 August 2005 and was sentenced to serve fifteen to eighteen months in prison. It is from this conviction that he appeals.

Defendant and two other men entered the Smoker Friendly Store in Dunn on 5 December 2004. They immediately began asking the store clerk, Tina Honeycutt, about the prices of cigarettes. Defendant approached Honeycutt, who was standing at the counter and working alone that evening, while the other men went to the back of the store where the cigarettes were kept. Defendant requested a money order for $125.00 and a pack of cigarettes. Honeycutt sold him two packs of Newports for $5.00, after which defendant rejoined his companions. The three men left the store and then returned a few moments later, at which time defendant attempted to sell Honeycutt some jewelry, alleging that she should buy it because she had "been wrong to [her] man." Honeycutt declined the offer, and defendant rejoined his companions at the back of the store. A videotape of the incident shows the three men taking cartons of cigarettes from the shelves at the back of the store. The three men then walked out and as defendant was leaving, he said "You'll be sorry." Honeycutt testified that, "He looked at me and smiled and said, 'You'll be sorry.' I'll never forget that. That's implanted onto my brain."

After the men left, Honeycutt contacted her manager, who determined that fifty-two cartons of cigarettes, collectively worth approximately $1,400.00, were missing.

During the investigation on 16 February 2005, Honeycutt was shown a photographic lineup, from which she identified defendant. Rather than using a traditional "mug book," the detective used a computer program that displays individual photos, rather than an array of six or eight, on the screen. When setting up the photo display, the detective chose a broad category of "black males" for the photo database and then inserted defendant's photograph into the virtual lineup. The computer then randomly selected and displayed photographs from that database. By clicking the screen, the detective was able to advance from one photograph to the next. Defendant's photograph had been inserted into the photo array and appeared within the first four to eight photographs. When defendant's picture appeared on the screen, Honeycutt immediately and without hesitation pointed to him on the screen and said, " 'That's him' or 'That's the man, right there.' " She then commented, " 'I'll never forget that smile . . . I'll never forget it.' "

The detective testified that he did not suggest to Honeycutt who she should choose, or who was a suspect. He did not reveal any of the men's identities, including defendant's. He purposefully selected only black men to display alongside defendant's photograph because defendant is a black man. Defense counsel objected to the use of this identification because the State could not show the trial court which photographs were used in the virtual lineup. The judge conducted *voir dire*, and eventually overruled the objection, but asked that the State lay additional foundation in front of the jury.

At the close of the State's case-in-chief, defense counsel moved to suppress evidence generated by the virtual lineup. The trial judge denied this motion without making any findings of fact or conclusions of law.

Defendant first argues that the trial court erred

> by denying defendant's motion to dismiss at the close of evidence on the grounds that the State failed to adequately allege ownership of the property subject to the alleged larceny both in the indictment and during the presentation of evidence.

The indictment states that the missing cartons of cigarettes were the personal property of "Smoker Friendly Store, Dunn, North Carolina."

"To be sufficient, an indictment for larceny must allege the owner or person in lawful possession of the stolen property. If the entity named in the indictment is not a person, it must be alleged that the victim was a legal entity capable of owning property[.]" *State v. Phillips*, 162 N.C. App. 719, 720-21, 592 S.E.2d 272, 273 (2004) (internal citations and quotations omitted) (alteration in original). "If a larceny indictment names a corporation as the owner, 'the name of the corporation should be given, and the fact that it is a corporation stated, unless the name itself imports a corporation.' " *State v. Cave*, 174 N.C. App. 580, 581, 621 S.E.2d 299, 300 (2005) (quoting *State v. Thornton*, 251 N.C. 658, 662, 111 S.E.2d 901, 903 (1960)). "[A] larceny indictment which does not indicate the legal entity is a corporation or the name of the legal entity does not import a corporation is fatally defective." *State v. Cathey*, 162 N.C. App. 350, 353-54, 590 S.E.2d 408, 410 (2004); *see, e.g.*, *State v. Thompson*, 6 N.C. App. 64, 66, 169 S.E.2d 241, 242 (1969) (arresting judgment after holding that the words, "Belk's Department Store," in the indictment do not import a corporation, that the indictment does not allege that "Belk's Department Store" is a corporation, proprietorship, or partnership, and that " 'Belk's Department Store' certainly does not suggest a natural person"); *State v. Biller*, 252 N.C. 783, 783-84, 114 S.E.2d 659, 659-60 (1960) (arresting judgment after holding that the indictment, which described the stolen property's owner as, "U-Wash-It, in Chapel Hill," "did not sufficiently allege that the owner of the property allegedly stolen was either a natural person or a legal entity capable of owning property").

The indictment at issue here does not specify that "Smoker Friendly Store, Dunn, North Carolina" is a legal entity capable of owning property, nor does the name suggest a natural person. As in *Thompson*, the indictment merely states that the entity is a store. The State argues that when both counts of the indictment are read together, the indictment does specify that Smoker Friendly Store is a legal entity capable of owning property. However, "[i]t is settled law that each count of an indictment containing several counts should be complete in itself." *State v. Moses*, 154 N.C. App. 332, 336, 572 S.E.2d 223, 226 (2002) (quoting *State v. Hackney*, 12 N.C. App. 558, 559, 183 S.E.2d 785, 786 (1971)). It is also settled that "allegations in one count may be incorporated by reference in another count." N.C. Gen. Stat. § 15A-924(a)(2) (2005).

The second count of the indictment, which the State urges us to consider in tandem with the defective first count, states that the prop-

erty stolen was "the personal property of the person, corporation, and other legal entity described in Count I above . . . ." The second count incorporates by reference the description used in the first count, but we cannot agree that the first count is saved by the additional language used in the second count; the first count does not incorporate by reference any language used in the second count, and without this incorporation by reference, we must read the first count without consideration of the second.

Accordingly, the judgment below is vacated.

Vacated.

Judges HUNTER and McCULLOUGH concur.

JULIE ORD, Employee/Plaintiff v. IBM, Employer, LIBERTY MUTUAL INSURANCE, Carrier/Defendants

No. COA06-1318

(Filed 3 July 2007)

Appeal and Error— multiple rules violations—dismissal—appellate review frustrated—Rule 2 not invoked

An appeal was dismissed for multiple violations of the appellate rules, including failure to argue specific findings and conclusions, failure to cite supporting arguments, failure to refer to assignments of error pertinent to the question presented, failure to identify page numbers where the assignments of error appear, and failure to include a statement of the grounds for appellate review. Rule 2 was not invoked since the outcome would be no different and the violations were so serious as to fundamentally frustrate appellate review.

Judge Wynn concurring in the result.

Appeal by plaintiff from opinion and award entered 26 April 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 April 2007.

Julie Ord, pro se.

Cranfill, Sumner & Hartzog, L.L.P., by P. Collins Barwick, III, and Jaye E. Bingham, for defendants-appellees.

CALABRIA, Judge.

Julie Ord ("plaintiff") appeals from an opinion and award of the Industrial Commission. Since plaintiff has committed numerous violations of the North Carolina Rules of Appellate Procedure, and we decline to invoke our discretionary authority under N.C. R. App. P. 2 (2006), we dismiss the appeal.

Plaintiff worked as a financial analyst for IBM Corp. ("IBM") in April of 2000 when a flood occurred in her building. The flood occurred on a Sunday, when plaintiff was not at work. On the evening of the flood, the IBM and property management team opened doors, placed fans, and vacuumed the water. Subsequently, contractors removed all water-damaged material including but not limited to the carpet in the affected area. In addition, all employees who worked in the affected areas were relocated to other buildings.

IBM collected carpet and wallboard samples, as well as air samples, and the samples were analyzed at Research Triangle Institute. The samples from the wallboard had organisms at a level lower than the limits of detection, while samples of the carpet were at a level slightly above the limits of detection. The air samples revealed three locations with small visible colonies of fungal growth. However, only one indoor sample contained more mold-causing organisms than those detected in outdoor samples.

Plaintiff testified that she first experienced vertigo on 4 May 2000. She also experienced a number of other symptoms, including driving problems, cognitive problems, confusion, tingling in her arms and legs, congestion, nausea, diarrhea, irritability, shortness of breath, chest tightness, fever, and depression. In addition, plaintiff testified that she experienced serious memory problems.

Following a hearing, the deputy commissioner determined that plaintiff had not carried her burden to prove that she suffered an occupational injury or disease and denied her claim under the North Carolina Workers' Compensation Act. Plaintiff appealed to the full commission and the commission affirmed the judgment of the deputy commissioner. From that opinion and award, entered on 25 January 2006, plaintiff appeals.

On appeal, plaintiff argues the commission erred in its findings of facts and conclusions of law. However, we do not reach the merits of plaintiff's argument because plaintiff has committed several major violations of the North Carolina Rules of Appellate Procedure. Without invoking Rule 2, in our discretion, we conclude that her appeal should be dismissed.

The Rules of Appellate Procedure set forth what is required in an appellant's brief. The rules provide that the brief must contain:

> (6) 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. *Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.*

N.C. R. App. P. 28(b)(6) (2005) (emphasis supplied).

Here, plaintiff assigns error to numerous findings and conclusions, but fails to argue specific findings and conclusions. She also fails to cite any authority in support of her arguments. In addition, plaintiff has failed to reference the assignments of error pertinent to each question presented, and has failed to identify the page numbers in the record where such assignments appear. Finally, plaintiff failed to include a statement of grounds for appellate review in her brief, as required by N.C. R. App. P. 28(b)(4) (2005) ("Such statement shall include citation of the statute or statutes permitting appellate review.").

"[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 v. N.C. DOT*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). We are mindful that our Supreme Court, in *State v. Hart*, 361 N.C. 309, —— S.E.2d —— (2007) recently noted that we may use N.C. R. App. P. 2 to suspend the rules in order to prevent "manifest injustice." However, we do not agree with the concurring opinion that the rules should be suspended in this case since manifest injustice will not result in our decision to dismiss the appeal. The concurring opinion concedes that if we chose to invoke Rule 2 and suspend the rules, the

outcome would be no different. Further, the rule violations are so serious as to fundamentally frustrate appellate review. In light of this, we conclude plaintiff's appeal should be dismissed.

Dismissed.

Judge TYSON concurs.

Judge WYNN concurs in a separate opinion.

WYNN, Judge, concurring in the result.

Plaintiff Julie Ord's assignments of error take up thirteen pages of the record and essentially include her arguments on appeal. Because it is relatively straightforward to follow her argument from her assignments of error, I would not dismiss her appeal. Rather, I would reach the merits and render to this citizen "access to justice" for her appeal.

Moreover, it is easier to provide this *pro se* litigant with a substantive answer to her appeal rather than engage in a protracted discussion as to the reasons not to reach the merits, such as her technical violations of our appellate rules. Indeed, I would provide the answer to her appeal in one simple paragraph:

> Plaintiff Julie Ord appeals from an adverse ruling of the Industrial Commission asking this Court to establish "by a greater weight of the evidence" that she should prevail on her worker's compensation claim. Though her appeal contains numerous violations of our Rules of Appellate Procedure, we invoke review under Rule 2 and summarily conclude that under the standard of review for worker's compensation appeals, we may not reweigh the evidence on appeal. Accordingly, the Opinion and Award of the Full Commission is affirmed.

Notwithstanding the rules violations, Ms. Ord's argument on appeal is clear. While the outcome for Ms. Ord remains the same, the difference is that by addressing the merits of her contention, she has been afforded her day in court. I vote to hear the appeal and affirm the Full Commission, rather than to dismiss this appeal.

WILLIAM LAWSON BROWN, III, PLAINTIFF v. MARK P. ELLIS, DEFENDANT

No. COA06-710

(Filed 3 July 2007)

Jurisdiction— long-arm—alienation of affections-out-of-state defendant

The trial court did not have long-arm jurisdiction over defendant under N.C.G.S. § 1-75.4 in an alienation of affections claim where there was no evidence that defendant solicited plaintiff's wife while she was in North Carolina, and it is undisputed that defendant has never been in North Carolina.

Appeal by defendant from judgment entered 2 February 2005 by Judge Melzer A. Morgan, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 5 February 2007.

Nix & Cecil, by Lee M. Cecil, for plaintiff-appellee.

Foreman Rossabi Black, P.A., by T. Keith Black and William F. Patterson, Jr., for defendant-appellant.

STROUD, Judge.

Defendant Mark P. Ellis appeals from the judgment of the trial court awarding compensatory and punitive damages to plaintiff William Lawson Brown, III for alienation of affections. We hold that the judgment of the trial court is void because the trial court did not have personal jurisdiction over defendant. Accordingly, we vacate the judgment of the trial court.

I. Background

Plaintiff is a resident of Guilford County, North Carolina. He lived with his wife until the occurrence of the events alleged in the complaint. Defendant is a resident of Orange County, California, who has never visited North Carolina. Defendant and plaintiff's wife were co-workers, who communicated regularly by phone and by e-mail. Some of the phone conversations occurred in the presence of plaintiff. Defendant and plaintiff's wife were together at a business meeting in Seattle, which included a recreational trip to Vancouver with co-workers.

Plaintiff filed a complaint on 13 September 2002, alleging that defendant alienated the affections of and engaged in criminal conver-

sation with his spouse. On 2 December 2002, defendant filed a Motion Pursuant to Rule 12, asking the trial court to dismiss the action for lack of personal jurisdiction. The trial court denied defendant's motion by order entered 6 April 2004. The trial court did not make specific findings of fact in its order, but concluded that "North Carolina has personal jurisdiction over the defendant" pursuant to N.C. Gen. Stat. § 1-75.4 (the "long-arm" statute) and that the exercise of personal jurisdiction "does not violate due process."

The case proceeded to trial, coming before a jury in Superior Court, Guilford County on 2 February 2005.[1] The jury found against defendant on all issues, and judgment was entered by the trial court against defendant in the amount of $350,000 in compensatory damages, and $250,000 in punitive damages (reduced by the trial court from the jury award of $350,000). Defendant appeals from the 2 February 2005 judgment.

II. Issue and Analysis

Defendant contends that the trial court erred by concluding that the State of North Carolina had personal jurisdiction over him pursuant to N.C. Gen. Stat. § 1-75.4 and by concluding that the exercise of personal jurisdiction did not violate defendant's due process rights. We agree.

Plaintiff argues that the long-arm statute authorizes personal jurisdiction over defendant, contending that "[s]olicitation or services activities were carried on within this State by or on behalf of the defendant." N.C. Gen. Stat. § 1-75.4(4)(a) (2005). Plaintiff further argues that this case is controlled by *Cooper v. Shealy*, 140 N.C. App. 729, 734, 537 S.E.2d 854, 857 (2000) (holding that allegations that a South Carolina defendant telephoned plaintiff's husband in North Carolina to solicit his affections were sufficient to authorize personal jurisdiction under N.C. Gen. Stat. § 1-75.4(4)(a)). However, we find the case *sub judice* more analogous to *Eluhu v. Rosenhaus*, 159 N.C. App. 355, 583 S.E.2d 707 (2003) (holding that the trial court did not have personal jurisdiction when defendant's only contact with plaintiff's spouse in North Carolina was during a three-day period in which no misconduct was alleged), *aff'd per curiam*, 358 N.C. 372; 595 S.E.2d 146 (2004).

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1. Neither defendant nor his attorney were present at trial, defendant having received notice of the trial date at his residence in California only two days before the scheduled date of the trial.

In considering an order denying a 12(b)(2) motion to dismiss for want of personal jurisdiction when the trial court makes no specific findings of fact, this Court "review[s] the record to determine whether it contains any evidence that would support the trial judge's conclusion that the North Carolina courts may exercise jurisdiction over defendants without violating defendants' due process rights." *Banc of America Securities, LLC, v. Evergreen Intern. Aviation, Inc.*, 169 N.C. App. 690, 693-95, 611 S.E.2d 179, 182-83 (2005).

Review of whether a nonresident is subject to personal jurisdiction in North Carolina has two steps. This Court must first determine whether N.C. Gen. Stat. § 1-75.4 authorizes the exercise of personal jurisdiction over the defendant. *Skinner v. Preferred Credit*, 361 N.C. 114, 119, 638 S.E.2d 203, 208 (2006). "In determining whether the 'long-arm' statute permits our courts to entertain an action against a particular defendant, the statute should be liberally construed in favor of finding jurisdiction." *Strother v. Strother*, 120 N.C. App. 393, 395, 462 S.E.2d 542, 543 (1995). A determination that the long-arm statute does not authorize jurisdiction ends the inquiry. If the long-arm statute does authorize the exercise of personal jurisdiction, this Court next determines whether the trial court's exercise of personal jurisdiction over the defendant comports with due process of law. *Skinner*, 361 N.C. at 119, 638 S.E.2d at 208.

Plaintiff offers the following facts in an attempt to show that defendant carried on solicitation activities in the State of North Carolina sufficient to authorize the exercise of personal jurisdiction over defendant: 1) plaintiff is a resident of North Carolina; 2) plaintiff's wife lived with plaintiff; 3) defendant made phone calls to plaintiff's wife in the presence of plaintiff (although there is no allegation regarding where these calls were actually received); and 4) evidence as to defendant's telephonic contacts with plaintiff's wife can be found in North Carolina (although nothing in the record indicates that actual evidence of such contacts was forecast).

After review of the record, we conclude that it contains no evidence to support the trial court's conclusion that the State of North Carolina may exercise personal jurisdiction over defendant pursuant to the long-arm statute. Even liberally construed, these facts offer no evidence that defendant solicited plaintiff's wife while she was in North Carolina. The case *sub judice* is distinguishable from *Cooper*, because plaintiff does not allege that his wife was physically present in the State of North Carolina *at the time of defendant's alleged solic-*

itations. The only allegations of the location of any communication or contacts between defendant and plaintiff's wife are outside of North Carolina, and it is undisputed that defendant has never even visited North Carolina.

Accordingly, we vacate the trial court judgment of 2 February 2005 awarding compensatory and punitive damages to plaintiff for alienation of affections. Because we conclude that North Carolina does not have personal jurisdiction over defendant under the long-arm statute, we need not reach defendant's constitutional argument that exercise of personal jurisdiction over him would violate due process of law.

VACATED.

Chief Judge MARTIN and Judge HUNTER concur.

PALM COAST RECOVERY CORP., A FLORIDA CORPORATION, PLAINTIFF v. NEIL R. MOORE AND DARLENE W. MOORE, DEFENDANTS

No. COA06-1217

(Filed 3 July 2007)

Statutes of Limitation and Repose— foreign judgments—ten years

The trial court erred by dismissing plaintiff's motion to register a 2005 Florida judgment based upon the statute of limitations, because: (1) plaintiff timely filed a new action in the courts of Florida in accordance with the law of that state to start the limitation period anew; (2) the pertinent 1990 judgment was extinguished by the 2005 judgment; (3) plaintiff's action under the Uniform Enforcement of Foreign Judgments Act was based upon the 2005 judgment and not the 1990 judgment; and (4) the filing in North Carolina was thus within the ten-year period prescribed by N.C.G.S. § 1-47.

Appeal by plaintiff from judgment entered 2 June 2006 by Judge J. Marlene Hyatt in Macon County Superior Court. Heard in the Court of Appeals 29 March 2007.

Jones, Key, Melvin & Patton, P.A., by Jennifer Berger Brown, for plaintiff-appellant.

Collins & Hensley, P.A., by Joseph M. Collins, for defendant-appellees.

STEELMAN, Judge.

Where a judgment creditor obtained a new judgment in 2005 in the State of Florida, based upon a previous 1990 judgment, an action to register the judgment in North Carolina pursuant to the Uniform Enforcement of Foreign Judgments Act was timely filed.

The facts of this case are gleaned from the cursory record filed in this matter. On 21 November 1990, Palm Coast Recovery Corp. ("plaintiff") obtained a money judgment in the County Court of Hillsborough County, Florida, against Neil R. Moore and Darlene W. Moore ("defendants"). On 17 August 2005, a second judgment was entered against defendants in the County Court of Hillsborough County, Florida, based on the 1990 judgment. The 2005 judgment recited that:

> Since this action is brought on a prior judgment dated November 21, 1990, which is now superceded by this final judgment, the November 21, 1990 final judgment, which was recorded in Official Record Book 6138, Page 1332, of the official records of Hillsborough County, Florida is declared to be null and void.

On 3 February 2006, plaintiff filed the 2005 judgment in the office of the Clerk of Superior Court of Macon County, North Carolina, together with a notice of filing pursuant to Article 17 of Chapter 1C of the North Carolina General Statutes (Uniform Enforcement of Foreign Judgments Act). Defendants filed an objection pursuant to N.C. Gen. Stat. § 1C-1705(a) based upon the applicable statute of limitations. On 30 May 2006, Judge J. Marlene Hyatt denied plaintiff's motion to register the judgment, holding that the judgment was "not legally enforceable, in that Plaintiff's claim is barred by the applicable North Carolina statute of limitations." Plaintiff appeals.

In its only assignment of error, plaintiff contends that the trial court erred in dismissing its motion to register the 2005 Florida judgment based upon the statute of limitations. We agree.

N.C. Gen. Stat. § 1-47(1) provides that an action based "[u]pon a judgment or decree of any court of the United States, or any state or

territory thereof" shall be brought within ten years from the date of its entry. This provision has been construed by our courts to apply to the enforcement of foreign judgments more than ten years old. *Wener v. Perrone & Cramer Realty, Inc.*, 137 N.C. App. 362, 364-66, 528 S.E.2d 65, 66-8 (2000). In *Wener*, we held that N.C. Gen. Stat. § 1-47 barred an action under the Uniform Enforcement of Foreign Judgments Act upon a Florida judgment that was over ten years old. *Wener*, at 366, 528 S.E.2d at 67-8. Under Florida law, an action on a judgment may be commenced within twenty years, Fla. Stat. § 95.11(1), rather than the ten year period provided for in North Carolina. Further, "[i]f the statute of limitation period has almost run on the judgment . . . the judgment creditor can start the limitation period anew by bringing an action upon the judgment and obtaining a new judgment." *Adams v. Adams*, 691 So. 2d 10, 11 (Fla. Dist. Ct. App. 1997) (citing *Koerber v. Middlesex College*, 383 A.2d 1054, 1057 (Vt. 1978)).

In this matter, plaintiff timely filed a new action in the courts of Florida, in accordance with the law of that State to "start the limitation period anew." The 1990 judgment was extinguished by the 2005 judgment. Plaintiff's action under the Uniform Enforcement of Foreign Judgments Act was based upon the 2005 judgment and not the 1990 judgment. The filing in North Carolina was thus within the ten-year period prescribed in N.C. Gen. Stat. § 1-47. The trial court erred in denying plaintiff's motion to register the 2005 Florida judgment.

The order of the trial court is reversed and this case is remanded to the trial court for registration of the 2005 Florida judgment in accordance with provisions of the Uniform Enforcement of Foreign Judgments Act.

REVERSED.

Judges BRYANT and LEVINSON concur.

STATE OF NORTH CAROLINA v. RAYMOND LEE MUELLER

No. COA05-1524

(Filed 17 July 2007)

1. Sexual Offenses— short form—sexual offenses—specific acts not mentioned—instructions and verdict sheets specific

There was no error where the indictment for numerous charges of sexual offenses by defendant with his daughter did not list the underlying sexual acts, but the jury was instructed on the specific acts in the instructions and the verdict sheets. The use of short-form indictments in charging sexual offenses and indecent liberties is permitted.

2. Appeal and Error— preservation of issue—motions sufficient

Defendant preserved his right to appeal the failure to dismiss all of the counts against him (despite the State's contention that he had preserved appeal from only five) where he made a motion to dismiss at the close of the State's evidence, presented arguments as to five of the charges, renewed the motion at the close of his case in chief, and moved to dismiss all of the charges after the jury returned the guilty verdicts.

3. Indecent Liberties— sufficiency of evidence—doctor's unsupported evidence

The trial court erred by denying defendant's motion to dismiss a charge of indecent liberties that was based on defendant asking his daughter to perform fellatio. The daughter provided no testimony to support this charge; a doctor's testimony that the daughter had told her about defendant's request was not sufficient.

4. Rape— attempted statutory rape—attempted incest—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss charges of attempted statutory rape and attempted incest. Although there was no evidence that defendant attempted to have intercourse with his daughter, there was sufficient evidence that he wanted to and his sexual acts with his daughter constitute actions beyond mere preparation.

5. Sexual Offenses— disseminating sexual material to daughter—material not shown to jury—evidence sufficient

The trial court acted properly in denying defendant's motion to dismiss a charge of disseminating obscene material to his daughter. The State is not required by the statute to produce the precise material alleged to be obscene, and no case law requires that a jury be shown the material. The victim was able to describe the pictures in detail, and to testify that the photographs shown to her by the State were substantially similar to those shown by defendant. Moreover, a detective testified about seizing diskettes containing photographs, some of which involved young women with blond hair, similar to defendant's daughter.

6. Sexual Offenses— sufficiency of evidence—position of power

The trial court acted properly in denying defendant's motion to dismiss charges of second-degree forcible sexual offense against his daughter. There was sufficient evidence from which a reasonable jury could conclude that defendant used his position of power as the victim's father to force her to engage in various sexual acts.

7. Rape— sufficiency of evidence—attempted second-degree—against daughter—position of power

There was sufficient evidence presented to sustain defendant's conviction for the attempted second-degree forcible rape of his daughter, and the trial court acted properly in denying defendant's motion to dismiss. There was sufficient evidence that defendant attempted to have sex with the victim, and his relationship with her was one in which he held a position of power which he used in such a way as to constitute constructive force.

8. Assault— against female—no age limit

The age limit in N.C.G.S. § 14-33(c)(3) for assaulting a child under 12 does not apply to any assault against a female under N.C.G.S. § 14-33(c)(2). Nothing in the latter statute, under which defendant was indicted, tried, and convicted, requires the victim to be under a certain age.

9. Assault— sufficiency of evidence—fondling

There was sufficient evidence that defendant assaulted his daughter by fondling her breasts on a particular morning where

she testified that she was awakened in the usual way, by his hands up her bra or down her pants.

10. Rape— statutory—evidence of age—not sufficient

The trial court should have granted defendant's motion to dismiss the charge of first-degree statutory rape where there was insufficient evidence of vaginal intercourse prior to the victim turning thirteen. Although the victim stated unequivocally that defendant began touching her earlier, she was thirteen when defendant began having sexual intercourse with her.

11. Indictment and Information— indictment citing wrong statute—validity

Although an indictment may cite the wrong statute, it remains valid when the body of the indictment is sufficient to properly charge defendant with an offense, and indictments which put defendant on notice that he was being charged under N.C.G.S. § 14-27.4(a)(1) were valid even though they listed N.C.G.S. § 14-27.7A as the statute allegedly violated.

12. Sexual Offenses— against child—evidence of age—not sufficient

The trial court erred by denying defendant's motions to dismiss four counts of first-degree sexual offense against a child under the age of thirteen where the victim's testimony did not constitute sufficient evidence to support the reasonable inference that the offenses were committed prior to the victim turning thirteen.

13. Appeal and Error— failure to object—unanimity of verdict

A defendant's failure to object at trial to a possible violation of his right to a unanimous jury verdict does not waive his right to appeal the issue. The issue may be raised for the first time on appeal.

14. Constitutional Law— unanimous verdict—sexual offenses—indictments not specific

Defendant was not deprived of his right to a unanimous jury verdict where the indictments did not include the specific acts which constituted the alleged sexual offenses but were valid, the jury instructions and verdict sheets specifically identified each case by number, date and the specific acts which were to serve as the underlying basis, the jury was instructed specifically that

each of the acts serving as the basis for the separate counts must have occurred on a date different than in the other cases charging the same offense with the same victim, and the jury was polled following the verdicts, further insuring unanimity.

15. Constitutional Law— double jeopardy—sexual offenses—indictments not specific

Defendant was not subjected to double jeopardy where he alleged that the indictments for the sexual abuse of his daughter and stepdaughter did not differentiate the offenses, but the indictments were sufficient to inform defendant of the charges against him, and he did not show any deprivation of his ability to prepare a defense.

Appeal by defendant from judgments entered 3 May 2005 by Judge Ronald K. Payne in Hoke County Superior Court. Heard in the Court of Appeals 16 August 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Margaret A. Force, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

JACKSON, Judge.

On 6 October 2003, Raymond Lee Mueller ("defendant") was indicted for thirty-three felonies and three misdemeanors, on charges of first-degree statutory rape, first-degree statutory sexual offense, statutory rape of a person who is 13, 14, or 15 years old, statutory sexual offense against a person who is 13, 14, or 15 years old, second-degree forcible sexual offense, attempted second-degree rape, incest between near relatives, attempted incest, taking indecent liberties with a child, felony child abuse, disseminating obscene material, and assault on a female by a male at least 18 years of age. All of the offenses were alleged to have involved defendant's biological daughter, K.M., and his stepdaughter, J.M., and were alleged to have occurred on various dates from July 2000 until August 2002.

On 3 May 2005, a jury found defendant guilty on all charges. Following the announcement of the jury's verdict, defendant made a motion for judgment notwithstanding the verdict as to all charges. The trial court granted defendant's motion for one count of disseminating obscene material (03 CRS 2301), and denied the motion as to the remaining thirty-five convictions. Defendant was then sentenced

to eight consecutive sentences of imprisonment, with the terms being four consecutive sentences of 240 to 297 months, followed by two terms of 288 to 355 months, followed by two terms of 100 to 129 months. Defendant appeals from his convictions.

In the record on appeal, defendant lists fifty-four separate assignments of error. However, defendant presents argument as to only twenty-six of them in his brief; therefore, the remaining assignments of error for which no argument has been presented are deemed abandoned. *See* N.C. R. App. P. 28(b)(6) (2006).

[1] We begin by addressing defendant's contention that each indictment for the following charges fails to list the specific underlying sexual act which constitutes the offense:

> 03 CRS 2284-2287—First Degree Statutory Sexual Offense (J.M.)
>
> 03 CRS 2289-2292—Statutory Sexual Offense of a Person Who Is 13, 14, or 15 Years of Age (J.M.)
>
> 03 CRS 2302-2306—Taking Indecent Liberties with a Child (K.M.)
>
> 03 CRS 2309-2310—Statutory Sexual Offense of a Person Who Is 13, 14, or 15 Years of Age (K.M.)
>
> 03 CRS 2314-2315—Second-degree Forcible Sexual Offense (K.M.);
>
> 03 CRS 2317-2319—Assault on a Female by a Male At Least 18 Years of Age (K.M.).

Although the indictments themselves did not list specific underlying sexual acts, both the trial court's instructions for each offense and the verdict sheets submitted to the jury, instructed the jury on the specific sexual acts that were to serve as the underlying act for each of the charged offenses. In all cases, the specific act stated in the trial court's instructions coincided with the specific act listed on each of the verdict sheets.[1]

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1. In cases 03 CRS 2284, 2285, 2286, and 2287, first-degree statutory sexual offense (J.M.), the jury was instructed, and the verdict sheets listed, the specific acts as, respectively, having anal intercourse with J.M., making J.M. perform oral sex upon defendant, digitally penetrating J.M., and performing oral sex upon J.M. In cases 03 CRS 2289, 2290, 2291, and 2292, statutory sexual offense of a person who is 13, 14, or 15 years of age (J.M.), the jury was instructed, and the verdict sheets listed, the specific acts as, respectively, having anal intercourse with J.M., making J.M. perform oral sex upon defendant, digitally penetrating J.M., and performing oral sex upon J.M. In cases 03 CRS 2302, 2303, 2304, 2305, and 2306, taking indecent liberties with a child (K.M.), the jury was instructed, and the verdict sheets listed, the specific acts

Our statutes permit, and our appellate courts have upheld, the use of short form indictments in charging a defendant with a sexual offense and taking indecent liberties with a child. *See* N.C. Gen. Stat. § 15-144.2 (2005); *State v. Wallace*, 351 N.C. 481, 503-08, 528 S.E.2d 326, 340-43 (2000); *State v. Effler*, 309 N.C. 742, 745-47, 309 S.E.2d 203, 205-06 (1983). When a short form indictment properly alleges the essential elements of the offense, it need not "allege every matter required to be proved on the trial." N.C. Gen. Stat. § 15-144.2(a) (2005). As our Courts previously have held, indictments charging indecent liberties with a child or a sexual offense are sufficient and valid even when they do not contain a specific allegation regarding which specific sexual act was committed. *See State v. Youngs*, 141 N.C. App. 220, 229-31, 540 S.E.2d 794, 800-01 (2000); *see also State v. Kennedy*, 320 N.C. 20, 23-25, 357 S.E.2d 359, 361-63 (1987); *Effler*, 309 N.C. at 745-47, 309 S.E.2d at 205-06; *State v. Edwards*, 305 N.C. 378, 380, 289 S.E.2d 360, 361-62 (1982). Thus, we hold defendant's indictments were sufficient to charge him with all of the above referenced offenses.

[2] On appeal, defendant contends the trial court erred in failing to dismiss fourteen of the thirty-six charges against him because there was insufficient evidence presented by the State to support convictions on these fourteen charges. The State contends defendant failed to preserve his right to appeal on the sufficiency of the evidence as to the majority of these fourteen convictions. The State argues that, at trial, defendant preserved his right to appeal the sufficiency of the evidence as to only five of his convictions, not all of the fourteen convictions he now argues on appeal.

Rule 10(b)(3) of our Rules of Appellate Procedure provides:

> A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he

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as, respectively, defendant's fondling of K.M.'s breasts, his sucking on K.M.'s breasts, having K.M. fondle defendant's penis, defendant's placing his penis between K.M.'s thighs and ejaculating, and his asking K.M. to perform oral sex on him. In cases 03 CRS 2309 and 2310, statutory sexual offense of a person who is 13, 14, or 15 years of age (K.M.), the jury was instructed, and the verdict sheets listed, the specific acts as, respectively, defendant's digitally penetrating K.M. and performing oral sex upon K.M. In cases 03 CRS 2314 and 2315, second-degree forcible sexual offense (K.M.), the jury was instructed, and the verdict sheets listed, the specific acts as, respectively, defendant's digitally penetrating K.M. and performing oral sex upon K.M. In cases 03 CRS 2317, 2318, and 2319, assault on a female by a male at least 18 years of age (K.M.), the jury was instructed, and the verdict sheets listed, the specific acts as, respectively, defendant's fondling of K.M.'s breasts, his sucking on K.M.'s breasts, and his fondling of K.M.'s breasts.

> moves to dismiss the action, or for judgment as in case of nonsuit, at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.
>
> A defendant may make a motion to dismiss the action or judgment as in case of nonsuit at the conclusion of all the evidence, irrespective of whether he made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of his motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action or for judgment as in case of nonsuit at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

N.C. R. App. P. 10(b)(3) (2006).

In the instant case, defendant made a motion to dismiss at the close of the State's evidence. Defense counsel stated "We move to dismiss at the close of the State's evidence." Following this motion, defense counsel proceeded to present specific arguments as to five of defendant's charges, including: 03 CRS 2306, taking indecent liberties with K.M.; 03 CRS 2311, attempted statutory rape of K.M.; 03 CRS 2312, disseminating obscene material to K.M.; 03 CRS 2316, attempted second-degree rape of K.M.; and 03 CRS 2301, disseminating obscene material to J.M. The trial court denied defendant's motions, and defendant proceeded with presenting evidence.

Following the close of defendant's case in chief, defense counsel renewed his motion to dismiss, which the trial court denied. After the jury returned guilty verdicts on all charges, defendant made a final motion to dismiss all charges, including the specific five charges previously argued in his motion to dismiss. The trial court denied defendant's motion as to all charges, except 03 CRS 2301 for which it allowed defendant's motion, thereby dismissing this charge.

Based upon defendant's motions made at trial, we hold he did preserve his right to appeal all of the convictions before us based upon an insufficiency of the evidence to support each conviction.

[3] In his first argument on appeal, defendant contends the trial court erred in failing to dismiss the charge of taking indecent liberties with a child, K.M. (03 CRS 2306). The jury found defendant guilty of taking indecent liberties with a child, with the child being K.M., and the indecent act being his asking K.M. to place his penis in her mouth. Defendant specifically contends there was insufficient evidence presented at trial that he asked or attempted to put his penis in K.M.'s mouth.

On appeal, the standard of review for the denial of a motion to dismiss is to determine whether the evidence, when taken in the light most favorable to the State, would permit a reasonable juror to find defendant guilty of each essential element of the offense beyond a reasonable doubt. *State v. Etheridge*, 319 N.C. 34, 47, 352 S.E.2d 673, 681 (1987). "The [S]tate is entitled to all reasonable inferences that may be drawn from the evidence. Contradictions in the evidence are resolved favorably to the [S]tate." *State v. Sumpter*, 318 N.C. 102, 107, 347 S.E.2d 396, 399 (1986). In order to survive a defendant's motion to dismiss, the State must present substantial evidence of each essential element of the offense charged, and of the defendant's identity as the perpetrator. *State v. Barden*, 356 N.C. 316, 351, 572 S.E.2d 108, 131 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion." *Id.* When the evidence "is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed." *State v. Baker*, 338 N.C. 526, 558, 451 S.E.2d 574, 593 (1994) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)).

In order for defendant to be convicted of taking indecent liberties with a child, the State must prove beyond a reasonable doubt that defendant is a person who "being 16 years of age or more and at least five years older than the child in question, . . . [w]illfully commit[ted] or attempt[ed] to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years." N.C. Gen. Stat. § 14-202.1(a)(2) (2001). Defendant does not contest the sufficiency of the evidence identifying him as the perpetrator, his age, or the age of K.M.; he contests only the sufficiency of the evidence asking K.M. to place his penis in her mouth.

During K.M.'s extensive testimony, she never testified that defendant asked or attempted to place his penis in her mouth. In fact,

she did not present any testimony concerning any attempt by defendant to have her perform oral sex upon him. The State specifically concedes that this piece of testimony did not occur; however, the State contends testimony presented by Dr. Cooper, the forensic pediatrician who physically examined K.M., is sufficient to satisfy this element of the offense. Dr. Cooper presented testimony regarding her physical examination and interview of K.M. She stated that K.M. specifically described the sexual abuse that she endured, and that defendant was the individual who performed the sexual acts upon her. Dr. Cooper stated that K.M. "described that [defendant] wanted her to perform fellatio, or to put his penis in her mouth, but she didn't want to do that." Dr. Cooper then testified that K.M. did not say that she had performed oral sex on defendant. This evidence constitutes all of the evidence presented regarding the issue of oral sex by K.M. upon defendant.

Without more than Dr. Cooper's lone statement that K.M. told her that defendant wanted her to perform oral sex upon him, we cannot hold that there was substantial evidence presented that defendant asked K.M. to place his penis in her mouth. *See State v. Cooke*, 318 N.C. 674, 679, 351 S.E.2d 290, 292 (1987) ("[T]here is no requirement that the victim testify before the accused may be convicted). *But see State v. Stancil*, 146 N.C. App. 234, 245, 552 S.E.2d 212, 218 (2001) (complaining witness' testimony is sufficient to establish that a defendant completed a sex act). The instant case stands in contrast to the facts in *Cooke*, in which the victim did not testify, but her two siblings both provided eyewitness testimony as to the defendant's sexual abuse of their younger sister. Here, K.M. testified at length as to many of the acts with which defendant is charged, but provided no testimony in support of charge 03 CRS 2306. Dr. Cooper's statement can only raise a suspicion or conjecture on the facts of this case, but fails to rise to the level of showing that defendant asked K.M. to perform the specific act. Therefore, we hold the trial court erred in denying defendant's motion to dismiss as to the charge of taking indecent liberties with K.M., as found in charge 03 CRS 2306. Defendant's conviction on this charge is thus reversed and the charge is dismissed.

Because this offense was joined, for purposes of sentencing, with one count of second-degree forcible sex offense, four counts of taking indecent liberties with children, two counts of felony child abuse, disseminating obscene material, attempted incest between near relatives, attempted second-degree rape, and three counts of assault on a female, we must remand these matters to the trial court for resen-

tencing.[2] *See State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987) ("Since it is probable that a defendant's conviction for two or more offenses influences adversely to him the trial court's judgment on the length of the sentence to be imposed when these offenses are consolidated for judgment, we think the better procedure is to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated.").

[4] Defendant next contends the trial court erred in failing to grant his motion to dismiss as to the charges of attempted statutory rape of K.M. (03 CRS 2311) and attempted incest with K.M. (03 CRS 2313).

"In order to prove an attempt of any crime, the State must show: '(1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense.' " *State v. Sines*, 158 N.C. App. 79, 85, 579 S.E.2d 895, 899 (quoting *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996)), *cert. denied*, 357 N.C. 468, 587 S.E.2d 69 (2003). In order to sustain a conviction for the attempted statutory rape of a person who is 13, 14, or 15 years old, the State must prove that defendant attempted to "engage[] in vaginal intercourse . . . with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person." N.C. Gen. Stat. § 14-27.7A(a) (2001). To sustain a conviction for attempted incest between near relatives, the State must prove that defendant attempted to engage in "carnal intercourse" with his or her child or stepchild or legally adopted child. N.C. Gen. Stat. § 14-178(a)(ii) (2001). Both offenses require evidence that defendant attempted to have vaginal intercourse with K.M. Vaginal intercourse is defined as " 'the *slightest* penetration of the female sex organ by the male sex organ.' " *State v. Summers*, 92 N.C. App. 453, 456, 374 S.E.2d 631, 633 (1988) (quoting *State v. Brown*, 312 N.C. 237, 244-45, 321 S.E.2d 856, 861 (1984)) (emphasis in original), *cert. denied*, 324 N.C. 341, 378 S.E.2d 806 (1989).

Defendant does not dispute that K.M. is his daughter, nor does he dispute that at the time of the alleged offense he was at least six years older than K.M. who was between the ages of thirteen and fifteen. Specifically defendant argues there was insufficient evidence that he attempted to have vaginal intercourse with K.M.

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2. Only those convictions properly before this Court on appeal may be considered upon resentencing. The following convictions were not appealed from the trial court: 03 CRS 2302-05 (taking indecent liberties with children); 03 CRS 2307-08 (felony child abuse); and 03 CRS 2317 (assault on a female).

At trial, K.M. testified that defendant told her that he was in love with her, and that he wanted to be "[her] first." She described how defendant would place his penis between her thighs and move back and forth until he ejaculated on her. K.M. also testified that defendant asked her to have sex with him, but that she always told him "no." K.M. stated that defendant told her that he loved her, and wanted to be "inside of [her]," but that when she told him "no," he did not press the issue or force her to do anything. K.M. did not present any testimony stating that defendant at any time attempted to penetrate her vaginally.

The State contends that defendant's consistent sexual acts with K.M. constitute actions beyond mere preparation, and thus constitute overt acts of his attempt to have vaginal intercourse with K.M. The State argues that K.M.'s testimony that defendant wanted to have sex with her shows defendant's intent to have vaginal intercourse with her. We agree.

It is undisputed that defendant committed multiple sexual acts upon K.M. over the course of several years. We also agree that defendant's actions towards K.M. were indeed sexually motivated and that there is sufficient evidence to show that defendant wanted to have sex with K.M. No evidence was presented that defendant ever physically attempted to have vaginal intercourse with K.M., or that he attempted to press the issue after K.M. told him "no." However, the State is not required to show that a defendant "made an actual physical attempt to have intercourse or that he retained the intent to rape his victim throughout the incident." *State v. Dunston*, 90 N.C. App. 622, 625, 369 S.E.2d 636, 638 (1988) (citing *State v. Hudson*, 280 N.C. 74, 77, 185 S.E.2d 189, 191 (1971), *cert. denied*, 414 U.S. 1160, 39 L. Ed. 2d 112 (1974)). "[T]here is substantial precedent from our courts establishing that some overt act manifesting a sexual purpose or motivation on the part of the defendant is adequate evidence of an intent to commit rape." *Id.*; *see*, *e.g.*, *State v. Whitaker*, 316 N.C. 515, 517, 342 S.E.2d 514, 516 (1986) (defendant verbally expressed desire to perform cunnilingus with his victim and told her to pull down her pants); *State v. Bell*, 311 N.C. 131, 140, 316 S.E.2d 611, 616 (1984) (defendant discussed with his brother "get[ting] some [sex]," took their two victims to a secluded area, and ordered them to remove their clothes); *State v. Henderson*, 182 N.C. App. 406, 411-13, 642 S.E.2d 509, 513 (2007) (defendant removed his pants, walked into the room where his seven- or eight-year-old daughter was seated, stood in front of her, and asked her to put his penis in her mouth);

State v. Schultz, 88 N.C. App. 197, 198, 362 S.E.2d 853, 854 (1987) (defendant touched victim's breast); *State v. Hall*, 85 N.C. App. 447, 448, 355 S.E.2d 250, 251, *disc. rev. denied*, 320 N.C. 515, 358 S.E.2d 525 (1987) (defendant pulled the victim's shirt down and touched her breasts); *State v. Wortham*, 80 N.C. App. 54, 55, 341 S.E.2d 76, 77 (1986), *rev'd in part on other grounds*, 318 N.C. 669, 351 S.E.2d 294 (1987) (defendant slit open the crotch of his sleeping victim's panties); *State v. Powell*, 74 N.C. App. 584, 585, 328 S.E.2d 613, 614 (1985) (defendant entered victim's bedroom at night, undressed, and began fondling his genitalia). As we noted in *Dunston*, "[t]he element of intent is established if the evidence shows that the defendant, at any time during the incident, had an intent to gratify his passion upon the victim notwithstanding any resistance on her part." *Dunston*, 90 N.C. App. at 625, 369 S.E.2d at 638.

In the instant case, K.M. testified that when she and defendant would go off to places alone, he would tell her that he loved her and wanted to have sex with her. She stated that she would tell him "no," and that he would then "put his penis between [her] legs and get himself to the point of ejaculation"—or gratification. Based upon the evidence presented at trial, we hold defendant's repeated asking of K.M. to have intercourse with him, when combined with his comments that he wanted to be "inside [her]" and be "[her] first," and the repeated sexual acts, "constitutes sufficient evidence of overt sexual behavior from which the jury could properly infer, notwithstanding the possibility of other inferences, that defendant intended to engage in vaginal intercourse with his victim." *Id.* at 625-26, 369 S.E.2d at 638. Thus, we hold the trial court did not err in denying defendant's motion to dismiss the charges of attempted statutory rape of K.M. (03 CRS 2311) and attempted incest with K.M. (03 CRS 2313), as there was sufficient evidence of defendant's overt actions beyond mere preparation in his attempt to have vaginal intercourse with K.M. Defendant's assignments of error are overruled.

[5] Defendant next contends the trial court erred in failing to dismiss the charge of disseminating obscene material to his daughter, K.M. (03 CRS 2312). Defendant's argument is based upon the fact that during his trial, K.M. was shown photographs depicting naked men and women, and women who looked similar to her, all of whom were engaged in sexual acts. K.M. testified that the photographs she was shown at trial were substantially similar to the ones defendant had shown to her, but she was unable to state definitively that the photographs she looked at in court were the same ones defendant had

shown to her. Defendant argues the photographs used at trial were only to illustrate the testimony of K.M., and were not introduced as substantive evidence. Defendant contends the statute under which he was charged clearly contemplates that the jury will have the opportunity to view the material allegedly disseminated in order to make a determination as to whether the material is obscene. Thus, defendant contends, the State failed to offer substantial evidence that the material defendant allegedly disseminated to K.M. was in fact obscene.

North Carolina General Statutes, section 14-190.1 provides:

> It shall be unlawful for any person, firm or corporation to intentionally disseminate obscenity. A person, firm or corporation disseminates obscenity within the meaning of this Article if he or it: . . . (4) Exhibits, presents, rents, sells, delivers or provides; or offers or agrees to exhibit, present, rent or to provide: any obscene still or motion picture, film, filmstrip, or projection slide, or sound recording, sound tape, or sound track, or any matter or material of whatever form which is a representation, embodiment, performance, or publication of the obscene.

N.C. Gen. Stat. § 14-190.1(a)(4) (2001). Moreover, material will be deemed to be obscene if:

> (1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and
>
> (2) The average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and
>
> (3) The material lacks serious literary, artistic, political, or scientific value; and
>
> (4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

N.C. Gen. Stat. § 14-190.1(b) (2001); *see State v. Hill*, 179 N.C. App. 1, 14-15, 632 S.E.2d 777, 786 (2006) (State's presentation of evidence by the minor victims that the defendant had provided pornography to them was sufficient to support a conviction pursuant to N.C. Gen. Stat. § 14-190.7). What is considered to be obscene is to be "judged with reference to ordinary adults except that it shall be judged with

reference to children or other especially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be especially designed for or directed to such children or audiences." N.C. Gen. Stat. § 14-190.1(d) (2001).

K.M. testified defendant repeatedly showed her and her stepsister, J.M., pictures of young naked girls with blond hair who looked like her. K.M. stated that some of the pictures defendant showed her depicted naked men and women engaged in sex, and that some of the pictures showed close-up images of a penis inside a woman's vagina. K.M. testified that at all times, the pictures shown to her by defendant were located on defendant's computer. During defendant's trial, the State showed K.M. more than seventy photographs which were found on diskettes seized from a storage building containing defendant's property. K.M. testified that the photographs shown to her by the State were substantially similar to the pictures defendant had shown to her on his computer. Due to the length in time which had passed since the incidents, and the numerous photographs, K.M. was unable to say with certainty that they were the specific photographs defendant had shown to her. The trial court instructed the jury that the photographs K.M. was shown during her testimony were admitted only for the purposes of illustrating and corroborating K.M.'s testimony.

Nothing in section 14-190.1 requires the State to produce the precise material alleged to be obscene, and defendant fails to cite any case law indicating that a jury must be shown the exact material which the State contends constitutes obscene material. In the instant case, K.M. was shown multiple photographs depicting naked men and women engaged in intercourse, and close up pictures of a man's penis in a woman's vagina. While she was unable to definitively state that the photographs shown to her in court were the exact ones shown to her by defendant, she was able to describe in detail the pictures defendant showed to her on his computer. When presented with the State's evidence, she testified that the photographs were substantially similar to those shown to her by defendant.

In addition, Detective Michael Hallman, who executed the search warrant on defendant's storage unit, testified in detail regarding the diskettes seized from defendant's property and the files contained on the diskettes. He testified that 280 diskettes were seized from defendant's property; however, the officer was unable to access almost ninety percent of the files. Some of the photographs on the diskettes required a specific software program in order to access the pho-

tographs. Some of the diskettes were labeled with titles such as "Sexxy #1" and "Sexxy #2." Five of the diskettes seized contained ninety-four photographs, of which seventy-three were pornographic. The photographs contained on the diskettes showed nude women, nude women engaging in sexual acts, photographs of women with blonde hair who appeared to be very young and were engaging in sexual acts, and photographs of nude men and women engaging in various sexual acts, including close-up shots of a penis and vagina. Detective Hallman also testified that the specific photographs, about which K.M. would later testify, were found on several of the diskettes seized from defendant's storage unit. He testified that the specific photographs, about which K.M. would later testify, showed nude men and women, in which the women appeared young in age and had blonde hair, and in which the men and women were engaged in a sexual act. As in *Hill*, the State offered sufficient evidence that whether or not defendant disseminated obscene material to K.M. was for the jury to decide. *Hill*, 179 N.C. App. at 14-15, 632 S.E.2d at 786.

Therefore, the trial court acted properly in denying defendant's motion to dismiss the charge of disseminating obscene material to K.M. (03 CRS 2312). Defendant's assignment of error is overruled.

[6] Defendant next contends the trial court erred in failing to dismiss the two charges of second-degree forcible sexual offense against K.M. (03 CRS 2314 and 2315), in that the State failed to present sufficient evidence of force necessary to sustain his conviction of the offense under North Carolina General Statutes, section 14-27.5(a). With respect to these two charges, defendant allegedly committed the acts of digital penetration and oral sex upon K.M. In order for defendant to be convicted of second-degree forcible sexual offense, the State had to prove that defendant engaged in a sexual act with K.M., and that the act was done by force and against K.M.'s will. *See* N.C. Gen. Stat. § 14-27.5(a)(1) (2002).

Our courts repeatedly have held that the element of force may be established by a showing of either " 'actual, physical force or by constructive force in the form of fear, fright, or coercion.' " *State v. Corbett*, 154 N.C. App. 713, 716, 573 S.E.2d 210, 213 (2002) (quoting *Etheridge*, 319 N.C. at 45, 352 S.E.2d at 680). Constructive force may be shown by "proof of threats or other actions by the defendant which compel the victim's submission to sexual acts." *Etheridge*, 319 N.C. at 45, 352 S.E.2d at 680. The threats used by defendant "need not be explicit so long as the totality of circumstances allows a reason-

able inference that such compulsion was the unspoken purpose of the threat." *Id.*

Defendant contends the State failed to produce any evidence of force, threats of violence, or emphatic demands towards K.M. Our courts have held that in the case of a parent-child relationship, " 'constructive force [may] be reasonably inferred from the circumstances surrounding the parent-child relationship.' " *Corbett*, 154 N.C. App. at 716, 573 S.E.2d at 213 (quoting *Etheridge*, 319 N.C. at 47, 352 S.E.2d at 681). " 'The youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose.' " *Id.* As the Court stated in *Etheridge*,

> [t]he child's knowledge of [her] father's power may alone induce fear sufficient to overcome [her] will to resist, and the child may acquiesce rather than risk [her] father's wrath. . . . [F]orce can be understood in some contexts as the power one need not use.
>
> In such cases the parent wields authority as another assailant might wield a weapon. The authority itself intimidates; the implicit threat to exercise it coerces.

Etheridge, 319 N.C. at 48, 352 S.E.2d at 681-82 (internal citation omitted).

As in both *Etheridge* and *Corbett*, defendant began abusing K.M. when she was a minor child living in his home. He conditioned her to succumb to his illicit acts through the use of pornography and the regular occurrence of the sexual acts. K.M. was subject to defendant's parental authority, as were the child victims in *Etheridge* and *Corbett*. K.M. testified that defendant told her that he wanted to be the first one to have sex with her, and he complained to her that his wife was cold and did not have sex with him. She stated defendant said he was in love with her. Defendant also told K.M. about a dream he once had in which he shot both K.M. and himself. Defendant told K.M. that if she ever told anyone what he did with her, that he would go to jail which would ruin his life and he would have no reason to live. During her testimony, K.M. read from portions of her diary, in which she stated that defendant had tried to choke her, and that she feared for her life. She also wrote that defendant "always threatens me, whether it's to knock me through a wall, knock my teeth through my skull, or to kill me."

From the circumstances surrounding defendant's and K.M.'s parent-child relationship, we hold there is sufficient evidence from which a reasonable jury could conclude that defendant used his position of power, as K.M.'s father, to force her to engage in the various sexual acts. Thus, the trial court acted properly in denying defendant's motion to dismiss the charges of second-degree forcible sexual offense against K.M. (03 CRS 2314 and 2315). Defendant's assignment of error is overruled.

[7] Defendant next argues the trial court erred in failing to dismiss the charge of attempted second-degree rape of K.M. (03 CRS 2316).

In order for defendant to be convicted of attempted second-degree rape, the State must prove that defendant attempted to have vaginal intercourse with K.M. by force or against her will. *See* N.C. Gen. Stat. § 14-27.3(a)(1) (2001). As noted *supra*, in order to prove an attempt of a crime, the State must show that defendant had " '(1) the intent to commit the substantive offense, and (2) [he performed] an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense.' " *Sines*, 158 N.C. App. at 85, 579 S.E.2d at 899 (citation omitted). Defendant specifically contends there was insufficient evidence presented that he attempted to have intercourse with K.M., and that he used force or threats in his attempt to have intercourse with her.

As previously held, there was sufficient evidence presented to show that defendant attempted to have intercourse with K.M., through his repeated asking K.M. for sex and the multiple other sexual acts. These repeated acts constituted overt sexual behavior beyond mere preparation in his attempt to have intercourse with her. We also held that defendant's relationship with K.M. constituted one in which he had a position of power over her, and that he used his position in such a way as to constitute constructive force. Thus, there was sufficient evidence presented to sustain defendant's conviction for the attempted second-degree forcible rape of K.M. (03 CRS 2316), and the trial court acted properly in denying defendant's motion to dismiss. Defendant's assignment of error is overruled.

[8] Defendant next contends the trial court erred in failing to dismiss the charge of assault on a female, with K.M. being the female and the specific act being defendant's sucking on K.M.'s breasts (03 CRS 2318). Defendant was indicted and tried pursuant to North Carolina General Statutes, section 14-33(c)(2), which provides that "any person who commits any assault, assault and

battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he . . . [a]ssaults a female, he being a male person at least 18 years of age." N.C. Gen. Stat. § 14-33(c)(2) (2001).

Defendant does not dispute the fact that at the time of the alleged offense he was over the age of eighteen, and that he assaulted K.M. by sucking on her breasts. Instead defendant contends that in enacting section 14-33(c), it was the legislature's intention that the female victim be under the age of twelve. Section 14-33(c)(3) provides that "any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he . . . assaults a child under the age of 12 years." N.C. Gen. Stat. § 14-33(c)(3) (2001). Defendant contends the legislature's inclusion of an age limit for the victim in section 14-33(c)(3) also applies to any assault committed against a female as provided in section 14-33(c)(2). We find no merit in defendant's argument.

"The primary endeavor of courts in construing a statute is to give effect to legislative intent." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 276-77 (2005) (citing *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 574, 573 S.E.2d 118, 121 (2002)). "This applies as equally to criminal statutes as to any other." *Id.* at 614, 614 S.E.2d at 277 (citing *State v. Jones*, 358 N.C. 473, 478, 598 S.E.2d 125, 128 (2004)). When the statutory language is clear and unambiguous, we are to interpret the language used by applying the plain and definite meaning to the words chosen by the legislature. *Id.* (citing *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993)).

In interpreting the meaning of section 14-33(c)(2), we first must look to the language chosen by the legislature in enacting the statute. Section 14-33(c) provides for several types of offenses for assault, assault and battery, or affray. *See* N.C. Gen. Stat. § 14-33(c) (2001).[3] Each of the subsections of section 14-33(c) are independent of each

3. North Carolina General Statutes, section 14-33(c) (2001) provides:

Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she:

(1) Inflicts serious injury upon another person or uses a deadly weapon;

(2) Assaults a female, he being a male person at least 18 years of age;

(3) Assaults a child under the age of 12 years;

other and provide for distinct ways in which a defendant may be found to have committed an assault. Our case law clearly establishes that the subsections of section 14-33(c) list separate and distinct offenses, and that the requirements of one subsection do not apply to or abrogate the other subsections. *See State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326 (2000), *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000) (defendant's conviction for assault on a child upheld when assault was on defendant's son); *State v. Romero*, 164 N.C. App. 169, 595 S.E.2d 208 (2004) (defendant's conviction for assault on a child upheld when assaults were on his son and daughter); *State v. West*, 146 N.C. App. 741, 554 S.E.2d 837 (2001) (defendant's conviction for assault of a female upheld where he reached under a coworker's blouse and touched her breast with his hand); *State v. Ackerman*, 144 N.C. App. 452, 551 S.E.2d 139 (2001) (defendant's conviction for assault on a female upheld where female was old enough to drive and order an alcoholic drink); *State v. Smith*, 139 N.C. App. 209, 216, 533 S.E.2d 518, 522 (2000) ("Under [section] 14-33(c)(2), one commits assault on a female if he 'assaults a female, he being a male person at least 18 years of age.' "). Nothing in section 14-33(c)(2)—the section under which defendant was indicted, tried, and convicted—requires the female victim to be under a certain age. The only elements required for an assault under section 14-33(c)(2) are that the victim be a female, and the perpetrator be a male who is at least eighteen years old. *See* N.C. Gen. Stat. § 14-33(c)(2) (2001). Therefore, defendant's argument is without merit, and his assignment of error is overruled.

[9] Next, defendant contends the trial court erred in failing to dismiss the charge of assault on a female, with K.M. being the female and the specific act being defendant's fondling of her breasts on 4 June 2002. Defendant argues insufficient evidence was presented to show that defendant assaulted K.M. by fondling her breasts on 4 June 2002 (03 CRS 2319).

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(4) Assaults an officer or employee of the State or any political subdivision of the State, when the officer or employee is discharging or attempting to discharge his official duties;

(5) [Repealed]; or

(6) Assaults a school employee or school volunteer when the employee or volunteer is discharging or attempting to discharge his or her duties as an employee or volunteer, or assaults a school employee or school volunteer as a result of the discharge or attempt to discharge that individual's duties as a school employee or school volunteer. . . .

At defendant's trial, K.M. presented the following testimony:

STATE: Okay. And Monday came, Monday, June the 3rd. What did you do Monday, June the 3rd?

K.M.: My dad woke me up. During the week he would wake me up by putting his hands up my bra or putting his hands down my pants. But that only lasted a few minutes until I woke up. I got dressed and went to school.

STATE: How long had that type of activity—that type of activity been going on, [K.M.]?

K.M.: I'm not exactly sure, but I believe—I remember it since Kathy and him got married.

STATE: How often would he wake you up in the morning?

K.M.: Almost every day during the week if nobody else was awake.

STATE: And how—how often would he wake you up in the way that you have described to the members of the jury?

K.M.: Almost every day during the week.

. . . .

STATE: And the next day comes, June the 4th.

K.M.: Right.

STATE: Tuesday. What happens June the 4th?

K.M.: June the 4th I was woke [sic] up the same way as I was every morning, and I got dressed and went to school.

Based upon K.M.'s testimony, we hold the jury reasonably could conclude that defendant awoke K.M. on 4 June 2002 in the same manner as he had on many other mornings, by fondling her breasts. When viewed in a light most favorable to the State, and giving the State the benefit of all reasonable inferences that may be drawn from K.M.'s testimony, there was sufficient evidence presented for a jury to decide the question of whether defendant committed an assault on a female by fondling K.M.'s breasts on 4 June 2002. Defendant's assignment of error is overruled. *See Sumpter*, 318 N.C. at 107, 347 S.E.2d at 399.

[10] In defendant's ninth assignment of error, he contends the trial court erred in failing to dismiss the charge of first-degree statutory rape of J.M. (03 CRS 2283). Defendant argues the State failed to present sufficient evidence that he had vaginal intercourse with J.M. prior to her thirteenth birthday.

North Carolina General Statutes, section 14-27.2(a)(1) provides that "[a] person is guilty of rape in the first degree if the person engages in vaginal intercourse . . . [w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim." N.C. Gen. Stat. § 14-27.2(a)(1) (1999). Defendant does not dispute that at the time of the alleged offense he was at least twelve years old, and was at least four years older than J.M. Defendant contends J.M.'s testimony fails to show that he engaged in vaginal intercourse with her prior to her turning thirteen on 17 August 2000.

At trial, J.M. testified that her relationship with defendant changed in July or August 2000, when he began showing her pictures of naked men and women engaged in vaginal and anal intercourse. She stated that "[s]tarting in July, like, after he showed me pictures and then later, like, in the—after months, he started having sex with me. Like, he said I was ready for sex." J.M. testified the first time defendant had sex with her it was anal intercourse. She stated unequivocally that although defendant began touching her in July 2000, she was thirteen years old when defendant started having sexual intercourse with her.

Based upon the evidence presented at defendant's trial, we hold there was insufficient evidence that defendant engaged in vaginal intercourse prior to J.M.'s turning thirteen on 17 August 2000. Thus, the trial court erred in denying defendant's motion to dismiss as to the charge of first-degree statutory rape of J.M., as found in charge 03 CRS 2383. Defendant's conviction on this charge is thus reversed and the charge is dismissed.

[11] Defendant next argues the trial court failed to dismiss his four charges of first-degree statutory sexual offense against J.M. (03 CRS 2284, 2285, 2286, and 2287). Specifically, defendant contends the evidence presented at his trial failed to show that the alleged sexual acts occurred prior to J.M. turning thirteen on 17 August 2000.

We begin by noting that although defendant's indictments for these offenses cite North Carolina General Statutes, section 14-27.7A

as the statute defendant allegedly violated, the wording of the indictments reveals the statute contemplated by the State in charging defendant was actually section 14-27.4. Defendant's indictments for the four offenses are identical, and all state:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about and between the 4th day of July, 2000, and the 16th day of August, 2000, in the county named above the defendant named above unlawfully, willfully and feloniously did engage in a sex offense with [J.M.], a child under the age of 13 years. At the time of the offense the defendant was at least twelve (12) years old and at least four (4) years older than the victim. This act was in violation of North Carolina General Statutes Section 14-27.7A.

Section 14-27.7A(a) sets forth the elements for the offense of the statutory rape or sexual offense of a person who is 13, 14, or 15 years old, when the perpetrator is at least six years older than the victim. N.C. Gen. Stat. § 14-27.7A(a) (1999). However, section 14-27.4(a)(1) sets forth the elements for the offense of first-degree statutory sexual offense with a child under the age of thirteen, when the perpetrator is at least twelve years old and at least four years older than the victim. N.C. Gen. Stat. § 14-27.4(a)(1) (1999). With respect to each of these offenses, the jury in defendant's trial was instructed pursuant to section 14-27.4(a)(1), rather than 14-27.7A. This Court previously has held that although an indictment may cite to the wrong statute, when the body of the indictment is sufficient to properly charge defendant with an offense, the indictment remains valid and the incorrect statutory reference does not constitute a fatal defect. *See State v. Jones*, 110 N.C. App. 289, 290-91, 429 S.E.2d 410, 411-12 (1993); *State v. Reavis*, 19 N.C. App. 497, 498, 199 S.E.2d 139, 140 (1973). Thus, defendant's indictments for these four offenses remain valid, as they properly put him on notice that he was being charged pursuant to section 14-27.4(a)(1), with four counts of first-degree sexual offense against a child who was under the age of thirteen, where defendant was at least twelve years old and at least four years older than J.M., the victim.

[12] As previously stated, in order for defendant to be found guilty of first-degree sexual offense, pursuant to section 14-27.4(a)(1), the State was required to prove that the sexual acts occurred prior to J.M. turning thirteen on 17 August 2000. With respect to the four counts of first-degree statutory sexual offense against J.M., defendant was charged with performing anal intercourse with J.M., having J.M. per-

form oral sex upon him, digitally penetrating J.M., and performing oral sex upon J.M. Based upon our analysis of defendant's prior assignment of error, we hold there was also insufficient evidence to show that defendant engaged in these sexual acts prior to J.M. turning thirteen in August 2000. J.M. testified that defendant did not start touching her until a few months after he began showing her pornographic pictures in July 2000. While at one point she did testify that defendant started touching her in July 2000, she did not state how defendant touched her and she testified that the first time defendant had sex with her, she was thirteen. She also testified that over the course of two years, defendant performed various other sexual acts upon her, including having her perform oral sex upon him, vaginal intercourse, digital penetration, and anal intercourse. However, J.M.'s testimony regarding these events fails to indicate that they occurred during the period of July 2000 when defendant began touching her and 16 August 2000, the day prior to her thirteenth birthday.

Therefore, we hold J.M.'s testimony does not constitute sufficient evidence to support the reasonable inference that defendant committed these offenses prior to her turning thirteen. Thus, the trial court erred in denying defendant's motions to dismiss as to the four counts of first-degree statutory sexual offense against J.M., as found in cases 03 CRS 2284, 2285, 2286, and 2287. Defendant's convictions on these charges are reversed and the charges are dismissed.

Defendant next contends that judgment should be arrested in the following cases, based upon the fact that the indictments for the offenses allege the same dates of occurrence, yet fail to differentiate the offenses in any way: first-degree statutory sexual offense (J.M.) (03 CRS 2284, 2285, 2286, and 2287); statutory sexual offense against a person who is 13, 14, or 15 years old (J.M.) (03 CRS 2289, 2290, 2291, and 2292); taking indecent liberties with a child (K.M.) (03 CRS 2302, 2303, 2304, 2305, and 2306); statutory sexual offense against a person who is 13, 14, or 15 years old (K.M.) (03 CRS 2309 and 2310); second-degree forcible sexual offense (K.M.) (03 CRS 2314 and 2315); and assault on a female by a male at least 18 years of age (K.M.) (03 CRS 2317, 2318, and 2319). Specifically, defendant contends the lack of specificity in the indictments deprived him of his constitutional right to a unanimous jury verdict.

[13] A defendant's failure to object at trial to a possible violation of his right to a unanimous jury verdict does not waive his right to appeal on the issue, and it may be raised for the first time on appeal.

State v. Ashe, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). When defendant is tried in a jury trial, "the jurors must unanimously agree that the State has proven beyond a reasonable doubt each and every essential element of the crime charged." *State v. Jordan*, 305 N.C. 274, 279, 287 S.E.2d 827, 831 (1982). Thus, although defendant failed to raise this issue before the trial court, he was not required to do so and the issue may be addressed on appeal.

[14] On appeal, defendant relies on this Court's holding in *State v. Gary Lee Lawrence, Jr.* (*G. Lawrence*), 165 N.C. App. 548, 599 S.E.2d 87 (2004), *rev'd in part*, 360 N.C. 393, 627 S.E.2d 615 (2006), in which we held the defendant's right to a unanimous jury verdict was violated when he was charged with multiple counts of sexual offenses in indictments that failed to differentiate the specific acts constituting the offenses. However, our opinion in *G. Lawrence* was reversed by our Supreme Court with respect to this issue; thus, defendant's argument on appeal is without merit.

For the reasons stated in *State v. Markeith Rodgers Lawrence* (*M. Lawrence*), 360 N.C. 368, 627 S.E.2d 609 (2006), our Supreme Court reversed in part our holding in *G. Lawrence*. In *M. Lawrence*, the Court held when the trial court " 'merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied.' " 360 N.C. at 374, 627 S.E.2d at 612 (quoting *State v. Lyons*, 330 N.C. 298, 303, 412 S.E.2d 308, 312 (1991)) (emphasis in original). Thus, " '[t]he risk of a nonunanimous verdict does not arise in cases such as the one at bar because the statute proscribing indecent liberties does not list, as elements of the offense, discrete criminal activities in the disjunctive.' " *Id.* at 375, 627 S.E.2d at 613 (quoting *State v. Hartness*, 326 N.C. 561, 564, 391 S.E.2d 177, 179 (1990)). The Court held that a defendant may be unanimously convicted of a sexual offense, such as taking indecent liberties with a child, even when the indictment "lacked specific details to identify the specific incidents." *Id.*

In defendant's case, we already have addressed the fact that his indictments remain valid absent the inclusion of the specific acts which constituted the alleged sexual offenses. Moreover, the jury instructions and verdict sheets for each offense specifically identified each case by its number, listed the date on which each offense was alleged to have occurred, and listed the specific acts which were to serve as the underlying basis for each offense. The jury was in-

structed specifically in each case in which defendant was charged with multiple counts of the same offense involving the same victim, that each of the acts serving as the basis for the separate counts must have occurred on a date different than in the other cases charging defendant with the same offense involving the same victim. There is nothing in the record to indicate that the jury was confused by either the trial court's instructions or the verdict sheets. In addition, the jury was polled following the announcement of the verdicts, thereby further ensuring that each verdict was the result of a unanimous decision. *See State v. Tirado*, 358 N.C. 551, 584, 599 S.E.2d 515, 537 (2004).

Thus, based upon our Supreme Court's holding in *M. Lawrence*, we hold that defendant was not deprived of his right to a unanimous jury verdict, and defendant's assignment of error is overruled.

[15] In defendant's final assignment of error, he contends that judgment should be arrested in each of the cases listed in the previous argument, based upon the failure of the indictments to differentiate the offenses charged in any way, thereby violating his right not to be subjected to double jeopardy. Defendant contends that by failing to differentiate the various charges by providing different dates for the offenses and listing the underlying acts, the indictments open the door to his being subjected to double jeopardy for the same acts on the same dates. Defendant's argument previously has been rejected by our Supreme Court, and is without merit.

Each of the indictments in defendant's case lists a separate case number, and sufficiently charges defendant with one count of the alleged offenses. The indictments allege all of the elements of each offense, as required by the various statutes. Our statutes do not require that indictments for sexual offenses, such as statutory sexual offense, taking indecent liberties with a child, or assault on a female, specifically state the underlying act constituting the offense. *See* N.C. Gen. Stat. § 15-144.2(a) (2005); *see also Kennedy*, 320 N.C. 20, 23-25, 357 S.E.2d 359, 361-63 (1987); *Effler*, 309 N.C. at 745-47, 309 S.E.2d at 205-06; *Edwards*, 305 N.C. 378, 380, 289 S.E.2d 360, 361-62 (1982); *Youngs*, 141 N.C. App. at 229-31, 540 S.E.2d at 800-01.

Our Supreme Court has held that an indictment must sufficiently put a defendant on notice of the charges against him. *See Kennedy*, 320 N.C. at 24, 357 S.E.2d at 362. " 'An indictment is "constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to

protect him from subsequent prosecution for the same offense." ' " *State v. McGriff*, 151 N.C. App. 631, 634, 566 S.E.2d 776, 778 (2002) (quoting *State v. Hutchings*, 139 N.C. App. 184, 188, 533 S.E.2d 258, 261, *disc. rev. denied*, 353 N.C. 273, 546 S.E.2d 381 (2000)). "In general, an indictment couched in the language of the statute is sufficient to charge the statutory offense," and "need only allege the ultimate facts constituting the elements of the criminal offense and that evidentiary matters need not be alleged." *State v. Blackmon*, 130 N.C. App. 692, 699, 507 S.E.2d 42, 46, *cert. denied*, 349 N.C. 531, 526 S.E.2d 470 (1998).

In the instant case, defendant's indictments for all his charges of first-degree statutory sexual offense, statutory sexual offense against a person who is 13, 14, or 15 years of age, and second-degree sexual offense are in compliance with the requirements of North Carolina General Statutes, section 15-144.2, and the indictments match the wording of sections 14-27.4(a)(1), 14-27.7A(a), and 14-27.5(a)(1). Defendant's indictments for the charges of taking indecent liberties with a child match the wording of section 14-202.1(a)(2), and his assault on a female indictments match the wording of section 14-33(c)(2). Therefore, each of the indictments was sufficient to inform defendant of the charges against him, and he has failed to show any deprivation of his ability to prepare a defense due to a lack of specificity in the indictments. Accordingly, his final assignment of error is overruled.

Therefore, we find no error in defendant's convictions in cases 03 CRS 2289, 2290, 2291, 2292, 2302, 2303, 2304, 2305, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, and 2319, and we reverse and dismiss defendant's convictions in cases 03 CRS 2283, 2284, 2285, 2286, 2287, and 2306.

No Error in part; Reversed and remanded for resentencing in part.

Judges CALABRIA and GEER concur.

IN RE I.R.T.

[184 N.C. App. 579 (2007)]

IN THE MATTER OF: I.R.T., A JUVENILE

No. COA06-676

(Filed 17 July 2007)

1. Criminal Law— juvenile's competency to stand trial— abuse of discretion standard

The trial court did not abuse its discretion by determining that a juvenile was competent to stand trial under N.C.G.S. § 15A-1001(a) for possession of cocaine with intent to sell or deliver, because: (1) the court held a competency hearing, entered an order citing evidence offered by two psychologists giving conflicting opinions, and cited one evaluation in support of its findings; and (2) the court found the juvenile was able to assist in his own defense and work with his attorney, that he did not demonstrate symptoms of any mental disorder that could interfere with his ability to participate in court proceedings, and that he had the ability to understand legal terms and procedures that are explained in concrete terms.

2. Search and Seizure— investigatory seizure—motion to suppress evidence—cocaine

The trial court did not err by concluding officers had reasonable suspicion to make an investigatory seizure of a juvenile in a possession of cocaine with intent to sell or deliver case when an officer requested that the juvenile spit out what was in his mouth, because: (1) the juvenile was located in a high crime area and the police had received complaints that drug dealing had been occurring in the area; (2) the juvenile quickly turned his head away from the officer and was not moving his mouth while speaking as though he had something inside his mouth; and (3) the officer testified that individuals who have exhibited such characteristics have generally kept crack cocaine in their mouths.

3. Search and Seizure— warrantless search—probable cause

The trial court did not err by denying a juvenile's motion to suppress evidence of crack cocaine found on his person in a possession of cocaine with intent to sell or deliver case based on probable cause to conduct a warrantless search, because: (1) there was probable cause based on the same factors found for reasonable suspicion to conduct the investigatory seizure; (2) exigent circumstances existed when the juvenile had drugs in his

mouth and could have swallowed them, thus destroying the evidence or harming himself; (3) based upon the officer's training and experience, he knew that putting drugs in the mouth was a common method in which people hide drugs; and (4) the fact that the juvenile was in a high crime area was only one factor the officer used to form reasonable suspicion and probable cause that criminal activity was afoot.

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

The trial court erred by denying a juvenile's motion to dismiss the charge of possession of cocaine with intent to sell or deliver, and the case is remanded for disposition based on an adjudication finding juvenile responsible for simple possession, because: (1) although packaging and unexplained cash are appropriate factors to consider in determining whether there was sufficient evidence on the intent element, the evidence viewed cumulatively was insufficient when a single crack rock could only be viewed as possession of crack cocaine and the cellophane could just as easily be in the juvenile's possession in his role as a consumer who purchased the packaged crack rock from a dealer; (2) cases in which packaging have been a factor have tended to involve drugs divided into smaller quantities and packaged separately; (3) the $271 in cash on juvenile's person was not enough to establish intent given the totality of circumstances; and (4) when the trier of fact adjudicated the juvenile responsible for possession with intent to sell or deliver, it necessarily found juvenile responsible for simple possession of a controlled substance.

Judge JACKSON concurring.

Judge CALABRIA concurring in part and dissenting in part.

Appeal by juvenile from a juvenile adjudication order entered 8 February 2006 by Judge James T. Hill in Durham County District Court. Heard in the Court of Appeals 11 January 2007.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Kathleen M. Waylett and Assistant Attorney General Jay L. Osborne, for the State.

Terry F. Rose for juvenile-appellant.

HUNTER, Judge.

I.R.T. ("juvenile") appeals from an order adjudicating him delinquent for possessing crack cocaine with the intent to sell or distribute. After careful consideration, we remand for disposition based on an adjudication finding juvenile responsible for simple possession.

On the afternoon of 19 May 2005, Durham Police Officers S. E. Kershaw ("Corporal Kershaw") and J. L. Honeycutt ("Officer Honeycutt") were on patrol along Beaman Street when they observed a group of individuals standing outside an apartment building. The officers exited their vehicles and walked up to the group, engaging the group members in conversation. Corporal Kershaw testified that officers have previously arrested people on drug charges in the area, but stated that on 19 May police had not received any reports of drug sales nearby.

Corporal Kershaw testified that he approached juvenile, that juvenile looked at him, and then quickly turned his head away. Corporal Kershaw asked juvenile if he lived in the building, and juvenile answered no. "[A]s I was talking to him, he kept his head turned away from me and I could tell that he was not moving his mouth as though he had something inside of his mouth[,]" Corporal Kershaw stated.

Corporal Kershaw explained that he had previously encountered individuals acting evasive and hiding crack cocaine in their mouths, and those experiences made him suspect juvenile might be hiding drugs in his mouth. "By his mannerisms, by turning away, by not opening his mouth as he talked, you could tell that he had something in his mouth that he was trying to hide[,]" Corporal Kershaw stated.

Suspecting juvenile of hiding drugs in his mouth, Corporal Kershaw requested juvenile to spit out what was in his mouth. Juvenile then spit out one crack cocaine rock wrapped in cellophane. Corporal Kershaw then placed juvenile under arrest for possession of cocaine with the intent to sell or deliver. A search of juvenile's person turned up $271.00 in cash.

Following a bench trial in Durham County District Court, Judge James T. Hill entered an order adjudicating juvenile delinquent for possession of cocaine with the intent to sell or deliver. He placed juvenile on probation for a period of twelve months and required juvenile to complete a substance abuse assessment and a mental health assessment, as well as 200 hours of community service. The

order further provided that the juvenile would maintain passing grades in at least four courses during each grading period, and refrain from associating with anyone in the Blood gang. From this order, juvenile appeals.

I.

[1] Juvenile first argues that the trial court erred by determining that juvenile was competent to stand trial. N.C. Gen. Stat. § 15A-1001(a) (2005) states in relevant part:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "incapacity to proceed."

Id. "The question of defendant's capacity is within the trial judge's discretion and his determination thereof, if supported by the evidence, is conclusive on appeal." *State v. Reid*, 38 N.C. App. 547, 548-49, 248 S.E.2d 390, 391 (1978).

In the case *sub judice*, the trial court considered the opinions of two psychologists who testified and submitted reports giving conflicting opinions. Dr. David Vande Vusse ("Dr. Vande Vusse") submitted a forensic screening evaluation stating that, "Though legal terms and procedures will need to be explained to [juvenile] in concrete terms, [juvenile] does not demonstrate any mental defect that would preclude his capacity to proceed to trial."

Dr. Timothy Hancock ("Dr. Hancock") offered a different opinion, stating in his report that juvenile was not competent to stand trial. Dr. Hancock based his opinion on juvenile's evaluations showing a progressive decline in intellectual abilities. "While it is possible that he may be educated about the concrete facts of the courtroom, just as would a young child . . . [t]he preponderance of the evidence indicates that [juvenile] is not competent to stand trial."

Following the competency hearing, the trial court entered an order on 19 January 2006 finding juvenile competent to stand trial. The order cited the evidence offered by both psychologists and cited Dr. Vande Vusse's evaluation in support of its findings. Specifically, the court found that juvenile is able to assist in his own

defense and work with his attorney; that juvenile does not demonstrate symptoms of any mental disorder that could interfere with his ability to participate in court proceedings; and that juvenile has the ability to understand legal terms and procedures that are explained in concrete terms.

As the court's findings were based on testimony and evaluations submitted by experts, those findings were supported by competent evidence. We determine the trial court did not abuse its discretion in concluding, upon those findings, that juvenile was competent to stand trial. This assignment of error is overruled.

II.

[2] Juvenile next argues that the trial court erred in denying his motion to suppress evidence of crack cocaine found on his person. We disagree.

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. Const. amend. IV. A consensual encounter with the police in a public place is neither a search nor a seizure. *See State v. Streeter*, 283 N.C. 203, 208, 195 S.E.2d 502, 506 (1973) (citing *United States v. Hill*, 340 F. Supp. 344, 347 (E.D. Pa. 1972)). Accordingly, the Constitution does not "prevent[] a policeman from addressing questions to anyone on the streets." *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 34, 20 L. Ed. 2d 889, 913 (1968) (White, J., concurring)). When an encounter with the police develops into a "seizure" (or "stop"),[1] however, the constitutional protections of the Fourth Amendment are implicated. *United States v. Mendenhall*, 446 U.S. 544, 553-54, 64 L. Ed. 2d 497, 508-09 (1980).

A person will be " 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 554, 64 L. Ed. 2d at 509 (footnote omitted). Factors relevant to whether a seizure has occurred—that is, whether a reasonable person would not feel free to leave—include: (1) "the threatening presence of several officers," (2) "the display of a weapon by an officer," (3) "some physical touching of the person of

1. The term "seizure" is often used in multiple contexts. In this case, we use the term to refer to the situation where a person is seized, that is, stopped, within the meaning of the Fourth Amendment.

the citizen,"[2] or (4) "the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* (citations omitted).

There has not been an explicit holding by the courts of this state as to whether the age of a defendant or juvenile is a relevant inquiry in determining whether a reasonable person would feel free to leave. *See State v. Freeman*, 307 N.C. 357, 363, 298 S.E.2d 331, 334 (1983) (considering that the defendant was seventeen years old and the police officer was fifty years old in determining whether a reasonable person would feel free to leave) *cf. State v. Christie*, 96 N.C. App. 178, 184, 385 S.E.2d 181, 184 (1989) ("[t]he *Mendenhall* standard of whether a reasonable person would have believed that he was not free to leave is an objective standard, not subjective"). A defendant's age has been used to determine whether he was in custody, but the test to determine custody is not identical to the test to determine whether a seizure has occurred. *State v. Buchanan*, 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001). That said, we see no legal or common sense reason to make a distinction. Thus, we hold that the age of a juvenile is a relevant factor in determining whether a seizure has occurred within the meaning of the Fourth Amendment.

"Our review of a trial court's denial of a motion to suppress is limited to a determination of whether its findings are supported by competent evidence, and if so, whether the findings support the trial court's conclusions of law." *State v. McRae*, 154 N.C. App. 624, 627-28, 573 S.E.2d 214, 217 (2002). In the instant case, the officer "requested" that juvenile spit out what was in his mouth. However, the trial court made no finding as to consent. Accordingly, we are unable to determine whether this seizure was consensual. *See id.* at 630, 573 S.E.2d at 219 (the defendant's acquiescence to an officer's request to remove an item from his pocket amounted to clear and unequivocal consent for the seizure).

Although there is no case on point, we believe a seizure occurred under the facts of this case. First, there were two officers present, both of whom arrived in marked police cars. Second, the guns they were carrying were visible. Third, the officers had a gang unit emblem on their shirt. Fourth, juvenile was fifteen years old at the time of the alleged offense. Given this show of authority, the officer's

2. The application of actual physical force to the person results in a seizure. *State v. Fleming*, 106 N.C. App. 165, 169, 415 S.E.2d 782, 784 (1992) (citing *California v. Hodari D.*, 499 U.S. 621, 113 L. Ed. 2d 690 (1991)). There is no evidence in this case that there was any physical contact between the officers and juvenile.

"request" could have been construed by a reasonable person of juvenile's age as an order, compliance with which was mandatory. Under these circumstances, we do not believe that a reasonable person would feel free to leave. Having determined that juvenile was seized, we must now address whether that seizure was constitutional.

III.

In order for a seizure to pass constitutional muster, the officer must have reasonable suspicion to believe criminal activity was afoot. *State v. Roberts*, 142 N.C. App. 424, 429, 542 S.E.2d 703, 707 (2001). Factors relevant in determining whether a police officer had reasonable suspicion include: (1) nervousness of an individual (*State v. McClendon*, 350 N.C. 630, 639, 517 S.E.2d 128, 134 (1999)); (2) presence in a high crime area (*Illinois v. Wardlow*, 528 U.S. 119, 124, 145 L. Ed. 2d 570, 576 (2000)); and (3) unprovoked flight (*Id.* at 125, 145 L. Ed. 2d at 577). "None of these factors, standing alone, are sufficient to justify a finding of reasonable suspicion, but must be considered in context." *Roberts*, 142 N.C. App. at 429, 542 S.E.2d at 707-08. Additionally, refusal to cooperate, " ' "without more, does not furnish the minimal level of objective justification needed for a detention or seizure." ' " *Id.* at 429, n.1, 542 S.E.2d at 707, n.1 (citations omitted). Also, "[t]he facts known to the officers at the time of the stop [or seizure] 'must be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by experience and training.' " *State v. McDaniels*, 103 N.C. App. 175, 180, 405 S.E.2d 358, 361 (1991) (quoting *State v. Harrell*, 67 N.C. App. 57, 61, 312 S.E.2d 230, 234 (1984)). In short, an officer's belief that criminal activity may be afoot must be based on objective, articulable facts. *See, e.g.*, *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979).

In the instant case, the trial court concluded that the police had reasonable suspicion because he was located in a high crime area, the police had received complaints that drug dealing had been occurring in the area, and the way juvenile conducted himself. We hold that the juvenile's conduct, his presence in a high crime area, and the police officer's knowledge, experience, and training are sufficient to establish reasonable suspicion.

The officer testified that there had been "drug arrests [and gang activity] in the area before," that juvenile "quickly turned his head away" from the officer, and that juvenile "kept his head turned away from [him] and . . . [the officer] could tell that he was not moving his mouth [while responding to the officer's questions] as though he had

something inside of his mouth." According to the officer, "individuals that have exhibited those characteristics have generally kept crack-cocaine in their mouths."

In a similar case, this Court found reasonable suspicion when a defendant placed drugs in his mouth and took evasive action by attempting to walk into a store. *State v. Watson*, 119 N.C. App. 395, 398, 458 S.E.2d 519, 522 (1995) (noting that this sort of behavior would lead a reasonable officer to believe that the defendant was attempting to hide contraband).[3] Similarly, in this case juvenile's turning away from the officer and not opening his mouth while speaking constituted evasive actions. Finally, "[o]ur Supreme Court has . . . noted that the presence of an individual on a corner specifically known for drug activity and the scene of multiple recent arrests for drugs, coupled with evasive actions by defendant are sufficient to form reasonable suspicion to stop [or seize] an individual." *Id.* (citing *State v. Butler*, 331 N.C. 227, 415 S.E.2d 719 (1992)). Such is the case here, and we find that the officers in this case had reasonable suspicion to justify an investigatory seizure. This, however, does not end our inquiry on the issue of constitutionality of the search. We must next address whether the warrantless search was constitutional.

IV.

[3] Having determined that there was reasonable suspicion to make an investigatory seizure, we next address whether there was probable cause to conduct the warrantless search.

> So long as a stop [or seizure] is investigative, the police only need to have a reasonable suspicion [to conduct a *Terry* weapons frisk or "pat down"]. However, if the police conduct a full search of an individual without a warrant or consent, they must have probable cause, and there must be exigent circumstances.

State v. Pittman, 111 N.C. App. 808, 812, 433 S.E.2d 822, 824 (1993) (citing *State v. Mills*, 104 N.C. App. 724, 730, 411 S.E.2d 193, 196 (1991)); *see also Florida v. Royer*, 460 U.S. 491, 499, 75 L. Ed. 2d 229, 237 (1983) ("[d]etentions may be 'investigative' yet violative of the Fourth Amendment absent probable cause. In the name of investigating a person who is no more than suspected of criminal activity, the

3. We note without relying on *State v. Scott*, 178 N.C. App. 393, 631 S.E.2d 237 (2006) (unpublished) (finding reasonable suspicion where an officer observed defendant chewing and attempting to swallow items in his mouth while located in a high crime area and upholding the officer's request for defendant to "spit out" what was in his mouth).

police may not carry out a full search of the person or of his automobile or other effects. Nor may the police seek to verify their suspicions by means that approach the conditions of arrest").

Although this Court in *Watson* did not address whether there was probable cause to conduct a full search of a defendant, it did find probable cause to arrest the defendant on the same grounds on which it found reasonable suspicion to make the investigatory seizure. *Watson*, 119 N.C. App. at 400, 458 S.E.2d at 523. Thus, in this case, we find probable cause based on the same factors in which we found reasonable suspicion to conduct the investigatory seizure. The exigent circumstances are also apparent in this case: Juvenile had drugs in his mouth and could have swallowed them, destroying the evidence or harming himself. *See State v. Smith*, 118 N.C. App. 106, 115, 454 S.E.2d 680, 686, *reversed on other grounds*, 342 N.C. 407, 464 S.E.2d 45 (1995) (noting that "courts have allowed highly intrusive warrantless searches of individuals where exigent circumstances are shown to exist, such as imminent loss of evidence or potential health risk to the individual").

The dissent's reliance on *State v. Fleming* is misplaced. In that case, this Court held that the officer "had only a generalized suspicion that the defendant was engaged in criminal activity" because the defendant was merely in a high crime area. *Fleming*, 106 N.C. App. at 171, 415 S.E.2d at 785. It is well settled that presence " 'in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that [defendant] himself was engaged in criminal conduct.' " *Id.* at 170, 415 S.E.2d at 785 (quoting *Brown*, 443 U.S. at 52, 61 L. Ed. 2d at 362-63). The defendant in *Fleming* merely walked away from the officers which, without more, such as evasive maneuvers, is insufficient to establish reasonable suspicion. *Id.* Such is not the case here. Juvenile in this case appeared to have something in his mouth. Based on the officer's training and experience, he knew this was a common method in which people hide drugs. Unlike *Fleming*, the fact that juvenile in this case was in a high crime area was only one factor the officer used to form reasonable suspicion and probable cause that criminal activity was afoot. Thus, we find *Fleming* distinguishable from the case at bar and would uphold the trial court's ruling denying the motion to suppress the evidence. Having determined that the evidence was properly admitted we now turn to the question of whether the evidence presented was sufficient to justify an adjudication of possession with intent to sell or distribute.

V.

[4] Juvenile next argues that the trial court erred in denying his motion to dismiss the charge of possession with intent to sell or distribute. We agree.

In reviewing the denial of a motion to dismiss for insufficient evidence, we determine whether, in the light most favorable to the State, there was substantial evidence supporting each element of the charged offense. *In re Bass*, 77 N.C. App. 110, 115, 334 S.E.2d 779, 782 (1985). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) (citing *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980)). Here, the issue is whether there was substantial evidence to support the element of intent to sell or distribute crack cocaine.

> The offense of possession with intent to sell or deliver has three elements: (1) possession of a substance; (2) the substance must be a controlled substance; and (3) there must be intent to sell or distribute the controlled substance. N.C. Gen. Stat. § 90-95(a)(1); *State v. Fletcher*, 92 N.C. App. 50, 55, 373 S.E.2d 681, 685 (1988). While intent may be shown by direct evidence, it is often proven by circumstantial evidence from which it may be inferred. *State v. Jackson*, 145 N.C. App. 86, 90, 550 S.E.2d 225, 229 (2001). Although "quantity of the controlled substance alone may suffice to support the inference of an intent to transfer, sell, or deliver," it must be a substantial amount. *State v. Morgan*, 329 N.C. 654, 659-60, 406 S.E.2d 833, 835-36 (1991).

State v. Nettles, 170 N.C. App. 100, 105, 612 S.E.2d 172, 175-76 (2005). "Based on North Carolina case law, the intent to sell or distribute may be inferred from (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia." *Id.* at 106, 612 S.E.2d at 176 (citing *State v. Carr*, 122 N.C. App. 369, 373, 470 S.E.2d 70, 73 (1996)).

Here, the evidence showed a single rock of crack cocaine wrapped in cellophane, as well as $271.00 in cash on juvenile's person. The State argues that the cellophane packaging plus the presence of unexplained cash are sufficient to satisfy the intent to sell or distribute element. We disagree.

The State is correct in pointing out that packaging and unexplained cash are appropriate factors to consider in determining whether there is sufficient evidence on the intent element. However, we conclude that here the evidence, viewed cumulatively, was insufficient. The single crack rock does nothing to advance the intent element since possession of one rock, with nothing more, could only be possession of crack cocaine. The cellophane wrapper also does nothing to demonstrate intent. Cellophane may frequently be used to package street drugs, but under the facts in this case, the cellophane could just as easily be in his possession in his role as a consumer who purchased the packaged crack rock from a dealer. Cases in which packaging has been a factor have tended to involve drugs divided into smaller quantities and packaged separately.

The issue of the unexplained $271.00 in cash on juvenile's person is a factor to consider. However, unexplained cash is only one factor that can help support the intent element. We are not convinced the amount of cash found here, given the totality of the circumstances, is enough to establish intent. We have previously determined that a large quantity of contraband, alone, is insufficient to establish an inference that its possessor intended to sell or deliver it. In *State v. Wiggins*, 33 N.C. App. 291, 235 S.E.2d 265, *cert. denied*, 293 N.C. 592, 241 S.E.2d 513 (1977), we rejected the argument that 215.5 grams of marijuana alone is sufficient to infer intent. *Id.* at 294-95, 235 S.E.2d at 268. As with a large quantity of drugs, we determine that the presence of cash, alone, is insufficient to infer an intent to sell or distribute.

The charge of simple possession, however, is a lesser included offense of possession with intent to sell or distribute. *State v. Turner*, 168 N.C. App. 152, 159, 607 S.E.2d 19, 24 (2005). " 'When [the trier of fact] finds the facts necessary to constitute one offense, it also inescapably finds the facts necessary to constitute all lesser-included offenses of that offense.' " *Id.* (quoting *State v. Squires*, 357 N.C. 529, 536, 591 S.E.2d 837, 842 (2003), *cert. denied*, 541 U.S. 1088, 159 L. Ed. 2d 252 (2004)). Thus, in this case, when the trier of fact adjudicated juvenile responsible for possession with intent to sell or deliver, it necessarily found juvenile responsible for simple possession of a controlled substance. *Id.* Accordingly, we remand for disposition based on an adjudication finding juvenile responsible for simple possession which was supported by substantial evidence. *See State v. Gooch*, 307 N.C. 253, 258, 297 S.E.2d 599, 602 (1982) (vacating the sentence imposed upon the verdict of guilty of possession of

more than one ounce of marijuana and remanding for resentencing "as upon a verdict of guilty of simple possession of marijuana," a lesser included offense).

VI.

In summary, we uphold the trial court's ruling regarding the admission of evidence but remand for disposition based on an adjudication finding juvenile responsible for simple possession.

No error in part; remanded in part.

Judge JACKSON concurs in a separate opinion.

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

JACKSON, Judge concurs in a separate opinion.

I concur with the majority's ruling regarding the admission of evidence and remanding the case for disposition based upon an adjudication finding juvenile responsible for simple possession. I also concur with the majority's affirming the trial court's finding that the juvenile is competent to stand trial; however, I write in a separate opinion to express my concerns with this decision.

Although the determination of whether or not a defendant is competent to stand trial is one that lies within the discretion of the trial court, I am troubled by the particular circumstances found in the instant case. In the juvenile's case, he was subjected to two competency evaluations by two different psychologists, both resulting in conflicting determinations.

The first competency evaluation, done on 23 September 2005 by Dr. VandeVusse, a psychologist, concluded that although the juvenile has significant intellectual limitations that affect his verbal skills, his limitations do not lead to a diagnosis of mental retardation or of a learning disability. Dr. VandeVusse assessed the juvenile by conducting a clinical interview and observing the juvenile's behaviors. He also reviewed all of the court documents, interviewed the juvenile's mother, and reviewed his previous evaluation of the juvenile conducted a year and a half prior. Dr. VandeVusse stated in his evaluation that although the juvenile would need to have legal terms and procedures explained to him in concrete terms, "he does not demonstrate any mental defect that would preclude his capacity to proceed to

trial." In Dr. VandeVusse's previous evaluation performed 3 March 1989, he stated that the juvenile's overall IQ score was within the borderline range of intellectual functioning, however his verbal IQ score was found to be in the mildly mentally retarded range. Despite this, Dr. VandeVusse previously had found that the juvenile was "able to discuss the charges against him and appeared to appreciate the consequences of the possible outcomes of the legal proceedings against him."

The second competency evaluation was conducted by Dr. Hancock, licensed clinical psychologist, within weeks of Dr. VandeVusse's second evaluation. In assessing the juvenile, Dr. Hancock conducted several tests, including the Test of Memory Malingering, the Instruments for Assessing Understanding and Appreciation of *Miranda* Rights, and the Evaluation of Competency to Stand Trial—Revised. Dr. Hancock also reviewed the juvenile's school records, the Durham Police Department Offense Record for the instant offense, prior competency evaluations by two other doctors including Dr. VandeVusse, he interviewed the juvenile's mother, and reviewed the motion for competency examination signed by the juvenile's attorney. Based upon his evaluation, Dr. Hancock reached a very different conclusion than Dr. VandeVusse. Dr. Hancock found that the juvenile's "language deficits contribute to an overall condition of significant impairment in verbal IQ that impacts his competence." Dr. Hancock found the juvenile's verbal IQ to be within the mentally retarded range, and that this, coupled with the results of the competency test performed, "indicate significant impairment in his factual and rational understanding of the legal system." Dr. Hancock found that the juvenile had a very limited understanding of the legal system, and did not have a clear understanding even of who the participants in the court system—including the jury—were. Based upon his review, Dr. Hancock concluded that the juvenile was not competent to stand trial.

While I am troubled by the fact that one evaluator conducted such extensive and relevant competency testing that the other did not, I recognize that the facts of this case cause it to be a difficult determination for the trial court. Thus, given that our standard of review is that of an abuse of discretion, this Court has no choice but to hold that the trial court did not abuse its discretion in finding the juvenile competent to stand trial. The trial court's determination was properly supported by the Dr. VandeVusse's evaluation, and thus the decision was a proper one.

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

I concur with the majority that the juvenile was competent to stand trial and that the court erred in denying defendant's motion to dismiss since there was insufficient evidence to find defendant guilty of possession of crack cocaine with intent to sell or deliver.

However, I respectfully dissent from the majority's determination that the search and seizure of the defendant was justified because I believe the officers had neither reasonable, articulable suspicion to detain the defendant, nor the probable cause and exigent circumstances required to search him. The majority determines that the defendant was seized by the officers' show of force, but concludes that such a seizure was justified. I disagree. The majority opinion bases its conclusion on three factors: defendant's presence in a high-crime area, his reluctance to speak with the police, and the presence in his mouth of some unknown object. The majority determines that these factors simultaneously provided Officer Kershaw with reasonable, articulable suspicion, probable cause, and exigent circumstances justifying a search of defendant's person. Assuming, *arguendo*, that these factors justify a brief investigatory seizure, they certainly do not rise to the level of probable cause.

"[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 244 n. 13, 76 L. Ed. 2d 527, 552 (1983). "Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty." *State v. Streeter*, 283 N.C. 203, 207, 195 S.E.2d 502, 505 (1973) (citation omitted). "The probable cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. 366, 371, 157 L. Ed. 2d 769, 775 (2003).

"The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct." *Brown v. Texas*, 443 U.S. 47, 52, 61 L. Ed. 2d 357, 362-63 (1979). Under *Brown*, the defendant's presence in an area characterized by law enforcement as "high crime" does not alone justify his seizure.

The majority notes Officer Kershaw's statement that there had previously been drug arrests in the area to support its determination

that the officer had reasonable grounds to seize the defendant. However, as the majority notes, police had received no calls concerning drug activity in the area where defendant was seized. The relevant exchange was as follows:

> [Defense counsel] So you would say that was a drug area?
>
> [Officer Kershaw] We've made drug arrests in the area before, yes.
>
> [Defense counsel] But you didn't receive any calls about drugs being sold on that day?
>
> [Officer Kershaw] Correct.

Further, Officer Kershaw testified that he had not seen defendant prior to the encounter and thus had no reason to suspect defendant might use or deal with illegal drugs.

Although an area previously known for drug arrests may be one factor to consider in determining reasonable suspicion and probable cause, our courts have indicated that when there have been no recent arrests in the area, such a factor does not carry substantial weight. *State v. Butler*, 331 N.C. 227, 233, 415 S.E.2d 719, 722 (1992) ("[the police officer] observed defendant not simply in a general high crime area, but on a specific corner known for drug activity and as the scene of *recent*, multiple drug-related arrests.") (emphasis supplied); *In re J.L.B.M.*, 176 N.C. App. 613, 621, 627 S.E.2d 239, 244 (2006) (In determining there was no reasonable suspicion, the court stated, "Officer Henderson did not observe the juvenile committing any criminal acts, nor had there been other reports of any criminal activity in the area that day.").

Since there was no evidence of any recent drug activity in the area in question, this fact adds little support to the majority's assertion that the officer had probable cause to search defendant, especially given the fact that Officer Kershaw testified that no drug activity was reported on the date in question. Officers were not responding to any reports of drug activity and had no specific reason to suspect that any illegal activity may be afoot. While a neighborhood's character as a high-crime area may be a factor in determining the existence of reasonable suspicion or probable cause, I find such a factor has little weight when, as here, there is no indication of recent drug activity.

The majority also relies on the fact that defendant turned his head and seemed reluctant to engage in conversation with Officer Kershaw. However, this fact is indicative of nothing more than a desire on the part of defendant to avoid speaking with police. Unless defendant was seized prior to Officer Kershaw questioning him, he was free to disengage from the encounter with Officer Kershaw. *See generally State v. Corbett*, 339 N.C. 313, 326, 451 S.E.2d 252, 258 (1994). If defendant was seized at the point Officer Kershaw questioned him, his seizure could not have been based on any other factor besides his presence in a high-crime area. Such a seizure would clearly violate defendant's Fourth Amendment rights as articulated in *Brown*. Accordingly, any evidence discovered from such a seizure would be fruit of the poisonous tree and subject to suppression. *Wong Sun v. United States*, 371 U.S. 471, 9 L. Ed. 441 (1963). Thus, defendant had a legal right to turn away from the officer, or alternatively, was illegally seized at that moment.

Lastly, the majority relies on the fact that defendant appeared to have some unknown object in his mouth. Despite the majority's assertion to the contrary, the fact that defendant appeared to have something in his mouth cannot provide probable cause, as the object very well could have been gum, a piece of candy, or a breath mint. Officer Kershaw himself admitted that the item could have been any number of things besides contraband.

> [Defense counsel] You couldn't tell what was in his mouth[?]
>
> [Officer Kershaw] Not at that time, no.
>
> [Defense counsel] You didn't know if it was a piece of gum[?]
>
> [Officer Kershaw] Correct.
>
> [Defense counsel] You didn't know if it was a piece of hard candy[?]
>
> [Officer Kershaw] Correct.
>
> [Defense counsel] You didn't know if it was just the way that he talks[?]
>
> [Officer Kershaw] Possibly.

In support of its holding, the majority relies on *State v. Watson*, 119 N.C. App. 395, 458 S.E.2d 519 (1995), which is distinguishable from the case *sub judice*. In *Watson*, the defendant was observed

in an area where officers constantly made drug arrests by an officer who knew the defendant had previously been arrested on drug charges. Upon seeing the officer, the defendant hurriedly placed something in his mouth, began walking away from the officer, and attempted to take a drink of a beverage. Based on the totality of the circumstances, this Court determined the officer's demand was reasonable when he ordered defendant to spit out the contents of his mouth.

The majority misstates *Watson's* scope and ignores crucial distinctions between *Watson* and the instant case. In *Watson*, the officer was able to form a more particularized suspicion than the officer in this case, given the fact that the defendant, a known drug user in a specific location notorious for drug sales, was observed hurriedly placing something into his mouth and then trying to swallow the object by taking a drink of a beverage when he saw the police approaching. In this case, there is no evidence that defendant was a known drug user, and no evidence that he hurriedly tried to place any item in his mouth as the officers approached him. Here, officers simply approached some individuals and noticed that defendant turned his head and, when he spoke, appeared to have some indeterminate object in his mouth. For the reasons stated above, these facts fall short of the probable cause standard.

I believe the facts of this case are more similar to those in *State v. Fleming*, 106 N.C. App. 165, 415 S.E.2d 782 (1992). In *Fleming*, an officer observed two individuals walking in an area where crack cocaine was regularly sold. The officer first told the individuals to "hold it a minute" and then said, "Come here." When the officer patted one of them down for weapons, he felt an object and asked what it was. The defendant admitted the object was crack cocaine.

In reversing the defendant's conviction, we determined that the officer had no reasonable, articulable suspicion to seize the defendant in that the officer had no specific reason for suspecting any criminal wrongdoing. *Brown* is also similar to the case *sub judice*. In *Brown*, officers detained a defendant based on vague suspicions formed after seeing two individuals walk away from each other in an alley located in a high-crime area. The court noted that vague suspicions of wrongdoing are insufficient to justify a seizure. I believe this case is more in line with *Fleming* and *Brown*, and disagree with the majority's determination that Officer Kershaw had grounds to stop and search defendant.

The totality of the circumstances in this case can be summarized as such: an officer observed an unfamiliar individual who was not a known drug user or a criminal on a day in which no drug activity had been reported in the area and who seemed reluctant to speak with police and appeared to have some unknown object in his mouth. These facts, taken together, in no way permit a conclusion that Officer Kershaw had probable cause to search defendant's person.

To hold otherwise would allow police to search any individual located in an area where past crimes have occurred who exhibits a desire to be left alone and either has something in his mouth or speaks with a speech impediment. Such a holding eviscerates the protections of the Fourth Amendment and lowers the probable cause standard to allow police to conduct intrusive searches of residents of neighborhoods plagued by crime on the barest of suspicions. Because I believe there was no probable cause justifying the search, I see no need to address the majority's assertion that exigent circumstances existed. As the majority recognizes, a warrantless search of the person requires both probable cause and exigent circumstances. *State v. Pittman*, 111 N.C. App. 808, 812, 433 S.E.2d 822, 824 (1993).

In conclusion, I dissent from the majority's determination that Officer Kershaw had grounds to stop and search defendant. However, I concur with the majority's determination that defendant was competent to stand trial and that there was insufficient evidence that defendant intended to sell or deliver crack cocaine.

For the foregoing reasons, I would remand this case to the trial court for a new trial with evidence gathered from the illegal search and seizure suppressed.

PINEWOOD HOMES, INC. v. HARRIS

[184 N.C. App. 597 (2007)]

PINEWOOD HOMES, INC. AND PINEWOOD HOMES, INC., ACTING AS TRUSTEE OF THE FOLLOWING TRUSTS: TRUST NO. 802, TRUST NO. 1527, TRUST NO. 224, TRUST NO. 307, TRUST NO. 403, TRUST NO. 404, TRUST NO. 450, TRUST NO. 810, TRUST NO. 375, TRUST NO. 2629, TRUST NO. 310, TRUST NO. 730, PLAINTIFFS v. JULIE HARRIS AND DUANE HARRIS; BANK OF AMERICA CORPORATION AS BENEFICIARY BY ASSIGNMENT RECORDED IN BOOK 901, PAGE 484 AND SOUTHLAND ASSOCIATES, INC. AS TRUSTEE UNDER THE DEED OF TRUST IN BOOK 901, PAGE 482, ROWAN COUNTY REGISTRY, (REFERENCE TO 802 OVERHILL RD., SALISBURY, NORTH CAROLINA); C.M. PRINCE AND WIFE, MARLENE B. PRINCE AS BENEFICIARIES AND CLINTON S. FORBIS, JR. AS TRUSTEE UNDER THE DEED OF TRUST IN BOOK 1605, PAGE 899, LINCOLN COUNTY REGISTRY, (REFERENCE 1527 WESTDALE LANE, LINCOLNTON, NORTH CAROLINA); FIRST NATIONAL BANK, AS BENEFICIARY AS SUCCESSOR IN INTEREST TO ROWAN SAVINGS BANK SSB, INC. AND BRUCE B. JONES, CLAUDE M. COLVARD, AND CARL E. SLOOP, JR., AS TRUSTEES UNDER DEEDS OF TRUST IN BOOK 984, PAGE 936, ROWAN COUNTY REGISTRY (REFERENCE 224 LAFAYETTE STREET, SALISBURY, NORTH CAROLINA), BOOK 876, PAGE 352, ROWAN COUNTY REGISTRY (REFERENCE 307 EDGEWOOD CIRCLE, CHINA GROVE, NORTH CAROLINA), BOOK 3009, PAGE 278, CABARRUS COUNTY REGISTRY (REFERENCE 403, HELEN STREET, KANNAPOLIS, NORTH CAROLINA), BOOK 949, PAGE 879, ROWAN COUNTY REGISTRY (REFERENCE 404 CHAPEL STREET, LANDIS, NORTH CAROLINA), BOOK 890, PAGE 204, ROWAN COUNTY REGISTRY (REFERENCE 450 NEEL ROAD, SALISBURY, NORTH CAROLINA), BOOK 914, PAGE 679, ROWAN COUNTY REGISTRY (REFERENCE 810 RYAN STREET, SALISBURY, NORTH CAROLINA); CONSECO FINANCE SERVICING CORP. AS BENEFICIARY AS SUCCESSOR IN INTEREST TO GREEN TREE FINANCIAL SERVICING CORPORATION AND DON E. FUQUAY, AS TRUSTEE UNDER DEED OF TRUST IN BOOK 832, PAGE 361, ROWAN COUNTY REGISTRY (REFERENCE 375 VIRGINIA AVENUE, CHINA GROVE, NORTH CAROLINA); NATIONAL CITY MORTGAGE CO. D/B/A COMMONWEALTH UNITED MORTGAGE COMPANY AS BENEFICIARY AND LINDA K. HARTSELL, AS TRUSTEE UNDER DEED OF TRUST IN BOOK 2923, PAGE 291, CABARRUS COUNTY REGISTRY (REFERENCE 2629 SOUTH RIDGE AVE., KANNAPOLIS, NORTH CAROLINA); WACHOVIA MORTGAGE COMPANY AS BENEFICIARY AND NEW SALEM INC. AS TRUSTEE UNDER DEED OF TRUST IN BOOK 878, PAGE 947, ROWAN COUNTY REGISTRY (REFERENCE 310 FRY ST., CHINA GROVE, NORTH CAROLINA); AND FIRST NATIONAL BANK, AS BENEFICIARY AS SUCCESSOR IN INTEREST TO ROWAN SAVINGS BANK SSB, INC. AND BRUCE D. JONES, CLAUDE M. COLVARD, AND CARL E. SLOOP, JR., AS TRUSTEES UNDER DEED OF TRUST IN BOOK 878, PAGE 612, ROWAN COUNTY REGISTRY (REFERENCE 730 SAW RD., CHINA GROVE, NORTH CAROLINA), DEFENDANTS

No. COA06-690

(Filed 17 July 2007)

1. Injunction— preliminary injunction—action not collateral attack

An action by plaintiff corporation, of which a judgment debtor was a shareholder, and a corporate trustee of certain assets against the judgment creditors for interference with contracts and business relationships and abuse of process was not an improper collateral attack on a preliminary injunction in the prior action where the order granting the preliminary injunction had been vacated and rendered void.

2. Abuse of Process— complaint—statements of claim

The complaint of plaintiff corporation, of which a judgment debtor was a shareholder, and plaintiff corporate trustee of certain assets stated on abuse of process claim against defendant judgment creditors where it alleged: (1) defendants had an ulterior motive in seeking an injunction of coercing plaintiff to pay a judgment it was not obligated to pay and of oppressing its business activities until the judgment was paid; and (2) defendants maliciously refused to recognize the validity of the trusts and thus gained an advantage over assets held by the corporation.

3. Wrongful Interference— tortious interference with contract—lack of justification—sufficiency of allegations

The complaint of plaintiff corporation, of which a judgment debtor was a stockholder, and plaintiff corporate trustee of certain assets sufficiently alleged the fourth element of lack of justification to support a claim for tortious interference with contract against defendant judgment creditors where it alleged: (1) defendant judgment creditors obtained a preliminary injunction against plaintiffs in relation to a prior judgment not between the present parties; (2) trusts involved in the case were not owned by the judgment debtor; and (3) defendant judgment creditors did not respond to a request by plaintiffs to modify the injunction so it would not impact the trusts.

4. Pleadings— motion to amend complaint—answers already filed by parties in the case

The trial court did not abuse its discretion in an interference with contracts and business relationships and abuse of process case by denying plaintiffs' motion to amend their complaint under N.C.G.S. § 1A-1, Rule 15(a) in light of the substance of plaintiffs' motion to amend their complaint, it being filed at the same time as the hearing on defendants' N.C.G.S. § 1A-1, Rule 12(b)(6) motion, the fact that answers had been filed by parties to the case, and the Court of Appeals' applicable standard of review.

Judge WYNN concurring in part and dissenting in part.

Appeal by plaintiffs from an order entered 27 January 2006 by Judge John W. Smith in Rowan County Superior Court. Heard in the Court of Appeals 23 January 2007.

Ferguson, Scarbrough & Hayes, P.A., by James E. Scarbrough, for plaintiff-appellants.

Homesley, Jones, Gaines, Dudley, Childress, McLurkin, Donaldson & Johnson, P.L.L.C., by Mitchell P. Johnson, for defendant-appellees Julie Harris & Duane Harris.

Robinson, Bradshaw & Hinson, P.A., by Thomas Holderness, for defendant-appellees New Salem, Inc. and Wachovia Mortgage Company.

Law Firm of Hutchens, Senter & Britton, by H. Terry Hutchens, for defendant-appellees National City Mortgage Co. and Linda K. Hartsell.

Clinton S. Forbis, Jr. for defendant-appellees C.M. Prince, Marlene B. Prince, and Clinton S. Forbis, Jr.

HUNTER, Judge.

Pinewood Homes, Inc., and Pinewood Homes, Inc., as trustee ("plaintiffs" or "Pinewood") have asserted claims against Julie and Duane Harris ("defendants") for interference with contracts and business relationships as well as abuse of process. The purported cause of action arose after defendants received a judgment in the amount of $326,901.00 against Pinewood Development Corp., Willow Creek, LLP, and Ray Ritchie ("Ritchie") for allegedly engaging in fraudulent conduct in the course of a land sale. *See Harris et al. v. Pinewood Development Corp. et al.*, file 00 CVS 3117, Rowan County Superior Court. That judgment was not against plaintiffs in the instant case. Ritchie, however, was a shareholder and the president of Pinewood on the date of the judgment between Ritchie and defendants.

After the judgment, defendants were granted a preliminary injunction against Ritchie and all companies in which he maintains an ownership interest "from selling, disposing of, secreting, transferring or encumbering any assets until the post-judgment collection proceedings are completed[.]" Among those entities enjoined by the lower court was Pinewood, and, by extension, the assets Pinewood holds as trustee. Pinewood was not a named defendant in the injunction. According to the complaint, neither Ritchie nor Pinewood maintain an ownership interest in those trust assets. The preliminary injunction was later vacated by this Court. *Harris v. Pinewood Dev. Corp.*, 176 N.C. App. 704, 707-08, 627 S.E.2d 639, 642 (2006) (holding that N.C. Gen. Stat. § 1-355 does not allow a preliminary

injunction to be entered until either a judgment has been returned wholly or partially unsatisfied or the terms of N.C. Gen. Stat. § 1-355 are met).

Plaintiffs allege that while that appeal was pending defendants used the preliminary injunction to try to coerce Pinewood to pay the judgment that had been entered against Ritchie. Thus, plaintiffs brought two claims: (1) interference with contracts and business relationships; and (2) abuse of process, essentially arguing that Pinewood's business ventures had been shut down because of the injunction.

Defendants moved to dismiss plaintiffs' complaint for failure to state a claim under N.C.R. Civ. P. (12)(b)(6). Defendants also argued that Pinewood's suit was a collateral attack on the injunction. At the Rule 12 hearing, plaintiffs made a motion to amend their complaint under N.C.R. Civ. P. 15(a).

The trial court granted the motions to dismiss on the grounds that granting Pinewood's relief "would necessarily require this court to interpret and either affirm or limit and redefine the preliminary injunction[.]" The complaint was also dismissed because after taking all allegations as true, there had been no legitimate claim stated in the complaint. Finally, the trial court rejected plaintiffs' motion to amend because they could not correct a fatal defect, and dismissed the complaint with prejudice.

Plaintiffs present the following issues for review: (1) whether plaintiffs' cause of action is barred by the rule against collateral attacks and whether the trial court erred in dismissing plaintiffs' complaint for failure to state a claim; and (2) whether the trial court erred in denying plaintiffs' motion to amend the complaint. After careful consideration we affirm in part, reverse in part, and remand.

I.

The standard of review on a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure " '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.' " *Cabaniss v. Deutsche Bank Secs., Inc.*, 170 N.C. App. 180, 182, 611 S.E.2d 878, 880 (2005) (quoting *Block v. County of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000)). The complaint must be liberally construed and should not be dismissed unless it appears beyond a doubt that plaintiffs could not

prove any set of facts to support the claim which would entitle them to relief. *Id.*

Dismissal is proper " 'when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.' " *Newberne v. Department of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 204 (2005) (citation omitted). Before addressing whether plaintiffs' complaint adequately states a cause of action, we must first address whether the complaint is barred by the rule against collateral attacks.

[1] Defendants argue that plaintiffs' cause of action is a collateral attack on the preliminary injunction that had been previously granted between the parties. We disagree. A collateral attack is one " 'in which a plaintiff is not entitled to the relief demanded in the complaint unless the judgment in another action is adjudicated invalid.' " *Thrasher v. Thrasher*, 4 N.C. App. 534, 540, 167 S.E.2d 549, 553 (1969) (citation omitted). "A collateral attack on a judicial proceeding is 'an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it.' " *Regional Acceptance Corp. v. Old Republic Surety Co.*, 156 N.C. App. 680, 682, 577 S.E.2d 391, 392 (2003) (citation omitted). "North Carolina does not allow collateral attacks on judgments." *Id.*

In this case, a monetary judgment in favor of defendants was entered against Ritchie and several companies in which he has an ownership interest on 27 August 2004. None of those companies, however, were plaintiffs in the current action. After the judgment, the trial court entered an order on 12 January 2005 granting a preliminary injunction against Ritchie and all companies in which he has an ownership interest to prevent him "from selling, disposing of, secreting, transferring or encumbering any assets" until the judgment was satisfied. While the injunction was still in place, plaintiffs filed the current cause of action and the trial court ruled plaintiffs' action to be a collateral attack and dismissed the case. After the dismissal of plaintiffs' complaint by the trial court, and while the present case was pending, we vacated the injunction. *Harris*, 176 N.C. App. at 708, 627 S.E.2d at 642. The issue raised by the parties to this Court is whether Pinewood, a non-party to the first judgment, may attack the preliminary injunction arising out of that judgment in a collateral proceed-

ing. Because we vacated this injunction in *Harris*, we need not fully reach this issue. *Id.*

When something is "vacated," it is nullified and made void. *Alford v. Shaw*, 327 N.C. 526, 543 n.6, 398 S.E.2d 445, 455 n.6 (1990); *see also* Black's Law Dictionary 1584 (8th ed. 2004); *Stewert v. Oneal*, 237 F. 897, 906 (6th Cir. 1916) ("Vacate means to annul, set aside, or render void; suspend, to stay. When a thing is vacated it is devitalized"). Accordingly, "[o]nce [a] judgment [is] vacated, no part of it could thereafter be the law of the case." *Alford*, 327 N.C. at 543 n.6, 398 S.E.2d at 455 n.6. Thus, it cannot be said that plaintiffs are attempting to set aside a "judgment," as required by the rule against collateral attacks, because the prior order granting the preliminary injunction has been voided and is no longer part of the case between plaintiffs and defendants.

The dissent contends that "[p]laintiffs should either have filed a counter-complaint for tortious interference at the time the injunction was sought, or should have waited until after the injunction had been vacated to file their claim." The dissent, however, fails to recognize that plaintiffs were neither a party to the original dispute between Ritchie and defendants nor were they a party before this Court when we vacated the injunction. *See Harris*, 176 N.C. App. 704, 627 S.E.2d 639. Accordingly, we cannot say that plaintiffs engaged in a collateral attack when they filed this current cause of action. Having determined that there was no collateral attack, we next address whether plaintiffs' complaint has stated a claim upon which relief may be granted.

A.

[2] Plaintiffs argue that the trial court erred in dismissing their cause of action for abuse of process. We agree. "Abuse of process is the misapplication of civil or criminal process to accomplish some purpose not warranted or commanded by the process." David A. Logan & Wayne A. Logan, *North Carolina Torts* § 19.40 at 432 (1996) (citing *Ellis v. Wellons*, 224 N.C. 269, 29 S.E.2d 884 (1944)). Two elements must be proved to find abuse of process: (1) that the defendant had an ulterior motive to achieve a collateral purpose not within the normal scope of the process used, and (2) that the defendant committed some act that is a " 'malicious misuse or misapplication of that process *after issuance* to accomplish some purpose not warranted or commanded by the writ.' " *Stanback v. Stanback*, 297 N.C. 181, 200, 254 S.E.2d 611, 624 (1979) (citation omitted).

> The ulterior motive requirement is satisfied when the plaintiff alleges that the prior action was initiated by the defendant or used by him to achieve a collateral purpose not within the intended scope of the process used. The act requirement is satisfied when the plaintiff alleges that during the course of the prior proceeding, the defendant committed some wilful act whereby he sought to use the proceeding as a vehicle to gain advantage of the plaintiff in respect to some collateral matter.

Hewes v. Wolfe and Hewes v. Johnston, 74 N.C. App. 610, 614, 330 S.E.3d 16, 19 (1985) (citations omitted); *see also Stanback*, 297 N.C. at 201, 254 S.E.2d at 624.

In *Hewes*, this Court held that a complaint alleging that "defendants maliciously filed notices of *lis pendens* and notices of lien on property owned by plaintiffs 'for the purpose of injuring and destroying the credit business of the plaintiffs and in general to oppress the plaintiffs[]' " satisfied the ulterior motive and act requirements. *Hewes*, 74 N.C. App. at 614, 330 S.E.2d at 19. These allegations were sufficient because plaintiffs had alleged that the prior action was filed: (1) to coerce plaintiffs and (2) to achieve a collateral purpose—oppression. *Id.*

Here, plaintiffs argue that our holding in *Hewes* requires us to hold that plaintiffs have stated a claim upon which relief may be granted. We agree. Plaintiffs' complaint alleged that: (1) "[d]efendants . . . had an ulterior purpose of *coercing plaintiffs* to pay a judgment they were *not obligated* to pay"; (2) defendants "maliciously refused to recognize the validity" of the trusts; and (3) have therefore gained "an *advantage over the assets*" held by plaintiffs. (Emphasis added.) As in *Hewes*, these allegations, if proven, show that the injunction was sought to coerce plaintiffs to pay a judgment for which they were not responsible and to oppress their business activities until such judgment was paid. Thus, defendants' motion to dismiss for failure to state a claim should have been denied, and we therefore reverse as to this issue. To hold otherwise would allow a party who has a judgment against a debtor to seek an injunction against any company in which the debtor holds stock without serving the company and making them a party in the proceeding.

The dissent attempts to distinguish *Hewes* on the ground that the plaintiffs in this case have, according to the dissent, not alleged an act beyond the filing of the injunction. In *Hewes*, however, the act requirement was satisfied by the filing of the notices of lien and *lis*

pendens. *Id*. The dissent correctly points out that the mere filing of a lien or *lis pendens* would cloud title to property. We disagree, however, with the implication that an injunction which plaintiffs alleged to have shut down its business activities could not have the same impact on their trust assets. Indeed, the plaintiffs alleged that the injunction caused "plaintiffs to refrain from conducting all lawful activities relating to the trust assets." If proven, this is more severe than a *lis pendens* which merely puts potential buyers of property on notice that the property is subject to litigation and that if they buy it they will take the property subject only to the result of that pending judgment. *Hill v. Memorial Park*, 304 N.C. 159, 164, 282 S.E.2d 779, 782 (1981).

The dissent's reliance on *Lyon v. May*, 108 N.C. App. 633, 424 S.E.2d 655, *disc. review denied*, 333 N.C. 791, 431 S.E.2d 25 (1993), is misplaced. In that case, we held that defendant[1] was entitled to a judgment notwithstanding the verdict because there was "no evidence that [defendant] tried to use the attachment for anything other than its real purpose—to prevent the transfer of money which [defendant] believed he was entitled, albeit mistakenly." *Id.* at 640, 424 S.E.2d at 659. It could very well be that at a later stage in this case plaintiffs will not have established sufficient evidence to prevail on the abuse of process claim, but we are reviewing this case at the motion to dismiss phase. As stated, in reviewing a motion to dismiss plaintiffs are entitled to have all allegations treated as true and to have the complaint liberally construed. *Cabaniss*, 170 N.C. App. at 182, 611 S.E.2d at 880. Accordingly, we do not find *Lyon* persuasive on this issue.

B.

[3] Plaintiffs next argue that the trial court erred in dismissing their cause of action for tortious interference with a contract. The elements of a tortious interference with a contract claim are: (1) a valid contract existed between the plaintiff and a third person, conferring upon the plaintiff some contractual right against the third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) the defendant acts without justification; and (5) the defendant's conduct causes actual pecuniary harm to the plaintiffs. *Childress v. Abeles*, 240 N.C.

1. In that case, we were actually addressing the defendant's counterclaim against the plaintiff for intentional interference with a contract. To remain consistent with the rest of this opinion, we refer to the plaintiff in *Lyon* as "defendant."

667, 674, 84 S.E.2d 176, 181-82 (1954). Defendants attack only the fourth element (lack of justification) in plaintiffs' complaint; consequently, we address only that issue and express no opinion as to whether plaintiffs have established the other elements of tortious interference with a contract.

A motion to dismiss a claim of tortious interference is properly granted where the complaint shows the interference was justified or privileged. *Peoples Security Life Ins. Co. v. Hooks*, 322 N.C. 216, 220, 367 S.E.2d 647, 650 (1988). " 'In general, a wrong purpose exists where the act is done other than as a reasonable and *bona fide* attempt to protect the interest of the defendant which is involved.' " *Id.* (citation omitted).

Interference of the contract must be without justification. "The interference is 'without justification' if the defendants' motives . . . were 'not reasonably related to the protection of a legitimate business interest' of the defendant." *Privette v. University of North Carolina*, 96 N.C. App. 124, 134, 385 S.E.2d 185, 190 (1989) (quoting *Smith v. Ford Motor Co.*, 289 N.C. 71, 94, 221 S.E.2d 282, 292 (1976)). Accordingly, we have held that the complaint must admit of no motive for interference other than malice. *Privette*, 96 N.C. App. at 134-35, 385 S.E.2d at 191; *Sides v. Duke University*, 74 N.C. App. 331, 346, 328 S.E.2d 818, 829 (1985), *rev'd on other grounds*, *Kurtzman v. Applied Analytical Industries, Inc.*, 347 N.C. 329, 493 S.E.2d 420 (1997).

At the outset, we note that plaintiffs' complaint has alleged that the actions of defendants in seeking the injunction were taken maliciously and without justification. Defendants correctly point out, however, that general allegations of malice are insufficient as a matter of pleading. *See Equipment Co. v. Equipment Co.*, 263 N.C. 549, 559, 140 S.E.2d 3, 11 (1965). Thus, we must determine whether plaintiffs' have alleged a factual basis to support the claim of malice. We conclude that they have.

Here, plaintiffs have alleged that the seeking of the injunction was the malicious act. This is a factual basis supporting plaintiffs' assertion of malice. Specifically, the complaint makes the following allegations:

> 38. Plaintiffs were not parties to Harris v. Ritchie, file 00 CVS 3117, Rowan County.

39. The real estate title held in trust by plaintiffs is not subject to the money judgment entered in Harris v. Ritchie, file 00 CVS 3117, Rowan County.

40. In an effort to coerce payment of the judgment in 00 CVS 3117, defendants Harris have unlawfully pursued a course of action culminating in an injunction against plaintiffs. . . . Said injunction was obtained without notice to plaintiffs or the holders of deed of trust liens described herein.

41. Pursuant to a court order obtained by defendants Harris in Harris v. Ritchie . . . , plaintiffs produced trust documents and corporate records for inspection by defendants Harris. Despite reviewing the documents, defendants Harris have continued to pursue a course of action to make the assets held in trust subject to the judgment in 00 CVS 3117.

42. For the further purpose of coercing plaintiffs to pay the judgment in 00 CVS 3117, defendants Harris have intentionally and maliciously refused to recognize the validity of plaintiff's corporate status and the status of the trusts.

43. The actions of defendants Harris have been without just cause or excuse with the intent to injure plaintiffs and reach the assets held in trusts.

44. Defendants Harris knew or should have known that the trust assets are subject to deed of trust liens. Said deed of trust liens are a matter of public record.

45. The actions of defendants Harris have threatened and continue to threaten the viability of the trusts and the trust assets and will cause a default under the terms of the security instruments executed by plaintiffs to secure payment of the deed of trust notes.

46. As a result of the wrongful acts of defendants Harris, plaintiffs have been prevented from conducting business and the value of the trust assets have been adversely affected. Plaintiffs have been damaged in an amount in excess of $10,000.00.

In summation, the complaint alleges the following factual allegations: (1) that a preliminary injunction against plaintiffs was obtained in relation to a prior judgment not between the parties; (2) that the trusts involved in this case are not owned by Ritchie; and (3) that defendants did not respond to plaintiffs' request to modify the injunc-

tion so that it would not impact the trusts. If proved, these factual allegations tend to support plaintiffs' accusation of malice. Thus, assuming without deciding that plaintiffs' complaint establishes the other elements of interference with a contract, defendants' motion to dismiss for failure to state a claim should have been denied and we therefore reverse as to this issue.

II.

[4] Lastly, plaintiffs argue that the trial court erred in denying their motion to amend their complaint. We disagree.

We review a denial of a motion to amend under Rule 15(a) for abuse of discretion. *Smith v. McRary*, 306 N.C. 664, 671, 295 S.E.2d 444, 448 (1982). An abuse of discretion will be found where a trial court's ruling " 'is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006) (citation omitted).

In the instant case, plaintiffs moved to amend their complaint as a matter of course under N.C.R. Civ. P. 15(a). In substance, plaintiffs sought to amend the complaint "to make it clear that plaintiffs seek a judgment declaring that (a) the trusts are valid and (b) the assets of the trusts are not subject to the judgment." All of the proposed language was related to their first claim for relief for a declaratory judgment that the money judgment against Ritchie was not a lien against the assets or trusts held by plaintiffs. That claim for relief, however, was subsequently dismissed on 27 June 2006. It would follow then, that plaintiffs' motion to amend would be rendered moot. Plaintiffs' complaint, however, contained a sentence in each section that "[t]he allegations of the preceding paragraphs are adopted, realleged and incorporated herein by reference." Accordingly, the language in the proposed amendments would apply to all of plaintiffs' remaining claims for relief. That said, we are unable to say that the trial court abused its discretion in denying plaintiffs' request to amend their complaint.

Plaintiffs argue in their brief to this Court that no responsive pleadings had been filed prior to their motion to amend their complaint because the three parties who had filed answers at that point were "only joined in the action to afford complete relief and to make them bound by the outcome," not for any affirmative relief. Rule 15(a), however, refers only to a party's right to amend once as a mat-

ter of course "at any time before a responsive pleading is served," and makes no distinction among how named parties should be treated under the rule. N.C.R. Civ. P. 15(a). Plaintiff cites no authority to the contrary. Thus, plaintiffs' right to amend as a matter of course terminated when one of the parties filed a responsive pleading.

In light of the substance of plaintiffs' motion to amend their complaint, it being filed at the same time as the hearing on defendants' Rule 12(b)(6) motion, the fact that answers had been filed by parties to the case, and this Court's applicable standard of review, we cannot say that the trial court abused its discretion in ruling on plaintiffs' motion to dismiss. Thus, we affirm the ruling of the trial court as to this issue.

III.

In summary, we hold that plaintiffs' cause of action is not barred by the rule against collateral attacks. We also hold that plaintiffs have stated a valid claim for abuse of process and that they have sufficiently alleged that defendants acted without justification in seeking the injunction. Finally, we hold that the trial court did not err when it denied plaintiffs' motion to amend their complaint. Therefore, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

Affirmed in part; reversed in part and remanded.

Judge STEELMAN concurs.

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

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

I concur with that portion of the majority opinion that affirms the trial court's denial of Plaintiff's motion to amend their complaint. However, because I find that the timing of Plaintiffs' complaint for tortious interference makes it a collateral attack on the preliminary injunction sought by Defendants, I would affirm the trial court's dismissal of that cause of action. Additionally, after reviewing Plaintiffs' original complaint for abuse of process, I conclude they failed to allege any facts that would support a claim of abuse of process. Therefore, I respectfully dissent.

I.

As noted by the majority and previously held by this Court, "[a] collateral attack on a judicial proceeding is an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it." *Reg'l Acceptance Corp. v. Old Republic Sur. Co.*, 156 N.C. App. 680, 682, 577 S.E.2d 391, 392 (2003) (internal quotation and citation omitted). Significantly, as quoted by the majority, a collateral attack is one "in which a plaintiff is not entitled to the relief demanded in the complaint *unless the judgment in another action is adjudicated invalid*." *Thrasher v. Thrasher*, 4 N.C. App. 534, 540, 167 S.E.2d 549, 553 (1969) (internal quotation and citation omitted) (emphasis added).

Here, Plaintiffs contend that Defendants sought to use the injunction in question to coerce them into paying the judgment against Mr. Ritchie, a judgment for which they were not legally responsible. They further assert that their claim of tortious interference was based on Defendants' "intentional and malicious refusal . . . to recognize the validity of the trusts and Pinewood's status as trustee," and was not an attempt to have the injunction vacated or modified. Nevertheless, in the words of their own complaint, they asked the trial court to have the injunction "modified to exclude plaintiffs as well as real estate held in trust by plaintiffs so that plaintiffs may conduct business." In my opinion, this falls squarely within the prohibition against using an ancillary legal proceeding to "avoid, defeat, or evade . . ., or deny [the] force and effect" of a judgment in another proceeding.

Plaintiffs also state, however, that "now it is certainly true that granting [their] prayer for relief does not amount to a collateral attack on the injunction because the injunction has been vacated." This position—and that of the majority—begs the question of what our conclusion would be as to the collateral nature of Plaintiffs' claims had our Court *upheld* the preliminary injunction.

The majority maintains that, because the injunction was vacated, it was "nullified and made void," meaning that "no part of it could thereafter be the law of the case." *See Alford v. Shaw*, 327 N.C. 526, 543 n.6, 398 S.E.2d 445, 455 n.6 (1990). While I agree that the injunction no longer has any legal force, I observe that the majority's approach, that its existence is no longer part of the case between Plaintiffs and Defendants, would lead to this cause of action being mooted, as Plaintiffs would no longer be able to show the requisite

damages necessary to sustain a claim for tortious interference. That is clearly an absurd outcome; the injunction did exist and was in force for six months, barring Plaintiffs from selling and transferring assets and real estate titles and having a "real life" impact.

Thus, if the injunction existed to the extent necessary not to moot Plaintiffs' claim, then it should also be considered for the purpose of determining whether the claim of tortious interference was a collateral attack. Indeed, this very situation reinforces the need for a prohibition against such attacks, in order to avoid circumstances in which we would have to create legal fictions such as a supposedly non-existent injunction that did cause actual harm in the real world.

Moreover, Defendants would be guilty of tortious interference only if they acted without justification in seeking the injunction. *Beck v. City of Durham*, 154 N.C. App. 221, 232, 573 S.E.2d 183, 191 (2002). This Court has held that in order to establish this element, a plaintiff's complaint must admit of no motive for interference other than malice. *Id.* (internal quotation and citation omitted). Here, Plaintiffs stated in their complaint that "defendants Harris requested issuance of a preliminary injunction to prohibit Ray Ritchie and various companies from selling or transferring title to real estate" until "the post-judgment collection proceedings are completed by satisfaction of [the Harrises'] judgment." Thus, Plaintiffs essentially admitted to another motive in their complaint, i.e., to maintain assets and titles until Defendants had been paid. Even if no other motive was shown, a conclusion of malice would necessarily rely on the injunction being vacated, as surely it would have been sustained only if it was sought with justification. Accordingly, Plaintiffs would be entitled to relief for their claim of tortious interference only if the injunction were vacated, another definitive factor of a collateral attack. *See Thrasher*, 4 N.C. App. at 540, 167 S.E.2d at 553.

When Plaintiffs filed their complaint for tortious interference against Defendants, the preliminary injunction against Plaintiffs was still in force.[2] While true that the injunction was ultimately vacated, essentially on procedural grounds, *see Harris v. Pinewood Dev. Corp.*, 176 N.C. App. 704, 707-08, 627 S.E.2d 639, 642 (2006), that out-

2. Although Plaintiffs were not named as defendants in the injunction, the injunction was in force against them because the trial court entered it against Mr. Ritchie "and all of the companies in which he owns an ownership interest[.]" Furthermore, the trial court concluded that "Pinewood Homes, Inc. appears to be in active concert with Ray Ritchie, in his wrongful attempts to avoid accountability for the Judgment against him."

come was not certain at the time Pinewood filed its complaint, and the prohibition against collateral attacks is not retroactive in application. Plaintiffs should either have filed a counter-complaint for tortious interference at the time the injunction was sought, or should have waited until after the injunction had been vacated to file their claim. As such, I conclude that, when the trial court dismissed Pinewood's claims in January 2006, he did so properly, as he essentially had no subject matter jurisdiction at that time. I would therefore affirm.[3]

II.

On a Rule 12(b)(6) motion to dismiss, a trial court must determine whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted. *Isenhour v. Hutto*, 350 N.C. 601, 604, 517 S.E.2d 121, 124 (1999). Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiffs' claim, (2) the complaint on its face reveals the absence of facts sufficient to make a good claim, or (3) the complaint discloses some fact that necessarily defeats the plaintiffs' claim. *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985). A claim should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Garvin v. City of Fayetteville*, 102 N.C. App. 121, 123, 401 S.E.2d 133, 134-35 (1991).

In order to prove abuse of process, a plaintiff must show (1) an ulterior motive in the use of process and (2) a wilful act in the misuse of process after issuance to accomplish some purpose not warranted by the writ. *Stanback v. Stanback*, 297 N.C. 181, 200, 254 S.E.2d 611, 624 (1979). The majority concludes that Plaintiffs in the instant case alleged facts in their complaint sufficient, if proven, to make a good claim for abuse of process. In particular, the majority finds that Plaintiffs' allegations of Defendants' "ulterior purpose of coercing plaintiffs to pay," "malicious[] refus[al] to recognize the validity of the trusts," and attempt to "gain an advantage over the assets" held

3. While I would affirm without reaching the merits of Plaintiffs' claim as to tortious interference, I also note that Plaintiffs' complaint contained no factual allegations that would support a finding as to the third element of such a claim, namely, "acts by defendant to intentionally induce the third party not to perform the contract." *Childress v. Abeles*, 240 N.C. 667, 674, 84 S.E.2d 176, 181-82 (1954), *reh'g dismissed*, 242 N.C. 123, 86 S.E.2d 916 (1955). The paragraphs that Plaintiffs assert would show intentional acts of interference do not relate to any third party.

by Plaintiffs, are enough to withstand a Rule 12(b)(6) motion to dismiss. I disagree.

Unlike in *Hewes v. Wolfe and Hewes v. Johnston*, 74 N.C. App. 610, 330 S.E.2d 16 (1985), Defendants in the instant case did not file notices of liens or *lis pendens* against the real estate held by Plaintiffs. Defendants' sole action against Plaintiffs here was to seek the preliminary injunction; no facts were alleged in Plaintiffs' complaint that Defendants then committed some wilful act and used the injunction for anything other than the purpose for which it was intended—namely, to prevent the sale or transfer of assets to which Defendants believed they were entitled, even if mistakenly.

In *Hewes*, the liens and *lis pendens* were filed while an action was still pending alleging the misuse of, and failure to account for, partnership assets; the complaint alleged that the notices of liens and *lis pendens* were filed "for the purpose of injuring and destroying the credit business of the plaintiffs and in general to oppress the plaintiffs," purposes for which such processes were never intended. 74 N.C. App. at 614, 330 S.E.2d at 19. The mere filing of those notices would have clouded the title to the real estate in question, whereas here, Defendants would have had to take some further affirmative action, in addition to obtaining the injunction, in order to "gain an advantage over the assets held in trust by plaintiffs." Plaintiffs' complaint alleges no such further wilful act by Defendants to "coerce" Plaintiffs to pay Mr. Ritchie's judgment.

The facts of this case are analogous to those in *Lyon v. May*, 108 N.C. App. 633, 424 S.E.2d 655, *disc. review denied*, 333 N.C. 791, 431 S.E.2d 25 (1993), in which this Court concluded the defendant did not establish the elements of a claim for abuse of process, and the plaintiff was therefore entitled to judgment notwithstanding the verdict on that issue. In *Lyon*, we found that there was "no evidence that plaintiff tried to use the attachment [to proceeds] for anything other than its real purpose—to prevent the transfer of money which plaintiff believed he was entitled, albeit mistakenly." *Id.* at 640, 424 S.E.2d at 659. Even though the plaintiff "was not entitled to attachment of the proceeds," "that does not change the fact that plaintiff used the attachment for its true purpose." *Id.*

Likewise, here, no facts are alleged in Plaintiffs' complaint that would support their assertions that Defendants used the injunction to coerce them into paying Mr. Ritchie's judgment. Plaintiffs' language as to Defendants' "ulterior purpose," "coerc[ion]," "malicious re-

fus[al]," and attempt to "gain an advantage" are not factual allegations, but legal conclusions and are accordingly "not entitled to a presumption of truth" in considering a Rule 12(b)(6) motion to dismiss. *Miller v. Rose*, 138 N.C. App. 582, 592, 532 S.E.2d 228, 235 (2000); *see also Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (internal citation omitted) (in discussing the newly adopted North Carolina Rules of Civil Procedure, quoting with approval the statement that, "For the purpose of [a Rule 12(b)(6)] motion, the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted.").

Because Plaintiffs merely recite the legal terms used in the definition of a claim of abuse of process without alleging facts that would serve to support those legal conclusions, I would affirm the trial court's granting of Defendants' Rule 12(b)(6) motion to dismiss.

STATE OF NORTH CAROLINA, ex rel. ROY COOPER, Attorney General of North Carolina, Plaintiff v. RIDGEWAY BRANDS MANUFACTURING, LLC, a North Carolina corporation; RIDGEWAY BRANDS, INC.; JAMES C. HEFLIN; FRED A. EDWARDS; and CARL B. WHITE, Defendants

No. COA06-422

(Filed 17 July 2007)

1. Appeal and Error— appealability—dismissal of claims against one defendant—avoiding two trials on same issue—substantial right

An order dismissing claims against one defendant affected a substantial right and was immediately appealable despite being interlocutory where the liability of codefendants depended upon this defendant's joint and several liability, so that plaintiff faced the possibility of having to undergo two trials on the same issue.

2. Statutes of Limitation and Repose— amended complaint—expired statute of limitations—no relation back

The statute of limitations expired as to any claims against defendant Heflin for penalties under N.C.G.S. § 66-291(c) arising from failure to make the escrow deposit required of cigarette manufacturers, and an amended complaint which added him as a defendant did not relate back. The trial court correctly dismissed

the claim for penalties for failure to pay the 2004 escrow deposit, but this dismissal has no effect on other claims.

3. Corporations— piercing the corporate veil—allegations sufficient

The allegations in plaintiff's complaint were sufficient to state a claim for piercing the corporate veil, and the trial court erred by granting defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12 (b)(6).

4. Unfair Trade Practices— cigarette manufacturing—statutory requirements—not covered by unfair practices statute

The trial court did not err by dismissing plaintiff's claim under the Unfair and Deceptive Trade Practices Act arising from the statutory obligation of cigarette manufacturers under N.C.G.S. § 66-291. That statute provides an extensive remedy for failure to comply with its obligations; it was not the legislature's intent to extend the scope of Chapter 75 to include noncompliance with N.C.G.S. § 66-291.

5. Corporations— civil conspiracy—independent personal stake of corporate agent

The trial court erred by dismissing plaintiff's claim for civil conspiracy for failure to state a claim upon which relief could be granted. While an allegation that a corporation is conspiring with its agents, employees, or officers is tantamount to accusing a corporation of conspiring with itself, an exception exists if the corporate agent has an independent personal stake in achieving the corporation's illegal objective, as here.

Judge WYNN concurring in part and dissenting in part.

Appeal by the State of North Carolina from order entered 9 December 2005 by Judge Donald L. Smith in Wake County Superior Court. Heard in the Court of Appeals 12 December 2006.

Attorney General Roy Cooper, by Special Deputy Attorneys General Richard L. Harrison, Karen E. Long, and Melissa L. Trippe, for plaintiff-appellant State of North Carolina.

Poyner & Spruill LLP, by J. Nicholas Ellis and Timothy W. Wilson, for defendant-appellees, Ridgeway Brands Manufacturing, LLC and James C. Heflin.

STEELMAN, Judge.

When the dismissal of a suit affects the plaintiff's right to avoid two trials on the same issue, the plaintiff's appeal is not interlocutory. When a plaintiff fails to amend his complaint to add a party defendant until after the expiration of the applicable statute of limitations as to that defendant, the claim cannot relate back to circumvent the statute of limitations. When the allegations in a plaintiff's complaint, taken as true, are sufficient to state a claim for piercing the corporate veil, the trial court's grant of defendant's motion to dismiss is improper. Further, when the application of both N.C. Gen. Stat. § 75-1.1 and N.C. Gen. Stat. § 66-291 creates overlapping supervision, enforcement and liability in a particular area of law, the rationale of *Lindner v. Durham Hosiery Mills, Inc.*, 761 F.2d 162 (4th Cir. 1985), and *Skinner v. E. F. Hutton & Co.*, 314 N.C. 267, 333 S.E.2d 236 (1985), precludes the application of N.C. Gen. Stat. § 75-1.1 to cases of noncompliance with N.C. Gen. Stat. § 66-291. Finally, when the allegations in a plaintiff's complaint, taken as true, are sufficient to state a claim for civil conspiracy, including the allegation that a corporate agent has an independent personal stake in achieving a corporation's illegal objective, the trial court's grant of defendant's motion to dismiss is improper.

Factual Background

In November 1998, the State of North Carolina ("plaintiff") entered into a Master Settlement Agreement ("MSA") with major domestic cigarette manufacturers. Cigarette manufacturers in North Carolina were required to either sign the MSA or comply with the provisions of N.C. Gen. Stat. § 66-291, which obligated cigarette manufacturers to deposit funds into a qualified escrow account for sales of cigarettes in North Carolina.

Because the trial court dismissed the claims against James C. Heflin ("Heflin") under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), we treat the allegations in the complaint as true. The complaint sets forth the following allegations.

In early 2001, Heflin formed the corporation later named Ridgeway Brands Manufacturing, LLC ("Ridgeway"). Heflin was an owner and member-manager of Ridgeway, which was located in Stantonsburg, North Carolina, and sold tobacco products largely to Ridgeway Brands, Inc. ("Brands"). Brands was a Kentucky corporation, distributing tobacco products for sale in North Carolina and other states. Fred A. Edwards ("Edwards") and Carl B. White

("White") were owners and active managers of Brands. Heflin, Edwards and White "dominated and controlled [Ridgeway] to further [their] own objectives and those of [Brands][.]"

In late 2002, Heflin, Edwards and White hired Lee Welchons ("Welchons") as the general manager of Ridgeway. Welchons had extensive experience in tobacco manufacturing and was familiar with both the payment obligations of manufacturers pursuant to the MSA and North Carolina escrow statutes.

In early 2003, Heflin, Edwards and White announced the merger of Ridgeway and Brands. The merger, although never formally completed, was accomplished *de facto* between Ridgeway and Brands. In early 2003, Brands became the sole purchaser of cigarettes manufactured by Ridgeway, and Ridgeway became "a corporation without a separate mind, will or existence of its own[,] . . . operated as a mere shell to perform for the benefit of [Heflin] . . . Ridgeway [Brands], Edwards [and] White."

Heflin, Edwards and White exhibited control over Ridgeway in the following ways: (1) establishing the pricing structure of cigarettes that Ridgeway sold to Brands; (2) ignoring Welchon's advice that the pricing structure was "grossly inadequate" to satisfy North Carolina's escrow statute requirements; (3) on one occasion, forbidding Welchons to shut down a cigarette line for repairs; (4) determining in which states cigarettes manufactured by Ridgeway would be sold; (5) making hiring decisions for Ridgeway; (6) directing money intended for Ridgeway to Heflin, White, Edwards and Brands; (7) excessively fragmenting Ridgeway; (8) directing the movement of funds to prevent the payment of statutory escrow obligations; (9) disposing of almost all assets of Ridgeway; (10) directing Welchons to send information regarding the value of the equipment, spare parts, and inventory owned by Ridgeway to an employee of Swift Transportation ("Swift"), by whom Heflin had previously been employed; (11) hiring attorneys, Michelle Turpin and Victor Schwartz, in 2004 to assist Ridgeway with its finances; (12) making payments to the attorneys in excess of $1 million, "[without] financial records of how that money was spent"; (13) directing, with Schwartz's aid, the destruction of Ridgeway's paper records, computer hard drives, and tape back-ups; (14) keeping "no corporate financial records or grossly inadequate corporate records"; and (15) informing Welchons that Ridgeway would not file bankruptcy because Heflin "did not want anybody looking back to see what was going on and track the money back to where it came from."

Rather than become a participating manufacturer under the MSA, Ridgeway elected to comply with N.C. Gen. Stat. § 66-291. In April 2003, Ridgeway made its first escrow deposit of $1,220,313.60, as required by N.C. Gen. Stat. § 66-291(b), for sales of cigarettes in North Carolina during 2002. However, in 2003, Ridgeway sold at least 70.6 million cigarettes in North Carolina, which required a deposit of approximately $1.3 million into the escrow account before 15 April 2004. Ridgeway failed to make this deposit. In 2004, Ridgeway sold at least 17 million cigarettes in North Carolina, and despite being notified multiple times by the State of their escrow obligation, Ridgeway again failed to make the required deposit before 15 April 2005. In fall 2004, Ridgeway stopped manufacturing cigarettes, and no escrow was ever deposited by Ridgeway for cigarettes sold during 2003 and 2004.

On 4 May 2004, plaintiff instituted this action seeking to recover from Ridgeway the escrow deposit due in 2004, civil penalties, and also seeking an injunction prohibiting Ridgeway from selling cigarettes in North Carolina for two years. On 19 October 2005, plaintiff filed an amended complaint. This complaint added claims for the escrow deposit due in 2005, together with civil penalties arising from the failure to make the deposit. It further sought to impose liability upon defendants Brands, Edwards, White and Heflin under a piercing the corporate veil theory. Claims were also made against defendants under the North Carolina Unfair and Deceptive Trade Practices Act and for civil conspiracy.

On 25 October 2005, Ridgeway and Heflin moved to dismiss plaintiff's amended complaint. On 9 December 2005, Judge Smith granted the motion to dismiss in part, dismissing the claims for piercing the corporate veil, unfair and deceptive trade practices, and conspiracy as to both Ridgeway and Heflin. The order further dismissed the claims for civil penalties as to Heflin. From this order, plaintiff appeals only as to the dismissal of its claims against Heflin.

Interlocutory Appeal

[1] We must first determine whether plaintiff's appeal is interlocutory and whether it is properly before this Court. This appeal concerns only Heflin, not the other defendants. The trial court did not certify the judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) (2005). Therefore, we must first determine whether this appeal affects a substantial right. We conclude it does.

"The right to avoid two trials on the same or overlapping issues . . . constitute[s] a substantial right[.]" *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 705, 707, 582 S.E.2d 343, 345 (2003); *see also Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982); *Liggett Group v. Sunas*, 113 N.C. App. 19, 437 S.E.2d 674 (1993). Similarly, the dismissal of plaintiff's claim against Heflin "affects a substantial right to have determined in a single proceeding the issues of whether [plaintiff] has been damaged by the actions of one, some or all defendants, especially since [plaintiff's] claims against all of them arise upon the same series of transactions." *Fox v. Wilson*, 85 N.C. App. 292, 298, 354 S.E.2d 737, 741 (1987).

In the instant case, since the liability of Edwards, White, and Brands depends on Heflin's joint and several liability, plaintiff faces the possibility of having to undergo two trials on the same issue. We therefore address the merits of this appeal.

Standard of Review

A motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2005), tests the legal sufficiency of the complaint. *Grant Constr. Co. v. McRae*, 146 N.C. App. 370, 373, 553 S.E.2d 89, 91 (2001) (citation omitted). On appeal, our standard of review "is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory[.]" *Bowman v. Alan Vester Ford Lincoln Mercury*, 151 N.C. App. 603, 606, 566 S.E.2d 818, 821 (2002) (quotation omitted). The complaint should 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." *Id.*

I: Liability pursuant to Piercing the Corporate Veil

In its first argument, plaintiff contends that the trial court erred by granting Heflin's N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) motion to dismiss plaintiff's claim for piercing the corporate veil. We agree. However, we must first address the argument in Heflin's brief that N.C. Gen. Stat. § 1-54(2) bars plaintiff from collecting penalties in connection with past due escrow payments from Heflin under a theory of piercing the corporate veil, because plaintiff's amended complaint does not relate back to the original complaint. We agree in part.

A: Statute of Limitations

[2] On 4 May 2004, plaintiff filed suit against Ridgeway for Ridgeway's failure to make escrow payments due on 15 April 2004. Plaintiff filed suit within one year of Ridgeway's failure to make the 15 April 2004 escrow payment, which was within the applicable statute of limitations. *See* N.C. Gen. Stat. § 1-54(2) and 66-291(c) (2005). On 19 October 2005, plaintiff amended its complaint to include Ridgeway's failure to make escrow payments due on 15 April 2005 and to bring an action against Heflin, alleging a theory of piercing the corporate veil. Heflin contends that the statute of limitations had expired as to him, since the complaint was amended to add him as a party defendant more than one year after Ridgeway's failure to make the escrow payment due on 15 April 2004, and that the amended complaint does not relate back to the original complaint.

"[I]t is well-established law that if a plaintiff does not name the party responsible for his alleged injury before the statute of limitations runs, his claim will be dismissed." *Estate of Fennell v. Stephenson*, 354 N.C. 327, 332, 554 S.E.2d 629, 632 (2001). However, in certain circumstances, a complaint may relate back "with respect to a party defendant added after the applicable limitations period[.]" *Franklin v. Winn Dixie Raleigh, Inc.*, 117 N.C. App. 28, 39, 450 S.E.2d 24, 31 (1994). The law regarding "[w]hether a complaint will relate back" to an added party hinges upon "whether that new defendant had notice of the claim so as not to be prejudiced by the untimely amendment." *Id.*

N.C. Gen. Stat. § 1A-1, Rule 15(c), allows the relation back of claims in amended complaints in certain circumstances:

> A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

Id. In *Callicutt v. Motor Co.*, 37 N.C. App. 210, 212, 245 S.E.2d 558, 560 (1978), this Court explained Rule 15(c):

> If the effect of the proposed amendment is merely to correct the name of a party already in court, clearly there is no prejudice in allowing the amendment, even though it relates back to the date of the original complaint. . . . On the other hand, if the effect of the amendment is to substitute for the defendant a new party, or

> add another party, such amendment amounts to a new and independent clause (sic) of action and cannot be permitted when the statute of limitations has run.

Id. (citing *Kerner v. Rackmill*, 111 F. Supp. 150, 151 (M.D.P.A. 1953)). In the second scenario, in which the amended complaint actually "add[s] another party," our Supreme Court has been reluctant to conclude that a party added in an amended complaint can ever have adequate notice. *Id.; see also Estate of Fennell*, 354 N.C. at 332, 554 S.E.2d at 632; *Crossman v. Moore*, 341 N.C. 185, 459 S.E.2d 715 (1995). The Court explained that "while Rule 15 of the North Carolina Rules of Civil Procedure permits the relation-back doctrine to extend periods for pursuing claims, it does not apply to parties." *Estate of Fennell*, 354 N.C. at 334-5, 554 S.E.2d at 633-4 (citing *Crossman*, 341 N.C. at 187, 459 S.E.2d at 717). The Court set forth the rationale for this rule:

> When [an] amendment seeks to add a party-defendant or substitute a party-defendant to the suit, the required notice cannot occur. As a matter of course, the original claim cannot give notice of the transactions or occurrences to be proved in the amended pleading to a defendant who is not aware of his status as such when the original claim is filed. We hold that this rule does not apply to the naming of a new party-defendant to the action. It is not authority for the relation back of a claim against a new party.

Crossman, 341 N.C. at 187, 459 S.E.2d at 717. This is true even when "a proposed amendment join[s] a partner as an individual defendant in an action against his partnership . . . even though the partner was fully aware of the action and participated in its defense." 1 G. Gray Wilson, *North Carolina Civil Procedure* § 15-12, at 315 (1995) (citing *Crossman*, 341 N.C. 185, 459 S.E.2d 715).

In light of *Crossman*, we hold that the statute of limitations expired as to any claims against Heflin for penalties under N.C. Gen. Stat. § 66-291(c) arising from the failure to make the 2004 escrow deposit. We thus affirm the trial court's dismissal of the claim for penalties arising out of the failure to pay the 2004 escrow deposit. However, the dismissal of this claim has no effect upon plaintiff's claims for payment of the 2004 escrow deposit. *See Miller v. C. W. Myers Trading Post, Inc.*, 85 N.C. App. 362, 368, 355 S.E.2d 189, 193 (1987) (holding that N.C. Gen. Stat. § 1-54(2) was inapplicable to an action not constituting a "penalty or forfeiture" and the purpose of which was not "punitive"); *see also* N.C. Gen. Stat. § 1-52(2) (2005).

Further, at the time of the filing of the amended complaint, which named Heflin as a party to this action, the one-year statute of limitations had not expired as to any penalties arising from the failure to make the 2005 escrow deposit.

B: Piercing the Corporate Veil

[3] North Carolina courts will "pierce the corporate veil" where an "individual exercises actual control over a corporation, operating it as a mere instrumentality[.]" *Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 790, 561 S.E.2d 905, 908 (2002) (citation omitted). The North Carolina Supreme Court set forth the "instrumentality rule" as follows:

> [When a] corporation is so operated that it is a mere instrumentality or alter ego of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State, the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person, it being immaterial whether the sole or dominant shareholder is an individual or another corporation.

Henderson v. Finance Co., 273 N.C. 253, 260, 160 S.E.2d 39, 44 (1968). Liability may be imposed on an individual controlling a corporation as an "instrumentality" when the individual had:

(1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and

(2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and

(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Glenn v. Wagner, 313 N.C. 450, 455, 329 S.E.2d 326, 330 (1985).

Factors to consider in determining whether to pierce the corporate veil include: (1) inadequate capitalization; (2) non-compliance with corporate formalities; (3) complete domination and control of the corporation so that it has no independent identity; and (4) excessive fragmentation of a single enterprise into separate corporations.

Id. at 455, 329 S.E.2d at 330-31 (citing generally, Robinson, *North Carolina Corporation Law* §§ 2-12, 9-7 to -10 (3d ed. 1983)).

The question for this Court is whether the allegations in plaintiff's complaint are sufficient to state a claim for piercing the corporate veil.

Plaintiff alleges that Heflin: (1) "overwhelmingly dominated and controlled [Ridgeway] to the extent [Ridgeway] had no separate identity[;]" (2) used that control to "set[] the pricing structure" so as to violate N.C. Gen. Stat. § 66-291(b); and (3) that Heflin's aforesaid control and statutory violation proximately caused unjust capital loss to the escrow fund established by N.C. Gen. Stat. § 66-291(b). Plaintiff specifically alleged that Heflin "deliberately ignored" the advice of Ridgeway's general manager, who warned that "the pricing structure was grossly inadequate to satisfy the statutory obligations of the [North Carolina] escrow payment [statute]." Plaintiff alleged that Heflin, Edwards and White were responsible for setting the pricing structure for the sale of cigarettes, "which was well below the minimum necessary level to pay the statutory obligations[.]" Further, they set this pricing structure "to have an unfair advantage over similarly situated competitors . . . with no intention of paying their statutory obligations[.]" Moreover, plaintiff contended that Heflin, Edwards and White "took money out of [Ridgeway] and left [Ridgeway] in disarray[;]" that Ridgeway was "inadequately capitalized" and "excessively fragment[ed][;]" that "no corporate financial records or grossly inadequate corporate records existed for [Ridgeway][;]" and that Ridgeway "failed to follow corporate formalities[.]" Accordingly, we hold that the allegations in plaintiff's complaint are sufficient to state a claim for piercing the corporate veil. *See*, *e.g.*, *Becker*, 149 N.C. App. at 790, 561 S.E.2d at 908.

We reverse the trial court as to this assignment of error.

II: Unfair and Deceptive Trade Practices

[4] In its second argument, plaintiff contends that the trial court erred by dismissing its claim for relief under N.C. Gen. Stat. § 75-1.1 (2005), the Unfair and Deceptive Trade Practices Act. We disagree and affirm the trial court.

N.C. Gen. Stat. § 75-1.1 states, in pertinent part, the following:

(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

Id.

To establish a *prima facie* claim for unfair and deceptive trade practices, the plaintiff must show: (1) Heflin committed an unfair or deceptive act or practice; (2) the action in question was in or affecting commerce; and (3) the act proximately caused injury to the plaintiff. *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 664, 464 S.E.2d 47, 58 (1995).

Heflin contends that its failure to perform its obligation under N.C. Gen. Stat. § 66-291 does not provide a cause of action under N.C. Gen. Stat. § 75-1.1, basing his argument upon the rationale of *Lindner v. Durham Hosiery Mills, Inc.*, 761 F.2d 162, 166 (4th Cir. 1985), in which the Fourth Circuit held that N.C. Gen. Stat. § 75-1.1 did not apply to securities transactions. The court reasoned that "the North Carolina legislature would [not] have intended § 75-1.1, with its treble damages provision, to apply to securities transactions which were already subject to pervasive and intricate regulation under the North Carolina Securities Act" and other federal acts. *Id.* at 167. The court stated that "[t]he presence of other federal or state statutory schemes may limit the scope of § 75-1.1." *Id.*

In *Skinner v. E. F. Hutton & Co.*, 314 N.C. 267, 268, 333 S.E.2d 236, 237 (1985), our Supreme Court cited *Lindner* as persuasive authority, holding that "securities transactions are beyond the scope of [N.C. Gen. Stat. § 75-1.1.]" *Id.* The Court in *Hajmm Co. v. House of Raeford Farms*, 328 N.C. 578, 403 S.E.2d 483 (1991), expanded the exception established by *Skinner*, holding that § 75-1.1 did not apply to a corporation's refusal to redeem revolving fund certificates issued by the corporation. The Court reasoned that the extension of the scope of § 75-1.1 in this context would "create overlapping supervision, enforcement, and liability in [an] area [that] is already pervasively regulated by state and federal statutes and agencies." *Id.* at 593, 403 S.E.2d at 493. The Court explained that "there is enough legislative apparatus already in place . . . without also applying [§ 75-1.1]." *Id.*

In the instant case, N.C. Gen. Stat. § 66-291 (2005) provides that: "Any tobacco product manufacturer selling cigarettes to consumers within the State . . . shall" either elect to "[b]ecome a participating

manufacturer . . . under the Master Settlement Agreement" or "[p]lace into a qualified escrow fund by April 15 of the year following the year in question the following amounts[:] . . . For each of 2003 through 2006: $.0167539 per unit sold." *Id.* N.C. Gen. Stat. § 66-291(c) provides the remedy for failure to comply with the aforementioned statute: "[t]he Attorney General may bring a civil action on behalf of the State against any tobacco product manufacturer that fails to place into escrow the funds required under this section." *Id.* N.C. Gen. Stat. § 66-291(c) further provides that the noncompliant manufacturer has fifteen days to "place such funds into escrow as shall bring it into compliance." *Id.* If the violation was a "knowing violation," the court may impose the following civil penalty:

> [A]n amount not to exceed fifteen percent (15%) of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed three hundred percent (300%) of the original amount improperly withheld from escrow[.]

Id. We hold that N.C. Gen. Stat. § 66-291 is analogous to the regulations discussed in *Lindner*, 761 F.2d 162, *Skinner*, 314 N.C. 267, 333 S.E.2d 236, and *Hajmm Co.*, 328 N.C. 578, 403 S.E.2d 483. N.C. Gen. Stat. § 66-291 itself provides an extensive remedy for failure to comply with the escrow obligation. Because the presence of other statutory schemes may limit the scope of N.C. Gen. Stat. § 75-1.1, we conclude that extension of the scope of N.C. Gen. Stat. § 75-1.1 in this context would create unnecessary and "overlapping supervision, enforcement, and liability[.]" *Hajmm Co.*, 328 N.C. at 593, 403 S.E.2d at 493. We conclude that it was not the legislature's intent to extend the scope of Chapter 75 to include noncompliance with N.C. Gen. Stat. § 66-291. "[T]here is enough legislative apparatus already in place . . . without also applying the Act." *Id.* We affirm the trial court's dismissal of this claim.

III: Civil Conspiracy

[5] In its third argument, plaintiff contends that the trial court erred by granting Heflin's N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) motion to dismiss the claim for civil conspiracy in plaintiff's amended complaint. We agree.

The elements of a civil conspiracy are: "(1) an agreement between two or more individuals; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) resulting in injury to plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a

common scheme." *Privette v. University of North Carolina*, 96 N.C. App. 124, 139, 385 S.E.2d 185, 193 (1989).

The doctrine of intracorporate immunity holds that, since at least two persons must be present to form a conspiracy, a corporation cannot conspire with itself, just as an individual cannot conspire with himself. *Buschi v. Kirven*, 775 F.2d 1240, 1251-52 (4th Cir. 1985). An allegation that a corporation is conspiring with its agents, officers or employees is tantamount to accusing a corporation of conspiring with itself. *Id.* Moreover, the grant of immunity is not destroyed by suing the agent in his individual capacity. *Id.* at 1252. However, an exception to the doctrine exists if the corporate agent has an "independent personal stake in achieving the corporation's illegal objective." *Id.* (citing *Greenville Publishing Co., Inc., v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974)).

In the instant case, the complaint alleged:

> Defendants shared an understanding, either expressed or implied, to enter into an agreement to underprice the cigarettes made by Defendant [Ridgeway] and distributed and sold by [Brands] so that [Ridgeway] would be unable to deposit sufficient escrow to cover sales in violation of N.C. Gen. Stat. § 66-291 and would deprive the State of North Carolina of a fund against which it could execute judgments against Defendant [Ridgeway].
>
> Defendants shared an understanding, either express or implied, to enter into an agreement to unfairly and deceptively underprice the cigarettes made by Defendant [Ridgeway] and distributed and sold by [Brands] so that [Ridgeway] would be unable to deposit sufficient escrow to cover sales in violation of N.C. Gen. Stat. § 66-291 and deprived the State of a fund against which it could execute judgments.

We again note that the complaint should 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." *Bowman* 151 N.C. App. at 606, 566 S.E.2d at 821.

Plaintiff's complaint alleges that an agreement existed between Heflin, Edwards and White, to violate, pursuant to a common scheme, the corporation's escrow obligation under N.C. Gen. Stat. § 66-291, which caused injury to plaintiff by "depriv[ing] [plaintiff] of a fund

against which it could execute judgments." *See generally Privette*, 96 N.C. App. 124, 385 S.E.2d 185.

Furthermore, we conclude that the benefit accruing to Heflin from his conspiracy was not merely the benefit associated with the profitability of the corporations, Ridgeway and Brands. Plaintiff's complaint supports the theory that Heflin had an "independent personal stake in achieving the corporation's illegal objective," because plaintiff alleged that Heflin "directe[d] monies intended to [Ridgeway] to either . . . Edwards, White, [Brands] or [Heflin][.]" Plaintiff further alleged that, in 2004, Heflin told Welchons that "[Ridgeway] was not going to file for bankruptcy because [Heflin] and others did not want anybody looking back to see what was going on and track the money back to where it came from." After this comment, Welchons considered "the creation of financial records" and the hiring of "attorneys Schwartz and Turpin" to be "a cover-up to hide activities." Ridgeway made payments in excess of $1 million to Turpin and Schwartz, "of which none was ever accounted for or returned to [Ridgeway][.]" Welchons, the general manager of Ridgeway, was never told how the money was spent. Plaintiff alleged that Heflin and others "disposed of almost all assets of [Ridgeway]" and "siphon[ed] off funds to" themselves. We hold that the foregoing is sufficient to support the theory that Heflin had an "independent personal stake in achieving the corporation's illegal objective." *Buschi*, 775 F.2d at 1252.

We reverse the trial court's order granting Heflin's N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) motion to dismiss as to the claim for civil conspiracy.

For the reasons discussed above, we affirm in part, reverse in part, and remand this case to the trial court for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART.

Judge HUNTER concurs.

Judge WYNN concurring in part and dissenting in part.

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

I concur with the majority in concluding that this appeal presents the possibility of two trials on the same issue, as well as the major-

ity's holding to reverse the trial court's granting of Mr. Heflin's Rule 12(b)(6) motion on the State's claim for piercing the corporate veil and to affirm the trial court's dismissal of the State's UDTP claim. However, I would reverse the trial court's dismissal of the State's claim for civil penalties, and I would affirm the trial court's dismissal of the State's claim of civil conspiracy. From those portions of the majority opinion, I therefore respectfully dissent.

I.

First, I disagree with the conclusions of the majority's analysis as to the issue of the State's claim for civil penalties against Mr. Heflin, relating to the non-payment of the 2004 escrow fees.

As cited by the majority, our Supreme Court has established the rule that a "new party-defendant" may not be named in the amendment of a complaint, as the North Carolina Rules of Civil Procedure are "not authority for the relation back of a claim against a new party." *See, e.g.*, *Crossman v. Moore*, 341 N.C. 185, 187, 459 S.E.2d 715, 717 (1995). The instant case, however, also involves a claim by the State to pierce the corporate veil of Ridgeway, a claim which we allow to go forward by reversing the trial court's granting of Mr. Heflin's Rule 12(b)(6) motion.

If the State subsequently succeeds on its claim to pierce the corporate veil, Mr. Heflin would not be a *new* party-defendant, as a jury would therefore have concluded that he is the alter ego of Ridgeway. As such, the lack of his name in the original complaint would essentially be immaterial with respect to the question of notice, the Supreme Court's primary concern in disallowing the relation-back doctrine as to newly named parties. *See id.* ("As a matter of course, the original claim cannot give notice of the transactions or occurrences to be proved in the amended pleading to a defendant who is not aware of his status as such when the original claim is filed.").

I find the reasoning in *Strawbridge v. Sugar Mountain Resort, Inc.*, 243 F. Supp. 2d 472 (W.D.N.C. 2003), to be persuasive and applicable to the case at hand. In *Strawbridge*, the Western District Court held that the filing of an action against a corporation stopped the limitation period from running with respect to alter egos of the corporation. *Id.* at 476-77. I believe this approach to be more consistent with the idea of what an "alter ego" means, in that "the corporate entity will be disregarded and the corporation and the shareholder treated as *one and the same person*[.]" *Henderson v. Security Mortgage &*

Finance Co., Inc., 273 N.C. 253, 260, 160 S.E.2d 39, 44 (1968) (emphasis added).

Thus, I would conclude that the State's claim for civil penalties, and whether it was filed after the expiration of the applicable statute of limitations, hinges on whether the State can successfully pierce the corporate veil and establish that Mr. Heflin and Ridgeway are alter egos. Given that this case is before us on review of a Rule 12(b)(6) motion, and we have held that the State can proceed with its claim to pierce the corporate veil, I would likewise reverse the trial court's order dismissing the State's claim for civil penalties.

II.

Next, although I agree with the majority that intracorporate immunity should not apply in this case, I do not believe that the State's complaint alleged sufficient facts to show a civil conspiracy in this case. I would therefore affirm that portion of the trial court's order that dismissed the State's claim for civil conspiracy.

To state a claim for civil conspiracy, there must be proof of an agreement between two or more persons to do an unlawful act or a lawful act in an unlawful manner. *Dove v. Harvey*, 168 N.C. App. 687, 690, 608 S.E.2d 798, 800-01 (2005), *disc. review denied*, 360 N.C. 289, 628 S.E.2d 249 (2006). Here, the State's complaint referred only to Defendants "shar[ing] an understanding, either expressed or implied, to enter into an agreement[.]" Although the State argues that this allegation should be sufficient in light of North Carolina's adoption of notice pleading, this Court has also noted that "the evidence of the agreement must be sufficient to create more than a suspicion or conjecture in order to justify submission to a jury." *Id.* at 690-91, 608 S.E.2d at 801 (citation and quotation omitted). I do not believe the State's complaint meets this burden.

The State's complaint includes no factual allegations to support the notion of an agreement or conspiracy among Mr. Heflin, Mr. Edwards, and Mr. White to underprice the cigarettes for the express purpose of avoiding its statutory obligations to pay into the qualified escrow account. Even were all the facts of the complaint taken as true, its allegations are insufficient to "create more than a suspicion or conjecture" of an actual agreement among the parties; accordingly, they fail to state a claim for civil conspiracy. I would therefore affirm the trial court's dismissal of the State's claim for civil conspiracy.

WINDING RIDGE HOMEOWNERS ASSOCIATION, INC., A NORTH CAROLINA NOT-FOR-PROFIT CORPORATION, AND THEODORE J. HUMPHREY, III, A NATURAL PERSON, PLAINTIFFS v. ZALMAN JOFFE AND WIFE, DEVORA JOFFE, SUNTRUST MORTGAGE, INC., JACKIE MILLER, TRUSTEE, ALSTON MASON, TYLER MURTAUGH, TRIP SHORT, BROOKS WELLER, AND TAYLOR HARRINGTON, DEFENDANTS

No. COA06-1506

(Filed 17 July 2007)

1. Deeds— restrictive covenant—structural and usage restriction

A restrictive covenant requiring that lots in a subdivision "shall be used for single family residential structures," when considered with captions for relevant sections of the covenant as "Use Restrictions" and "Use of Property," constituted both a structural and usage restriction.

2. Deeds— restrictive covenant—single family residence—students

The trial court correctly found that college students living in a single family residence were not an integrated family unit where defendants failed to allege or produce evidence that the students considered themselves to be a family or that they operated their home in any manner other than convenience. Thus, a lease of the residence to the students violated a subdivision restrictive covenant limiting use of the property to a single family dwelling.

Judge GEER dissenting.

Appeal by defendants from order entered 18 August 2006 by Judge Carl R. Fox in Orange County Superior Court. Heard in the Court of Appeals 6 June 2007.

Brown & Bunch, PLLC, by Charles Gordon Brown, for plaintiff-appellees.

The Brough Law Firm, by G. Nicholas Herman, for defendant-appellants.

JACKSON, Judge.

On 19 April 2006, the Winding Ridge Homeowners Association, Inc., and Theodore Humphrey, III ("plaintiffs") filed an action against

defendants Zalman and Devora Joffe ("Joffes"), owners of Lot 1 and a residence located at 106 Mullin Court, Chapel Hill, North Carolina, in the Winding Ridge Subdivision. The action also included as defendants: SunTrust Mortgage, Inc., who holds an interest in defendants' property; Jackie Miller, who holds security title to defendants' property under a deed of trust; and Alston Mason, Tyler Muraugh, Trip Short, Brooks Weller, and Taylor Harrington, who were college students residing at defendants' property as tenants or subtenants at the time of the action. Plaintiffs alleged that defendants' leasing of their residence to the tenants violated the subdivision's restrictive covenants. Specifically, plaintiffs alleged that defendants were in violation of Article VIII, Section 3(b) of the restrictive covenants, which provides that the lots in the subdivision "shall be used for single family residential structures." Plaintiffs sought an injunction to enforce the restrictive covenants, and to prohibit defendants from allowing the property to be occupied other than by a single family. On 9 May 2006 and 20 June 2006, respectively, Joffe and the students answered the complaint, admitting most of its factual allegations but denying that the students' use of the residence violated the restrictive covenant.

Neither party disputes the fact that the restrictive covenant at issue is binding upon the Joffes' property and use of the property. The restrictive covenant at issue, originally recorded in 1987, contains a provision found in Article VIII, titled "Use Restrictions." The covenant provides:

> Section 3. Use of Property.
>
> (a) Only one *single family dwelling* or replacement thereof shall be placed upon each lot as designated on the said plat and no such lot shall be further subdivided by future owners for the purpose of accommodating additional buildings . . . .
>
> (b) *This property shall be used for single family residential structures* and no duplex houses, apartments, trailers, tents or commercial or industrial buildings shall be erected or permitted to remain on the property provided, however, that this restriction shall not preclude the inclusion of one small light housekeeping apartment within the residential structure for occupancy by not more than two persons.
>
> (c) No *single family dwelling* shall be built, erected, altered or used unless the main body of the structure, exclusive of garages,

> porches, breezeways, stoops and terraces, shall contain at least 1650 square feet of finished and heated floor space in the main body of the house if the structure is a one-story building or at least 2,000 square feet for all other structures. . . .

(Emphases added). On 23 January 2004, Joffe's wholly-owned construction company, Ridge Construction, Inc. (Ridge Construction), acquired the subject lot in the Winding Ridge Subdivision. On 30 December 2003, Ridge Construction obtained a zoning compliance permit from the Town of Chapel Hill to develop the lot with a "single family residence." On 13 January 2004, a building permit was issued, and on 7 June 2004, the Town issued a Certificate of Occupancy for the residence. Ridge Construction then conveyed the lot and residence to the Joffes on 10 June 2004.

At some point after the conveyance of the property, Joffe leased the residence to four students who were unrelated to one another. Based upon the affidavit of one of the students, they had been "living together in the residence as a single housekeeping unit and as a single place for culinary purposes." In addition their "house [was] operated in a home-like manner. The roommates share[d] in common household chores, car pool[ed] to campus when possible, cook[ed] meals and [ate] together, car pool[ed] to eat out together, and gather[ed] for relaxation and to watch television, talk and entertain together."

On 16 June 2006, plaintiffs filed a Motion for Partial Summary Judgment and Permanent Injunction, seeking an injunction against defendants' continued violation of Article VIII, Section 3 of the subdivision's restrictive covenants. The Joffes filed a Motion for Partial Summary Judgment on 21 June 2006, arguing that the restrictive covenant at issue limits only the use of the lots to "single family residential structures" and does not limit the use of lots within the subdivision to single family occupancy. On 18 August 2006 the trial court entered an order granting plaintiffs' motion for partial summary judgment and permanent injunction. The trial court held that:

> 5. Article VIII of the Covenants, reasonably construed, unambiguously restricts the use of Lot 1 to single family residential use.
>
> 6. Based upon a reasonable construction of Article VIII in context with the rest of the Covenants, use of Lot 1 is restricted to single family residential.

7. The plain and obvious purpose of Article family residential use. The multiple references to "single family dwelling or replacement," "single family residential structures" and "single family dwelling" in combination with the captions "Use Restrictions" and "Use of Property" restricts the utilization of Lot 1 to single family occupancy. This finding is also supported by the prohibition of duplex houses and apartments and the negative inference derived from the narrow exception for a "light housekeeping apartment within the residential structure for occupancy by not more than two persons."

8. Giving each part of the Covenants effect according to the natural meanings of the words, including all reasonable inferences therefrom applied in such a way as to avoid defeating the plain and obvious purposes of the restriction, the Covenants were intended to restrict Lot 1 to single family residential use.

9. The Joffes had actual and constructive notice of this use restriction when they purchased Lot 1.

10. The five student occupants are not related by blood, marriage or lawful adoption.

11. The five student occupants are not substantively structured as an integrated family unit.

12. The five student occupants are housemates who, in the course of attending college, share the cost of having a place to live as well as, on occasion, meals and fellowship. However, they are not substantively structured like a family or an integrated family unit.

13. The occupancy of Lot 1 by these students is a use of Lot 1 other than for single family residential purposes.

14. The Joffes, by permitting these students to occupy Lot 1, have violated the Covenants.

The Joffes also were "enjoined and restrained from using or making Lot 1 available for occupancy to any group of two or more persons not related by blood, marriage, lawful adoption, or who are not substantively structured like an integrated family unit." The Joffes have appealed from this order.

On appeal, defendants present two issues for our review: (1) whether the trial court erred in concluding that the restrictive covenant prescribing that lots "shall be used for single family residential structures" is an occupancy restriction rather than a structural restriction; and (2) if we are to hold that the restrictive covenant at issue is an occupancy restriction rather than a structural restriction, then whether the trial court erred in concluding that the students who occupied the premises were not substantively structured like an integrated family unit, and thus defendants' use of the property violated the covenant. Defendants contend that the restrictive covenant at issue constitutes a structural restriction, whereas plaintiffs argue that the covenant, when construed with the Article and Section titles, constitutes an occupancy restriction, and thus limits the usage of the property to usage by a "single family."

On appeal, our standard of review for an order granting summary judgment is *de novo*. *Stafford v. County of Bladen*, 163 N.C. App. 149, 151, 592 S.E.2d 711, 713 (2004), *appeal dismissed*, 358 N.C. 545, 599 S.E.2d 409 (2004). Summary judgment is only appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Leake v. Sunbelt, Ltd. of Raleigh*, 93 N.C. App. 199, 201, 377 S.E.2d 285, 287 (1989). "[I]n considering summary judgment motions, we review the record in the light most favorable to the nonmovant." *Id.* "The entry of summary judgment presupposes that there are no issues of material fact." *Cieszko v. Clark*, 92 N.C. App. 290, 292-93, 374 S.E.2d 456, 458 (1988). Thus, "[f]indings of fact and conclusions of law are not necessary in an order determining a motion for summary judgment," and, "such findings and conclusions do not render a summary judgment void or voidable and may be helpful, if the facts are not at issue and support the judgment." *Bland v. Branch Banking & Tr. Co.*, 143 N.C. App. 282, 285, 547 S.E.2d 62, 64-65 (2001).

"Restrictive covenants are strictly construed, but they should not be construed 'in an unreasonable manner or a manner that defeats the plain and obvious purpose of the covenant.' " *Hultquist v. Morrow*, 169 N.C. App. 579, 582, 610 S.E.2d 288, 291 (quoting *Cumberland Homes, Inc. v. Carolina Lakes Prop. Owners' Ass'n*, 158 N.C. App. 518, 521, 581 S.E.2d 94, 97 (2003)), *disc. rev. denied*, 359 N.C. 631, 616 S.E.2d 235 (2005). " 'The fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions.' " *Id.* (quoting

Long v. Branham, 271 N.C. 264, 268, 156 S.E.2d 235, 238 (1967)) (emphasis in original). Covenants that restrict the free use of property are to be strictly construed against limitations upon such use. *Long*, 271 N.C. at 268, 156 S.E.2d at 239.

> [I]n interpreting restrictive covenants, doubt and ambiguity are resolved in favor of the unrestricted use of property, " 'so that where the language of a restrictive covenant is capable of two constructions, the one that limits, rather than the one which extends it, should be adopted, and that construction should be embraced which least restricts the free use of the land.' "

Hultquist, 169 N.C. App. at 584-85, 610 S.E.2d at 292 (quoting *Long*, 271 N.C. at 268, 156 S.E.2d at 239). "[E]ach part of the covenant must be given effect according to the natural meaning of the words, provided that the meanings of the relevant terms have not been modified by the parties to the undertaking." *Hobby & Son v. Family Homes*, 302 N.C. 64, 71, 274 S.E.2d 174, 179 (1981).

[1] Defendants contend that our Supreme Court's holding in *Hobby & Son v. Family Homes*, 302 N.C. 64, 274 S.E.2d 174, controls the instant case. In *Hobby*, the plaintiff subdivision residents sought to enforce the subdivision's restrictive covenants against a nonprofit corporation which operated a family care home in a dwelling located in the subdivision. The family care home housed mentally retarded adults, along with adult caretakers who also lived in the residence. In *Hobby*, the restrictive covenant at issue read as follows:

> No lot shall be used except for residential purposes, but nothing herein shall be construed to mean that a lot may not be converted to a street regardless of the type of use made of such street. No building shall be erected, altered, placed, or permitted to remain on any building unit other than one detached single-family dwelling not to exceed 2 1/2 stories in height, a private garage for not more than three cars and outbuildings incidental to residential use.

Id. at 65-66, 274 S.E.2d at 176. In interpreting this restrictive covenant and applying it to the defendants' proposed usage of the property, the Court held that the defendants' use of the property was for residential purposes. *Id.* at 74, 274 S.E.2d at 181. The Court then went on to determine whether the restrictive covenant's limitation as to the type of structure that may be placed on a piece of property—one detached single-family dwelling—also limited the type of usage to which the

building would be subject. The Court held that "[w]hile it is possible that a restriction as to the type of structure would, in some instances, limit the character of the type of usage to which the building is employed, we conclude that such is not necessarily the case." *Id.* "[E]ach part of a contract which contains a restrictive covenant must be interpreted in such a manner that each portion of the covenant is given effect if that can be done by fair and reasonable intendment." *Id.* at 74-75, 274 S.E.2d at 181. The Court held that although the restrictive covenant in *Hobby* contained a restriction limiting use of the property to "residential purposes," this restriction alone could not be construed in conjunction with the statement referencing a "single-family dwelling" to impose a usage restriction in terms of who may occupy the property. *Id.* The Court held that with respect to the subject covenant,

> [a]n interpretation of the phrases which relate to a single-family dwelling as being a usage restriction would be to render them mere surplusage because nothing they contain adds anything to the concept of "residential purposes" in a clear and distinct way. All of the components of the particular clause may be interpreted according to their ordinary and accepted meanings as relating to structural matters. By delineating the number of stories which the building may contain, and the number of cars which its garage may accommodate, as well as nature of the outbuildings which may be erected on the lot, it would seem that the framers of the covenant were seeking to impose a structural requirement upon owners of the tract. Nothing in the record indicates that defendant has altered the structure which had been erected . . . in any manner . . . .
>
> We hold, therefore that a provision in a restrictive covenant as to the character of the structure which may be located upon a lot does not by itself constitute a restriction of the premises to a particular use. While a restrictive covenant may be so clearly and unambiguously drafted that it regulates the utilization of property through a structural limitation, such was not done in the present case.

Id. at 75, 274 S.E.2d at 181-82 (citation omitted). However, based upon the clear wording of the restrictive covenant at issue in the instant case, we hold the restrictive covenant here is not analogous to that in *Hobby*, and instead is more similar to that in *Higgins v. Builders & Finance, Inc.*, 20 N.C. App. 1, 10, 200 S.E.2d 397 (1973), *cert. denied*, 284 N.C. 616, 201 S.E.2d 689 (1974).

In *Higgins*, this Court held that the language of a restrictive covenant, which provided that "[n]o structure shall be erected, altered, placed or permitted to remain on any lot other than *for use as a single family residential dwelling*," was both a structural and usage restriction. *Id.* at 10, 200 S.E.2d at 404 (emphasis added). In comparison, the covenant in *Hobby* limited the use of the property only to "residential purposes." The portion of the covenant regarding the "single-family dwelling" did not contain a provision that the property be "used" for a "single-family dwelling," as is the case in *Higgins* and in the instant case. *See Hobby*, 302 N.C. at 65-66, 274 S.E.2d at 176-77; *compare Higgins*, 20 N.C. App. at 9, 200 S.E.2d at 403. Moreover, the portion of the covenant in *Hobby* that limited the use to "residential purposes" was in a completely separate and distinct sentence from the restriction regarding a "single family dwelling." Whereas in *Higgins*, the restrictive covenant at issue placed the term "use" within the same sentence as the requirement that there could only be a "single family residential dwelling." As we held in *Higgins*, a restrictive covenant, when drafted in this manner, constitutes both a structural and a usage restriction. *Higgins*, 20 N.C. App. at 10, 200 S.E.2d at 404. The dissent's drawing of a distinction between the terms "single family residential structure" and "single family residential dwelling" does not alter the fact that the structural restriction is found in a clause that also limits the structure or dwelling's usage.

In the instant case, the captions for the relevant Article and section of the covenants are "Use Restrictions" and "Use of Property," respectively. Unlike in *Hobby*, these captions, when construed with the specific language of the covenant "regulate[] the utilization of property through a structural limitation." *Hobby*, 302 N.C. at 75, 274 S.E.2d at 182. The restrictive covenant at issue is substantially similar to that in *Higgins*, and thus, we hold the restrictive covenant in the instant case constitutes both a structural and usage restriction, and the Joffes in fact were in violation of the restrictive covenant if the college students did not constitute a single family.

[2] Next we must determine whether the trial court was correct in holding that since the college students leasing the property from the Joffes were not substantively structured as an integrated family unit, the restrictive covenant was violated. In the instant case, the restrictive covenant at issue fails to define the term "single family" or any of the words comprising that term. Moreover, the additional restrictive covenants applicable to the subject property do not define "single family" or "family," nor do they offer any insight as to how the terms

are to be interpreted or as to what were the intentions of the original drafters. *See Long*, 271 N.C. at 268, 156 S.E.2d at 238.

This Court has held that "[i]n interpreting ambiguous terms in restrictive covenants, the intentions of the parties at the time the covenants were executed 'ordinarily control,' and evidence of the situation of the parties and the circumstances surrounding the transaction is admissible to determine intent." *Angel v. Truitt*, 108 N.C. App. 679, 681, 424 S.E.2d 660, 662 (1993) (quoting *Stegall v. Housing Auth.*, 278 N.C. 95, 100, 178 S.E.2d 824, 828 (1971)). In the absence of any evidence of intent regarding the meaning of "single family," courts must interpret the term consistent with its "natural meaning." *Hobby*, 302 N.C. at 71, 274 S.E.2d at 179. As noted *supra*, our courts previously have suggested that the term "family" should be construed to exclude "independent persons who share only the place where they sleep and take their meals" and are not an "integrated unit." *Id.* at 73, 274 S.E.2d at 180; *see also Smith v. Assoc. for Retarded Citizens*, 75 N.C. App. 435, 440, 331 S.E.2d 324, 327 (1985).

In the instant case, the evidence contained in the record, including an affidavit by one of the tenants, shows that the students were close personal friends who resided together while attending school. They operated the residence "in a home-like manner" and shared the common household duties and expenses. The students shared the costs of food, and lived "together in the residence as a single housekeeping unit and as a single place for culinary purposes." There is nothing indicating that the students considered themselves to be a "family" or anything more than close personal friends. Based upon the evidence in the record, we hold the trial court properly found that the students were not "substantively structured as an integrated family unit." Defendants failed to allege or produce evidence that the students considered themselves to be a "family" or that they operated their home in any manner other than one out of convenience. In addition, we hold the trial court's holding that "[t]he Joffes are hereby permanently enjoined and restrained from using or making Lot 1 available for occupancy to any group of two or more persons not related by blood, marriage, lawful adoption, or who are not substantively structured like an integrated family unit" is consistent with our appellate Courts' prior holdings by the Supreme Court in *Hobby* and the Court of Appeals in *Smith*.

Thus, we hold the restrictive covenant in the instant case constitutes both a structural and usage restriction, and the trial court prop-

erly found that defendants were in violation of the covenants and that the student tenants were not substantially structured as a family unit. Therefore, the trial court did not err in granting partial summary judgment to plaintiffs.

Affirmed.

Judge CALABRIA concurs.

Judge GEER dissents in a separate opinion.

GEER, Judge, dissenting.

Although I would agree as a general matter with the majority opinion's analysis of the proper meaning of the phrase "single family dwelling," *see Danaher v. Joffe*, 184 N.C. App. 642, 650, 646 S.E.2d 783, 788 (2007) (Geer, J., concurring), I would hold in this case that the restrictive covenant, as drafted, is only a limitation on the type of structure that may be placed on the property and not a restriction on the type of occupancy permitted within the dwelling. I believe that this conclusion is mandated by *J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc.*, 302 N.C. 64, 274 S.E.2d 174 (1981), and the well-established rules of construction applicable to restrictive covenants. The majority opinion has, in effect, rewritten the restrictive covenant to add a limitation not currently there. I must, therefore, respectfully dissent.

Our Supreme Court, in *Hobby*, set out the principles governing enforcement of restrictive covenants such as the one in this case:

> We begin our analysis of this case with a fundamental premise of the law of real property. While the intentions of the parties to restrictive covenants ordinarily control the construction of the covenants, *such covenants are not favored by the law, and they will be strictly construed to the end that all ambiguities will be resolved in favor of the unrestrained use of land.* The rule of strict construction is grounded in sound considerations of public policy: It is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent. Even so, we pause to recognize that *clearly and narrowly drawn restrictive covenants* may be employed in such a way that the legitimate objectives of a development scheme may be achieved.

Id. at 70-71, 274 S.E.2d at 179 (emphases added) (internal citations omitted). *Hobby* thus reiterated that (1) a restrictive covenant must be "clearly and narrowly" drafted, and (2) any ambiguities in a covenant will be resolved in favor of the free use of land. *Id.*

Hobby addressed a restrictive covenant that included two pertinent components: (1) "No lot shall be used except for residential purposes," and (2) "No building shall be erected . . . other than one detached single-family dwelling . . . ." *Id.* at 65-66, 274 S.E.2d at 176. The Supreme Court acknowledged that the first component restricted the use of the property to residential purposes, but rejected the plaintiffs' contention that the second part of the covenant also limited the use that could be made of the building after construction.

The Supreme Court explained, repeating the fundamental principles regarding restrictive covenants:

> [P]laintiffs' position is inconsistent with one of the fundamental premises of the law as it relates to restrictive covenants: Such provisions are not favored by the law and they will be construed to the end that all ambiguities will be resolved in favor of the free alienation of land. While it is possible that a restriction as to the type of structure would, in some instances, limit the character of the type of usage to which the building is employed, we conclude that such is not necessarily the case. Indeed, it is not uncommon for buildings that had once served as residences to be acquired by businesses and other concerns for renovation and subsequent utilization in new and varied ways.

Id. at 74, 274 S.E.2d at 181. The Court then flatly held:

> [A] provision in a restrictive covenant as to the character of the structure which may be located upon a lot does not by itself constitute a restriction of the premises to a particular use. While a restrictive covenant may be *so clearly and unambiguously drafted* that it regulates the utilization of property through a structural limitation, such was not done in the present case.

Id. at 75, 274 S.E.2d at 181-82 (emphasis added) (internal citation omitted).

In this case, the Article addressing "Use Restrictions" contained a section entitled "Use of Property." That section provides in pertinent part:

> (a) Only one single family dwelling or replacement thereof shall be placed upon each lot as designated on the said plat and no such lot shall be further subdivided by future owners for the purpose of accommodating additional buildings . . . .
>
> (b) This property shall be used for single family residential structures and no duplex houses, apartments, trailers, tents or commercial or industrial buildings shall be erected or permitted to remain on the property provided, however, that this restriction shall not preclude the inclusion of one small light housekeeping apartment within the residential structure for occupancy by not more than two persons.
>
> (c) No single family dwelling shall be built, erected, altered or used unless the main body of the structure, exclusive of garages, porches, breezeways, stoops and terraces, shall contain at least 1650 square feet of finished and heated floor space in the main body of the house if the structure is a one-story building or at least 2,000 square feet for all other structures. . . .

I can perceive no meaningful distinction between this restrictive covenant and the one in *Hobby*. Indeed, subsection (c) is essentially identical to the provision in *Hobby*.

Each of these provisions describes only "the character of the structure which may be located upon a lot." *Hobby*, 302 N.C. at 75, 274 S.E.2d at 181. The subsections regulate only the type and size of the building and the number of buildings. Nowhere in these subsections is there any language specifically restricting the type of occupancy or use that may be made of the dwelling. Each of the subsections focuses exclusively on construction and other structural concepts. In short, we have only "a provision in a restrictive covenant as to the character of the structure," which *Hobby* holds "does not by itself constitute a restriction of the premises to a particular use." *Id.*

The majority, however, focuses on subsection (b)'s provision that "[t]his property shall be used for single family residential structures," suggesting that it parallels the provision upheld in *Higgins v. Builders & Fin., Inc.*, 20 N.C. App. 1, 200 S.E.2d 397 (1973), *cert. denied*, 284 N.C. 616, 201 S.E.2d 689 (1974), a case decided before *Hobby*. In *Higgins*, however, the restrictive covenant stated: "No structure shall be erected . . . *other than for use as a single family residential dwelling* . . . ." *Id.* at 2, 200 S.E.2d at 399 (emphasis added). The two provisions are dispositively different.

The covenant in this case restricts *the use of the property* to certain types of "structures," as did the one in *Hobby*, while the *Higgins* covenant restricted *the use of the structure* to a single family dwelling. The headings used in the restrictive covenant in this case do not bring this provision within *Higgins* because they refer only to the use of the "property," a concept equally consistent with both structural and occupancy restrictions.

Moreover, if the restrictive covenant is read in the manner suggested by the majority, subsection (b) is rendered internally inconsistent. On the one hand, according to the majority, only a single family may live in the building placed on the lot, but on the other hand, subsection (b) permits a two-person housekeeping unit with no restriction on who can live in that unit. A housekeeping unit could result in the house being inhabited by two families.

In any event, in light of *Hobby* and *Higgins*, the restrictive covenant in this case is at best ambiguous. It cannot be viewed as being "clearly and unambiguously drafted," as required by *Hobby*. 302 N.C. at 75, 274 S.E.2d at 182. In the absence of the requisite clarity, the ambiguity must be resolved in favor of free use of the property. Other jurisdictions have reached the same conclusion with respect to similar restrictive covenants. *See*, *e.g.*, *Double D Manor, Inc. v. Evergreen Meadows Homeowners' Ass'n*, 773 P.2d 1046, 1048-49 (Colo. 1989) (holding that "[t]he covenant as written restricts only the type of structure to single-family dwellings" and citing cases from other jurisdictions to same effect); *Permian Basin Ctrs. for Mental Health & Mental Retardation v. Alsobrook*, 723 S.W.2d 774, 776 (Tex. Ct. App. 1986) ("There is no mention in this [paragraph providing that only a single-family dwelling could be erected] or any other paragraph of the covenant that seeks to impose a single-family occupancy requirement."). I do not believe plaintiffs have offered any persuasive reason for reaching a different result, especially in light of *Hobby*.

In sum, I believe the law is clear, but the restrictive covenant is not. This Court may not restrict the use of the property when the restrictive covenant has failed to do so in a clear manner.

JOAN C. DANAHER, ET AL., PLAINTIFFS v. ZALMAN JOFFE, ET AL., DEFENDANTS

No. COA06-659

(Filed 17 July 2007)

Deeds— restrictive covenants—usage—single family residential purposes

Although the trial court did not err by granting summary judgment in favor of plaintiffs on the issue that defendants were in violation of the usage restriction of a subdivision's restrictive covenants when it leased their residence to seven university students and the restrictive covenants limited the usage of the property to single family residential purposes, it erred by permanently enjoining defendants from allowing more than one person to occupy the subject property unless the persons occupying the same are related by blood or marriage or is a group of persons otherwise structured in the same way as the traditional view of an American family. The case is remanded for application of the correct standard set forth in *Winding Ridge Homeowners Ass'n, Inc. v. Joffe*, 184 N.C. App. 629 (2007).

Appeal by defendants from an order entered 14 February 2006 by Judge Dennis J. Winner in Orange County Superior Court. Heard in the Court of Appeals 14 December 2006.

Brown & Bunch, PLLC, by Charles Gordon Brown, for plaintiff-appellees.

The Brough Law Firm, by G. Nicholas Herman, for defendant-appellants.

Jack Holtzman and William D. Rowe, for The North Carolina Justice Center, amicus curia.

JACKSON, Judge.

On 6 July 2005, several residents ("plaintiffs") of the Franklin Hills Subdivision in Chapel Hill, North Carolina, filed an action against Zalman and Devora Joffe ("defendants"). Defendants are the owners of the lot and residence located at 438 Deming Road in the Franklin Hills Subdivision. Plaintiffs alleged that defendants' leasing of their residence to seven University of North Carolina at Chapel Hill ("UNC") students violated the subdivision's restrictive covenants.

Plaintiffs specifically alleged that defendants were in violation of the restrictive covenants limiting the usage of the property to "single family residential purposes," and the restriction that the lot contain only "one single family residence." On 21 July 2005, defendants answered the complaint, admitting most of its factual allegations but denying that the residence violated any of the restrictive covenants.

The restrictive covenants at issue contain a usage restriction, which provides that "[n]o lot shall be used except for single family residential purposes." The covenant also contains a structural restriction that provides:

> No building shall be erected, altered, placed or permitted to remain on any lot other than one single family residence and its customarily accessory buildings and uses. No duplex houses, apartments, commercial or industrial buildings shall be constructed within the area. This provision shall not be interpreted to preclude the provision of servant's quarters or rooms incidental to the residence and garage structure, nor does it preclude the inclusion of one small light housekeeping apartment within the residential structure . . . .

Zalman Joffe's wholly-owned construction company, Ridge Construction, Inc., acquired the lot at 438 Deming Road, subject to these restrictive covenants, on 14 July 2004. After constructing a residence on the lot, Ridge Construction conveyed the property to defendants.

The residence built on the lot is divided into two dwelling units, consisting of a 1,950 square foot main dwelling unit, and a 750 square foot dwelling with a separate exterior entrance and a separate postal address from the main dwelling unit. The residence contains a total of six bedrooms and five bathrooms, and the power and gas utilities are separately metered for the two dwelling units. Of the seven students leasing the property from defendants, four of the students rented the main dwelling unit, and three students rented the smaller unit.

On 1 November 2005, plaintiffs filed an Amended Verified Petition for Preliminary and Permanent Injunctive Relief to include the seven students as party defendants. Defendants answered this Amended Verified Petition on 2 December 2005, and the students answered on 2 February 2006. All parties involved filed motions for summary judgment, and plaintiffs' motion also sought a permanent injunction. In

response, the student defendants' motion also included a motion for denial of injunctive relief.

In connection with the parties' cross-motions for summary judgment, the uncontroverted affidavits of the students showed that all seven of them lived together in the residence "in a home-like manner." All but one of them were members of the University of North Carolina at Chapel Hill varsity baseball team, and they had been encouraged by their coaches to live together. All of them were otherwise close friends, and they operated their house "in a home-like manner in that all roommates share[d] in common household chores (including yard work), car pool[ed] to class and baseball practice, cook[ed] meals and [ate] together, car pool[ed] to eat out together, and gather[ed] for relaxation in a common family room [the main-floor living area] to watch television, talk and entertain together." They shared a common "Deming Road Household Account" to which all seven contributed to cover "common household expenses and supplies, cable television, electricity, gas, water, sewage and monthly rent."

A hearing was held on the parties' cross-motions for summary judgment, and on 14 February 2006, the trial court entered an order granting summary judgment in part for plaintiffs and in part for defendants. The trial court held that defendants were not in violation of the structural restriction limiting the residence to a single-family dwelling. However, the trial court also held that defendants were in violation of the usage restriction, and further held that the seven students did not constitute a single family. The trial court, in its discretion, also permanently enjoined defendants "to not allow more than one person to occupy the subject property unless the persons occupying the same are related by blood or marriage or is a group of persons otherwise structured in the same way as the traditional view of an American family."

Defendants appeal from the portion of the order finding them in violation of the usage restriction and permanently enjoining defendants from allowing "more than one person to occupy the subject property unless the persons occupying the same are related by blood or marriage or is a group of persons otherwise structured in the same way as the traditional view of an American family."

On appeal, our standard of review for an order granting summary judgment is *de novo*. *Stafford v. County of Bladen*, 163 N.C. App. 149, 151, 592 S.E.2d 711, 713 (2004), *appeal dismissed*, 358 N.C. 545, 599

S.E.2d 409 (2004). Summary judgment is only appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Leake v. Sunbelt, Ltd. of Raleigh*, 93 N.C. App. 199, 201, 377 S.E.2d 285, 287 (1989). "[I]n considering summary judgment motions, we review the record in the light most favorable to the nonmovant." *Id.* "The entry of summary judgment presupposes that there are no issues of material fact." *Cieszko v. Clark*, 92 N.C. App. 290, 292-93, 374 S.E.2d 456, 458 (1988). Thus, "[f]indings of fact and conclusions of law are not necessary in an order determining a motion for summary judgment," and, "such findings and conclusions do not render a summary judgment void or voidable and may be helpful, if the facts are not at issue and support the judgment." *Bland v. Branch Banking & Tr. Co.*, 143 N.C. App. 282, 285, 547 S.E.2d 62, 64-65 (2001).

"Restrictive covenants are strictly construed, but they should not be construed 'in an unreasonable manner or a manner that defeats the plain and obvious purpose of the covenant.' " *Hultquist v. Morrow*, 169 N.C. App. 579, 582, 610 S.E.2d 288, 291 (quoting *Cumberland Homes, Inc. v. Carolina Lakes Prop. Owners' Ass'n*, 158 N.C. App. 518, 521, 581 S.E.2d 94, 97 (2003)), *disc. rev. denied*, 359 N.C. 631, 616 S.E.2d 235 (2005). " 'The fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions.' " *Id.* (quoting *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 238 (1967)). Covenants that restrict the free use of property are to be strictly construed against limitations upon such use. *Long*, 271 N.C. at 268, 156 S.E.2d at 239.

> [I]n interpreting restrictive covenants, doubt and ambiguity are resolved in favor of the unrestricted use of property, " 'so that where the language of a restrictive covenant is capable of two constructions, the one that limits, rather than the one which extends it, should be adopted, and that construction should be embraced which least restricts the free use of the land.' "

Hultquist, 169 N.C. App. at 584-85, 610 S.E.2d at 292 (quoting *Long*, 271 N.C. at 268, 156 S.E.2d at 239).

Defendants contend that our Supreme Court's holding in *Hobby & Son v. Family Homes*, 302 N.C. 64, 274 S.E.2d 174 (1981), controls the instant case. In *Hobby*, the plaintiff subdivision residents sought to enforce the subdivision's restrictive covenants against a nonprofit

corporation which operated a family care home in a dwelling located in the subdivision. The family care home housed mentally retarded adults, along with adult caretakers who also lived in the residence. In *Hobby*, the restrictive covenant at issue read as follows:

> No lot shall be used except for residential purposes, but nothing herein shall be construed to mean that a lot may not be converted to a street regardless of the type of use made of such street. No building shall be erected, altered, placed, or permitted to remain on any building unit other than one detached single-family dwelling not to exceed 2 1/2 stories in height, a private garage for not more than three cars and outbuildings incidental to residential use. . . .

Hobby 302 N.C. at 65-66, 274 S.E.2d at 176. In interpreting this restrictive covenant and applying it to the defendants' proposed usage of the property, the Court held that the defendants' use of the property was for residential purposes. *Id.* at 74, 274 S.E.2d at 181. The Court held that the residents and the adult caretakers operated the residence "in such a manner that the residents are able to live in an atmosphere much like that found in the homes of traditionally structured American families." *Id.* at 72, 274 S.E.2d at 180. There, the Court also stated that

> [w]hile we deem it unnecessary to reach the question of whether the individuals living at the home constitute a family, we are compelled to observe that the surrogate parents and the adults subject to their supervision function as an integrated unit rather than independent persons who share only the place where they sleep and take their meals as would boarders in a boarding house.

Id. at 73, 274 S.E.2d at 180.

This Court has held that "[i]n interpreting ambiguous terms in restrictive covenants, the intentions of the parties at the time the covenants were executed 'ordinarily control,' and evidence of the situation of the parties and the circumstances surrounding the transaction is admissible to determine intent." *Angel v. Truitt*, 108 N.C. App. 679, 681, 424 S.E.2d 660, 662 (1993) (quoting *Stegall v. Housing Auth.*, 278 N.C. 95, 100, 178 S.E.2d 824, 828 (1971)). In the absence of any evidence of intent regarding the meaning of "single family," courts must interpret the term consistent with its "natural meaning." *Hobby*, 302 N.C. at 71, 274 S.E.2d at 179. As noted *supra*, our courts previously have implied that the term "family" should be construed to

exclude "independent persons who share only the place where they sleep and take their meals" and are not an "integrated unit." *Id.*, 302 N.C. at 73, 274 S.E.2d at 180; *see also Smith v. Assoc. for Retarded Citizens*, 75 N.C. App. 435, 440, 331 S.E.2d 324, 327 (1985).

In the instant case, the restrictive covenant at issue fails to define the term "single family" or any of the words comprising that term. Moreover, the additional restrictive covenants applicable to the subject property do not define "single family" or "family," nor do they offer any insight as to how the terms are to be interpreted or as to what were the intentions of the original drafters. *See Long*, 271 N.C. at 268, 156 S.E.2d at 238.

Here, the trial court found that defendants leased the subject property to seven college students. The trial court also found as fact that the students "share meals together, ride in carpools to school together, socialize together, and use a joint checking account to [pay] the rent and utility expenses of the house which they have rented." Affidavits submitted by the students state that the "house is operated in a home-like manner" and that they share common household duties and expenses. Although the findings do not indicate whether or not the students are related biologically or by marriage, the evidence contained in the record indicates that they are not. The evidence shows that the seven students are in fact not related biologically or by marriage, and that all of the students, with the exception of one, are members of the university's baseball team and were encouraged to live together by their coaches. The evidence indicates that the students are close personal friends only. There is nothing indicating that the students considered themselves to be a "family" or anything more than close personal friends and teammates. Based upon the evidence in the record, we hold the trial court properly found as a fact that the students were "not a single family." Defendants failed to produce evidence that the students considered themselves to be a "family" or that they operated their home in any manner other than one out of convenience.

Thus we hold the trial court's holding that plaintiffs were in violation of the usage restriction was proper.

However, we are unpersuaded that the trial court's judgment that plaintiffs are enjoined from permitting "more than one person to occupy the subject property unless the persons occupying the same are related by blood or marriage or is a group of persons otherwise structured in the same way as the traditional view of an American

family" is supported by our caselaw. We do not believe that this definition is supported by our Court's precedents. *See Hobby*, 302 N.C. at 71-73, 274 S.E.2d at 179-80; *Winding Ridge Homeowners Ass'n, Inc. v. Joffe*, 184 N.C. App. 629, 637, 646 S.E.2d 801, 807 (2007); *Smith*, 75 N.C. App. at 440, 331 S.E.2d at 327.

Therefore, we remand to the trial court for application of the correct standard as set forth in *Winding Ridge*, 184 N.C. App. at 637, 646 S.E.2d at 807.

Affirmed in part, and Remanded.

Judge CALABRIA concurs.

Judge GEER concurs in a separate opinion.

GEER, Judge, concurring.

This appeal turns essentially on a single question: What does the restrictive covenant mean when it refers to a "single family"? I believe that my views on this question are consistent with the majority, and I have written separately only to clarify further how a court should determine whether a group of unrelated individuals constitutes a "single family" for purposes of a restrictive covenant.

It is popular to suggest that, in earlier times, there was more consensus about how to define a "family," but such a view is not fully supportable. As the then interim Dean of Emory Law School pointed out in a 2005 article:

> In the first half of the twentieth century, "single family" had a flexible meaning depending upon the context. For many purposes the concept was interchangeable with "household," the key terminology used by the U.S. Census and social demographers from the eighteenth to mid-twentieth century. In light of the emphasis decades later on defining families as those related by "blood, marriage or adoption," it is striking that until then (and even later) there was widespread agreement that a single-family residence restriction was not violated by the presence of servants and domestics residing on the premises. A dictionary relied upon by a 1905 decision defined family as "persons collectively who live together in a house or under one head or manager; a household, including parents, children, and servants, *and, as the case may be, lodgers or boarders*."

Frank S. Alexander, *The Housing of America's Families: Control, Exclusion, and Privilege*, 54 Emory L.J. 1231, 1247 (2005) (emphasis added) (quoting *Robbins v. Bangor Ry. & Elec. Co.*, 100 Me. 496, 505-06, 62 A. 136, 140 (1905)).

Only after World War II did restrictive covenants and the courts express a preference for the "nuclear family," *id.* at 1250, a concept first created in 1949, *id.* at 1259. Yet, because a "nuclear family" is defined as consisting of a married man and woman with their offspring, *id.*, few would contend today that a "single family" should be defined to mean only a "nuclear family." Such an approach would exclude extended families, including elderly parents; domestic partnerships; or families caring for foster children.

Because this appeal involves a restrictive covenant, the task for the trial court and this Court is to determine what was intended by "single family" when the restrictive covenant was drafted. Plaintiffs do not urge an overly narrow construction, but rather suggest that "single family" should allow occupancy by one person; by more than one person if related by blood, marriage, or adoption; or by "a group that is structured substantively like a family (i.e., an 'integrated unit')." The "integrated unit" test is drawn from *J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc.*, 302 N.C. 64, 274 S.E.2d 174 (1981), in which our Supreme Court held, with respect to a group home:

> While we deem it unnecessary to reach the question of whether the individuals living at the home constitute a family, we are compelled to observe that the surrogate parents and the adults subject to their supervision *function as an integrated unit* rather than independent persons who share only the place where they sleep and take their meals as would boarders in a boarding house.

Id. at 73, 274 S.E.2d at 180 (emphasis added). Defendants also point to *Hobby* and advocate for an "integrated unit" test, arguing that the students meet that test.

Hobby does not specifically explain what would be considered "an integrated unit," apart from stating that it does not include people operating independently and only sleeping and eating together. The Supreme Court, however, immediately after this discussion of "family," cited *Crowley v. Knapp*, 94 Wis. 2d 421, 288 N.W.2d 815 (1980), as support for the Court's analysis. *Crowley* considered whether a

group home for mentally retarded adults violated a restrictive covenant limiting the property's use to a single family dwelling for residential purposes only. *Id.* at 424, 288 N.W.2d at 817. In the portion of the opinion distinguishing a group home from a boarding house, the Wisconsin Supreme Court stressed: "[T]he [group home] residents regard the home as their permanent residence. This is not a boarding house; the same eight people have resided at the home since it opened, and the record clearly indicates that they planned to remain there permanently." *Id.* at 439, 288 N.W.2d at 824.

I believe, consistent with *Crowley*, that an important component of *Hobby's* "integrated unit" test is a requirement that the group of unrelated persons are not transient—as is true with a boarding house—but rather intend to reside as a stable unit for an indefinite period of time. To hold, as defendants urge, that the test is met simply by jointly doing the housekeeping and paying the bills would place little limitation at all on the use of the home. It essentially equates a restriction regarding "single family use" to a restriction requiring only "residential use," even though the "single family" provision necessarily intends to impose a narrower restriction than just "residential use." There must be something more for the restrictive covenant to have any meaning.

Other courts, including the cases predominately relied upon by defendants, have likewise concluded that the intended stability and permanency of the group is relevant to determining whether the group is structured like a family. The New York Court of Appeals, in considering whether a group constituted a "single family" for purposes of a zoning ordinance, noted: "It is significant that the group home is structured as a single housekeeping unit and is, to all outward appearances, a relatively normal, stable, and permanent family unit, with which the community is properly concerned." *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 304, 313 N.E.2d 756, 758, 357 N.Y.S.2d 449, 452 (1974). The court ultimately concluded that "[s]o long as the group home bears the generic character of a family unit as a relatively permanent household, and is not a framework for transients or transient living, it conforms to the purpose of the ordinance [limiting residence to a single family.]" *Id.* at 305-06, 313 N.E.2d at 758, 357 N.Y.S.2d at 453. As an example of a group of people who would not comply with the ordinance, the court pointed to "a temporary living arrangement as would be a group of college students sharing a house and commuting to a nearby school." *Id.* at 304-05, 313 N.E.2d at 758, 357 N.Y.S.2d at 452. The court explained: "Every year

or so, different college students would come to take the place of those before them. There would be none of the permanency of community that characterizes a residential neighborhood of private homes." *Id.* at 305, 313 N.E.2d at 758, 357 N.Y.S.2d at 452.

Similarly, in *Albert v. Zoning Hearing Bd. of North Abington Twp.*, 578 Pa. 439, 452-53, 854 A.2d 401, 409 (2004), the Pennsylvania Supreme Court observed that "it is undeniable that inherent in the concept of 'family' and, in turn, in the concept of a 'single-family dwelling,' is a certain expectation of relative stability and permanence in the composition of the familial unit." The court, therefore, "conclude[d] that in order to qualify as a 'single housekeeping unit,' a group of individuals in a single household must not only function as a family within that household, but in addition, the composition of the group must be sufficiently stable and permanent so as not to be fairly characterized as purely transient." *Id.* at 453, 854 A.2d at 410. *See also Commonwealth v. Jaffe*, 398 Mass. 50, 57, 494 N.E.2d 1342, 1346-47 (1986) (holding that "the tenants' living arrangement simply did not achieve the permanency and cohesiveness inherent in the notion of a single housekeeping unit"); *Hill v. Cmty. of Damien of Molokai*, 121 N.M. 353, 361, 911 P.2d 861, 869 (1996) (holding that group home did not violate restrictive covenant limiting property to single family use when group home exhibited stability, permanency, and functional lifestyle equivalent to that of traditional family unit).

Defendants point to *Borough of Glassboro v. Vallorosi*, 117 N.J. 421, 568 A.2d 888 (1990), and *McMinn v. Town of Oyster Bay*, 105 A.D.2d 46, 482 N.Y.S.2d 773 (App. Div. 2d Dep't 1984), *aff'd*, 66 N.Y.2d 544, 488 N.E.2d 1240, 498 N.Y.S.2d 128 (1985), as supporting their contention that the students constituted a single housekeeping unit and, therefore, a family. Both of those decisions, however, recognize the same principles set forth above: that a single housekeeping unit must not only function as a unit, but also have a certain degree of stability and permanence.

In *Vallorosi*, the New Jersey Supreme Court quoted with approval from *Open Door Alcoholism Program, Inc. v. Bd. of Adjustment of New Brunswick*, 200 N.J. Super. 191, 491 A.2d 17 (App. Div. 1985):

> "It is thus evident that in order for a group of unrelated persons living together as a single housekeeping unit to constitute a single family in terms of a zoning regulation, they must exhibit a kind of stability, permanency and functional lifestyle which is equivalent to that of the traditional family unit. In our view, the

> residents of plaintiff's proposed halfway house, although comprising a single housekeeping unit, would not bear these generic characteristics of a single family. While the residents would share in the household responsibilities and dine together, their affiliation with one another would be no different than if they were fellow residents of a boarding house. Clearly, their living arrangements would not be the functional equivalent of a family unit. The individual lifestyles of the residents and the transient nature of their residencies would not permit the group to possess the elements of stability and permanency which have long been associated with single-family occupancy."

Vallorosi, 117 N.J. at 431, 568 A.2d at 893-94 (quoting *Open Door Alcoholism Program*, 200 N.J. Super. at 199-200, 491 A.2d at 22).

The New Jersey Supreme Court then held that the evidence in *Vallorosi*, involving students renting a house purchased by relatives of one of the students, presented "unusual circumstances" that substantially complied with the requirement of a stable and permanent living unit. *Id.* at 432, 568 A.2d at 894. The court observed in passing, however, that "[i]t is a matter of common experience that the costs of college and the variables characteristic of college life and student relationships do not readily lead to the formation of a household as stable and potentially durable as the one described in this record." *Id.*, 568 A.2d at 894-95. *See also Open Door Alcoholism Program*, 200 N.J. Super. at 197, 491 A.2d at 21 ("The controlling factor in considering whether a group of unrelated individuals living together as a single housekeeping unit constitutes a family, for purposes of compliance with a single-family zoning restriction, is whether the residents bear the generic character of a relatively permanent functioning family unit.").

Defendants also point to the New York intermediate appellate court decision in *McMinn*, in which the owners rented their house to four unrelated young men who were friends and coworkers. In holding that these four men functioned as "a single housekeeping unit" and, therefore, qualified as a "single family," the court stressed that, consistent with the New York Court of Appeals' opinion in *Ferraioli*, the group was "a normal, stable and permanent unit" that made the group's use of the house "compatible with the residential neighborhood in which it [was] located." 105 A.D.2d at 58, 482 N.Y.S.2d at 782.

Based upon the reasoning of courts across the country confronted with the issue present in this case, I believe that a "single fam-

ily" can be defined as a "single housekeeping unit" or, alternatively, as in *Winding Ridge Homeowners Ass'n, Inc. v. Joffe*, 184 N.C. App. 629, 637, 646 S.E.2d 801, 807 (2007), as a group "substantively structured as an integrated family unit." Other jurisdictions have made clear that a group does not meet the "single housekeeping unit" test unless the members show both (1) that they function as a family within the house and (2) that the composition of the group is relatively stable and permanent.

I believe the combination of these two factors is sufficient to establish that a group of unrelated individuals constitutes a "single housekeeping unit" or is "substantively structured as an integrated family unit," such that the group is a "single family" for purposes of a restrictive covenant. Without the requirement of stability and permanence, it would be difficult to distinguish a group living together in a house—sleeping, eating, and enjoying entertainment together—from a boarding house. I believe that *Hobby's* analysis of "family," including its citation to *Crowley*, requires such a two-factor approach.

In this case, defendants have offered evidence of the first factor, involving a family-type lifestyle, by showing that the baseball players share the chores and bills and engage in other activities together. Defendants have not, however, demonstrated that this group of ball players is a relatively permanent and stable group. Only three of the seven tenants filed affidavits, and they stated only that they intended to stay in the house for another year and a half. The record contains no evidence suggesting that the identity of the seven tenants would remain the same during that year and a half.

I do not believe that a group—the identity of whose members could change—that only intends to live together for a limited period of time during the school year and while attending college has the permanence and stability necessary to be considered a "single family." The New York Court of Appeals' observation bears repeating: "Every year or so, different college students would come to take the place of those before them. There would be none of the permanency of community that characterizes a residential neighborhood of private homes." *Ferraioli*, 34 N.Y.2d at 305, 313 N.E.2d at 758, 357 N.Y.S.2d at 452.

JAMES D. BLYTH AND ELK COUNTRY REALTY, INC., PLAINTIFFS v. SAMUEL E. McCRARY, COUNTRY SQUIRE REAL ESTATE, COUNTRY SQUIRE ENTERPRISES, INC., COUNTRY SQUIRE ENTERPRISES, INC. D/B/A, COUNTRY SQUIRE REAL ESTATE, PETER HESSION, AND WIFE KAREN HESSION, SCOTT GREENHALGE, BLUE SKY GROUP, INC., AND WILLIAM GUNN, DEFENDANTS

No. COA06-726

(Filed 17 July 2007)

1. Appeal and Error— appealability—jurisdiction—notice of appeal

The Court of Appeals lacked jurisdiction to review assignments of error to certain orders from which there was no notice of appeal.

2. Appeal and Error— assignment of error—specificity

Stating that an order is erroneous does not state a legal basis for assigning error.

3. Appeal and Error— preservation of issues—assignments of error—no supporting legal authority

The failure to cite supporting legal authority constituted abandonment of assignments of error.

4. Appeal and Error— preservation of issues—failure to object—jury instructions

The failure to object on the record resulted in dismissal of assignments of error to jury instructions.

5. Appeal and Error— preservation of issues—service of notice of appeal, briefs, record—required

The failure to serve Will Gun with the notice of appeal, briefs, or the record resulted in dismissal of assignments of error concerning the judgment against him, despite his expressed desire not to be served with anything to do with the lawsuit.

6. Appeal and Error— preservation of issues—necessity for ruling below

Plaintiffs' failure to obtain a trial court ruling meant that they could not assign error concerning the trial court's failure to order discovery of defendants' computers and failure to release information concerning defendants' income and assets.

7. Evidence— reputation for truthfulness—defamation action—defendants who had testified

Evidence of defendants' reputation for truthfulness was properly admitted in a defamation action. A defendant's charac-

ter for truthfulness is always at issue in a defamation suit and, in this case, each defendant for whom evidence of truthfulness was admitted had already been called as a witness.

8. Libel and Slander— instruction—multiple defendants—use of "and" rather than "or"

The trial court erred by using "and" instead of "or" when instructing the jury on whether defendants libeled plaintiffs. The instruction tended to mislead the jurors into believing that they could find for plaintiffs only if they believed that the alleged defamatory statement defamed both plaintiffs.

9. Appeal and Error— attorney fees and costs—no appeal from underlying orders

Plaintiffs abandoned their assignment of error to attorney fees and costs where they did not appeal from the underlying orders, although they assigned error to all of the orders granting attorney fees and costs.

10. Costs— attorney fees and costs—no findings and conclusions—basis for award

An order against defendant Greenhalge for attorney fees and costs was reversed and remanded where the order did not contain findings and conclusions, and did not indicate which portion was based on Rule 11 and which on N.C.G.S. § 75-16.1.

Appeal by plaintiffs from judgment entered 14 October 2005 and orders entered 14 December 2005, 17 January 2006 and 20 January 2006 by Judge J. Marlene Hyatt in Haywood County Superior Court. Heard in the Court of Appeals 24 January 2007.

Jeffrey W. Norris and Associates, PLLC, by Jeffrey W. Norris, for plaintiff-appellants James D. Blyth and Elk Country Realty, Inc.

Moody & Brigham, PLLC, by Fred H. Moody, Jr., for defendant-appellees Samuel E. McCrary, Country Squire Real Estate, Country Squire Enterprises, Inc., Country Squire Enterprises, Inc. d/b/a Country Squire Real Estate.

Melrose, Seago & Lay, P.A., by Randal Seago, for defendant-appellees Peter and Karen Hession.

Wenzel & Wenzel, PLLC, by Derek M. Wenzel, for defendant-appellees Scott Greenhalge and Blue Sky Group, Inc.

STROUD, Judge.

Plaintiffs appeal from the 14 October 2005 judgment of the trial court granting a directed verdict in favor of defendant Karen Hession and, following a jury verdict, dismissing with prejudice plaintiffs' claims as to all defendants except William Gunn. Plaintiffs also appeal from the 14 December 2005 order of the trial court denying plaintiffs' motion for judgment notwithstanding the verdict, for amendment of judgment, or for a new trial. Finally, plaintiffs appeal from the 17 January 2006 orders of the trial court awarding costs and attorneys' fees to defendants Samuel McCrary, Country Squire Real Estate, County Squire Enterprises, Inc., County Squire Enterprises, Inc. d/b/a Country Squire Real Estate (hereinafter collectively referred to as "defendants McCrary") and to defendants Scott Greenhalge and Blue Sky Group, Inc. (hereinafter collectively referred to as "defendants Greenhalge"), and from the 20 January 2006 order of the trial court awarding attorneys' fees and costs to defendants Peter and Karen Hession (hereinafter collectively referred to as "defendants Hession"). For the reasons stated below, ten of plaintiffs' assignments of error are dismissed because plaintiffs did not follow the North Carolina Rules of Appellate Procedure. As to the other assignments of error, we reverse the trial court judgment dismissing with prejudice plaintiffs' claims for defamation against defendant Peter Hession, defendants McCrary, and defendants Greenhalge and the unfair and deceptive trade practices (UDTP) claim against defendant Scott Greenhalge and remand for a new trial; and we reverse the trial court order awarding attorneys' fees and costs to defendants Greenhalge and remand for findings of fact and appropriate conclusions of law.

I. Background

Plaintiff Elk Country Realty conducts business in the Haywood County real estate market. Plaintiff James D. "Jim" Blyth is the owner of Elk Country Realty. Defendant Samuel E. McCrary owns Country Squire Real Estate. Defendant Peter Hession is retired and owns a bed and breakfast. Defendant Scott Greenhalge is also a real estate developer and owns Blue Sky Group. In 2004, defendant Scott Greenhalge worked, without compensation, as office manager of Country Squire Real Estate. Defendants compete with plaintiffs in the Haywood County real estate market. Sometime in early 2004, two separate documents bearing the name of "Concerned Citizens of Maggie Valley" began to circulate in the Haywood County business community. These documents stated that Jim Blyth, owner of Elk

Country Realty, was a felon who defrauded the elderly with Ponzi schemes.[1] There is evidence in the record that defendants circulated these documents and verbally communicated the information in them, in an effort to harm plaintiff Blyth and his business, plaintiff Elk Country Realty.

Plaintiffs filed a verified complaint against defendants Samuel E. McCrary and Country Squire Real Estate on 30 March 2004, alleging defamation, tortious interference with contract, tortious interference with prospective contracts, and wrongful interference with a business relationship. Plaintiffs subsequently amended the complaint, adding claims for UDTP and adding additional defendants, filing the third and final amended complaint on or about 14 October 2004. Plaintiffs sought compensatory and punitive damages, and equitable and injunctive relief.

Defendants filed separate answers, all denying the material allegations of the complaint. In addition to denying the material allegations of the complaint, the answers of defendants McCrary and Hession pleaded the affirmative defense of truth. Defendants Hession also pleaded the affirmative defense of privilege and asserted a counterclaim for tortious interference with contract against plaintiff Blyth. Plaintiff Blyth moved for summary judgment on defendants Hession's counterclaim on or about 1 June 2005. The trial court granted summary judgment in favor of plaintiff Blyth on defendants Hession's counterclaim on or about 17 August 2005.

On 15 July 2005, defendants Greenhalge, noting that plaintiffs had voluntarily dismissed the claims against them for tortious interference with contract and tortious interference with prospective contract, moved for summary judgment as to plaintiffs' claims for defamation, UDTP, and wrongful interference with a business relationship. There is nothing in the record showing that this motion was ever ruled on by the trial court. Defendants McCrary moved for summary judgment as to all of plaintiffs' claims on or about 31 May 2005. The trial court entered summary judgment in favor of defendants McCrary on 16 August 2005 as to the claims of tortious interference with contract, tortious interference with prospective contracts, equitable and injunctive relief, UDTP, and wrongful interference with a business relationship.

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1. A Ponzi scheme is a scam whereby early investors are paid returns from money contributed by later investors in order to entice more investors. *U.S. v. Godwin*, 272 F.3d 659, 665 n.3 (4th Cir. 2001), *cert. denied*, 535 U.S. 1069, 152 L. Ed. 2d 846 (2002).

Defendants Hession moved for summary judgment as to all of plaintiffs' claims on 31 May 2005. The trial court entered summary judgment on or about 17 August 2005 in favor of defendants Hession as to the claims for tortious interference with contract, tortious interference with prospective contracts, UDTP, and wrongful interference with a business relationship. However, the trial court denied the motions for summary judgment filed by defendants Hession and McCrary as to plaintiffs' claims for defamation.

Plaintiffs' defamation claims were tried from 4 to 7 October 2005, in Superior Court, Haywood County. The trial court granted a directed verdict in favor of Karen Hession. The jury then found against plaintiffs on all remaining claims submitted to it. The trial court entered judgment on 14 October 2005, dismissing plaintiffs' complaints with prejudice as to all defendants except William Gunn. On 20 October 2005, plaintiffs moved for Judgment Notwithstanding The Verdict, And To Amend the Judgment, or alternatively, For A New Trial. Those motions were denied by the trial court on 14 December 2005.

On or about 23 November 2005, defendants Hession moved the trial court to tax costs and attorney fees to plaintiffs pursuant to N.C. Gen. Stat. § 75-16.1, N.C. Gen. Stat. § 1A-1, Rule 11, and N.C. Gen. Stat. § 1A-1, Rule 26. The trial court granted this motion on 20 January 2006. On or about 1 December 2005, defendants McCrary moved the trial court to tax costs and attorney fees to plaintiffs pursuant to N.C. Gen. Stat. § 75-16.1 and N.C. Gen. Stat. § 1D-45. The trial court granted this motion on 17 January 2006. On or about 30 November 2005, defendants Greenhalge moved the trial court to tax costs and attorney fees to plaintiffs pursuant to N.C. Gen. Stat. § 75-16.1 and N.C. Gen. Stat. § 1A-1, Rule 11. The trial court granted this motion on 17 January 2006. Plaintiffs appeal from the judgment entered 14 October 2005, from the order denying their motions for post-trial relief entered on 14 December 2005, and from the orders awarding attorneys' fees and costs entered on 17 and 20 January 2006.

II. Violations of Procedural Rules

Ten of plaintiffs' assignments of error are dismissed for procedural reasons. Therefore, we will not review them.

[1] "[A] notice of appeal 'must designate the judgment or order from which appeal is taken.' Without proper notice of appeal, the appellate court acquires no jurisdiction." *Bromhal v. Stott*, 116 N.C. App. 250,

253, 447 S.E.2d 481, 483 (1994) (quoting N.C.R. App. P. 3(a)), *aff'd*, 341 N.C. 702, 462 S.E.2d 219 (1995). Plaintiffs assigned error to trial court orders granting summary judgment in favor of defendants Hession and defendants McCrary on plaintiffs' claim of UDTP. However, the record contains no notice of appeal which designates those orders. Consequently, this Court lacks jurisdiction to review them.

[2] An assignment of error "shall state plainly, concisely and without argumentation the legal basis upon which error is assigned." N.C.R. App. P. 10(c)(1). Plaintiffs assigned error to the entry of judgment by the trial court and to the order denying plaintiffs' post-trial motions simply on the basis that the judgment and order, respectively, were error. To say, in essence, that an order is error because it is error does not state a legal basis upon which the error is assigned. Those two assignments of error are therefore dismissed.

[3] "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). Plaintiffs assigned error to the trial court judgment granting defendant Karen Hession's motion for directed verdict without citing any legal authority in their brief in support of the assignment of error. This assignment of error is deemed abandoned.

[4] Plaintiffs assign as error the omission of a jury instruction for plaintiffs' exhibit 3, the inclusion of a jury instruction that defendants' statements related to a matter of public concern, and the inclusion of a jury instruction that it could find that privilege barred liability for some of defendant Peter Hession's statements. Plaintiffs did not object on the record to any of these jury instructions or omissions at trial.

> When a party alleges error in a jury instruction, the 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).

Because plaintiffs did not object on the record to the foregoing omission from and inclusions in the jury instructions before the jury

retired to consider its verdict, they may not assign error to them on appeal. Accordingly, plaintiffs' three assignments of error to those jury instructions and omissions are dismissed.

[5] Plaintiffs next assign error to the failure of the trial court to enter judgment against William Gunn. Parties who petition this Court for review must notify, through service of process, the other parties to the appeal. N.C.R. App. P. 26(b). There is no indication in the record that William Gunn was served with the notice of appeal, the briefs, or the record on appeal. At oral argument plaintiffs acknowledged that Gunn had not been served with any of these documents, and sought to excuse their failure to serve Gunn by asserting that he had communicated a desire not to be served with anything related to this lawsuit. We find no authority for the proposition that a party's expression of a desire not to be served excuses another party's failure to serve all required papers. This assignment of error is dismissed.

[6] Plaintiffs next assign error to the failure of the trial court to order discovery of defendants' computers and the failure of the trial court to release information concerning the income and assets of the defendants. "In order to preserve a question for appellate review . . .[,] the complaining party [must] obtain a ruling [from the trial court] upon the party's request, objection or motion." N.C.R. App. P. 10(b)(1). Plaintiffs concede that the trial court entered no order regarding discovery of defendants' computers or release of information concerning the income and assets of defendants. Absent a ruling from the trial court on these two issues, plaintiffs may not assign error to them. Accordingly, these two assignments of error are dismissed.

III. Admission of Evidence

[7] Plaintiffs contend that the trial court erred when it admitted evidence of defendants' reputation for truthfulness. We disagree.

Plaintiffs rely on *Holiday v. Cutchin*, 63 N.C. App. 369, 305 S.E.2d 45 (1983), *aff'd*, 311 N.C. 277, 316 S.E.2d 55 (1984), a medical negligence case in which this Court held that the admission of evidence to bolster the defendant doctor's character was error, 63 N.C. App. at 370, 305 S.E.2d at 47. *Holiday* stated that character evidence of a party is "*generally* inadmissible" in a civil action. 63 N.C. App. at 371, 305 S.E.2d at 47 (emphasis added). In their brief, plaintiffs argue that "as in *Holiday*, defendants' character was never at issue in the trial."

"Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked." N.C. Gen. Stat. § 8C-1, Rule 608. An action for defamation necessarily alleges that the defendant has made a false statement. *Hanton v. Gilbert*, 126 N.C. App. 561, 569, 486 S.E.2d 432, 437, *disc. review denied*, 347 N.C. 266, 493 S.E.2d 454 (1997). Thus, a defendant's character for truthfulness is always at issue in a defamation suit. Even in *Holiday*, the case plaintiffs rely on, this Court noted an exception to the general rule forbidding character evidence in civil cases, stating "character evidence *is admissible* when character is directly in issue as in actions involving moral intent [like] *defamation*." 63 N.C. App. at 371, 305 S.E.2d at 47 (emphasis added).

In the case *sub judice*, each defendant for whom evidence of truthful character was admitted had already been called as a witness and questioned before the admission of the evidence of his truthful character. Therefore, we conclude that the trial court did not err when it admitted testimony concerning defendants' reputations for truthfulness.

IV. Jury Instructions

[8] Plaintiffs assign error to the following jury instruction, given in reference to each defendant: "Did [name of defendant(s)] libel (or slander) the plaintiffs, James D. Blyth and Elk Country Realty?" Plaintiffs argue that because two different plaintiffs brought the suit, a separate jury instruction should have been given for each plaintiff as to each defendant. We agree.

"The [trial] judge must submit to the jury such issues as when answered by them will resolve all material controversies between the parties, as raised by the pleadings." *Harrison v. McLear*, 49 N.C. App. 121, 123, 270 S.E.2d 577, 578 (1980). It is certainly possible for a defamatory statement to injure either an individual plaintiff or a business that the individual plaintiff owns, or both. *See, e.g., Ellis v. Northern Star Co.*, 326 N.C. 219, 224-25, 388 S.E.2d 127, 130-31 (1990) (jury properly instructed in finding that the business was defamed, but not its owner, when suit was filed by both the owner and the business). Thus, when both an individual and his business are plaintiffs in a defamation action, the jury cannot resolve the material issues in the case unless it is instructed that the owner and the business are distinct parties, and that it could find that the defendant defamed one but not the other.

Here the trial court combined the two plaintiffs in its instructions to the jury, "Did [name of defendant(s)] libel (or slander) the plaintiffs, James D. Blyth *and* Elk Country Realty?" (Emphasis added.) This instruction tended to mislead the jurors into believing that they could find in plaintiffs' favor only if they believed that the alleged defamatory statement defamed both plaintiffs, and that if only one plaintiff was defamed, they should find in favor of defendants. Although requested by plaintiffs' counsel before the jury retired to consider its verdict, the trial court did not give separate jury issues or instructions for the two plaintiffs.[2] Failure to submit separate issues or at least to instruct the jury that it was to answer the issue separately for each plaintiff was error. Accordingly, we reverse the judgment of the trial court in favor of defendant Peter Hession, defendants McCrary, and defendants Greenhalge on the claims for defamation and remand for a new trial. Further, because the trial court instructed the jury not to consider the UDTP claim against defendant Scott Greenhalge if it found that defendant Scott Greenhalge did not slander plaintiffs, the claim for UDTP against defendant Scott Greenhalge must also be included in the new trial.

V. Attorneys' Fees

[9] Plaintiffs assigned error to the trial court orders awarding attorneys' fees and costs to defendants Hession, McCrary, and Greenhalge. The trial court ordered plaintiffs to pay attorneys' fees and costs to: (1) defendants Hession pursuant to N.C. Gen. Stat. § 75-16.1,[3] because the trial court found that plaintiffs knew or should have known that their claims that defendants Hession violated N.C.

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2. In the instructions *sub judice*, simply substituting "or" for "and" would have cured the error.

3. N.C. Gen. Stat. § 75-16.1 (2005) states:

> In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:
>
> (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or
>
> (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

Gen. Stat. § 75-1.1[4] were "frivolous and malicious"[5] and pursuant to N.C. Gen. Stat. § 1D-45,[6] because the trial court found that plaintiffs knew or should have known that their claims for punitive damages arising from defendants' alleged defamatory statements were "frivolous or malicious;" (2) defendants McCrary, because the trial court found that plaintiffs knew or should have known that their claims that defendants McCrary violated N.C. Gen. Stat. § 75-1.1 were "frivolous and malicious" and pursuant to N.C. Gen. Stat. § 1D-45, because the trial court found that plaintiffs knew or should have known that their claims for punitive damages arising from defendants' alleged defamatory statements were "frivolous or malicious;" and (3) defendants Greenhalge, but with no findings of fact by the trial court. We agree in part and disagree in part.

"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). Although plaintiffs assigned error to all three orders of the trial court which granted attorneys' fees and costs, in their brief plaintiffs argue only (1) that the attorneys' fees and costs awarded pursuant to N.C. Gen. Stat. § 75-16.1 are error, and (2) that attorneys' fees and costs on the claims that survived summary judgment and directed verdict are error, reasoning that a claim that is presented to the jury cannot be frivolous.

Plaintiffs' claims that defendants Hession and defendants McCrary violated N.C. Gen. Stat. § 75-1.1 (the UDTP claims) did not survive summary judgment, and as we noted before, plaintiffs did not appeal from the trial court orders awarding summary judgment to

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4. N.C. Gen. Stat. § 75-1.1(a) (2005) states that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

5. A claim "is frivolous if 'a proponent can present no rational argument based upon the evidence or law in support of [it].' " *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 689, 562 S.E.2d 82, 94 (2002) (quoting *Black's Law Dictionary* 668 (6th ed. 1990)), *aff'd*, 358 N.C. 160, 594 S.E.2d 1 (2004). A claim "is malicious if it is 'wrongful and done intentionally without just cause or excuse or as a result of ill will.' " *Id.* (quoting *Black's Law Dictionary* 958 (6th ed. 1990)).

6. N.C. Gen. Stat. § 1D-45 (2005) states:

> The court shall award reasonable attorneys' fees, resulting from the defense against the punitive damages claim, against a claimant who files a claim for punitive damages that the claimant knows or should have known to be frivolous or malicious. The court shall award reasonable attorney fees against a defendant who asserts a defense in a punitive damages claim that the defendant knows or should have known to be frivolous or malicious.

defendants Hession and defendants McCrary on the UDTP claims. We therefore conclude that plaintiffs abandoned the assignment of error to the order awarding attorneys' fees and costs to defendants Hession and defendants McCrary.[7]

[10] All that remains from plaintiffs' assignment of error to the trial court orders awarding attorneys' fees and costs is the order awarding attorneys' fees and costs to defendants Greenhalge. Defendants Greenhalge had moved for attorneys' fees and costs pursuant to Rule 11, alleging that plaintiffs knew that the allegations in the complaint were not truthful, and pursuant to N.C. Gen. Stat. § 75-16.1, alleging that plaintiffs knew that their UDTP claim was frivolous and malicious.

"In awarding attorneys' fees under G.S. 75-16.1, the trial court must make findings of fact to support the award." *Lapierre v. Samco Development Corp.*, 103 N.C. App. 551, 561, 406 S.E.2d 646, 651 (1991). Failure to make findings of fact "requires remand in order for the trial court to resolve any disputed factual issues [unless] the record reveals no evidence to support an award of sanctions on any of the bases asserted by defendants." *Taylor v. Taylor Products Inc.*, 105 N.C. App. 620, 630, 414 S.E.2d 568, 576 (1992).

Although there is some evidence in the record which would support an award of attorneys' fees in favor of defendants Greenhalge, the trial court's order contains no findings of fact or conclusions of law, even though it summarily granted all of the attorneys' fees and costs requested by defendants Greenhalge. The order also fails to indicate what portion of the fees granted was based on Rule 11 and what portion was based on N.C. Gen. Stat. § 75-16.1. In addition, we are remanding for a new trial on the defamation claims against defendants Greenhalge and the UDTP claim against defendant Scott Greenhalge. Accordingly, we reverse and remand the trial court order granting attorneys' fees and costs to defendants Greenhalge for findings of fact and appropriate conclusions of law. We note that the trial court will need to consider the allocation of any fees awarded in light

7. In reversing the attorneys' fees and costs awarded to defendants Greenhalge, we do not hold that a claim that survives summary judgment cannot be frivolous. *See Castle McCulloch, Inc. v. Freedman*, 169 N.C. App. 497, 504, 610 S.E.2d 416, 421-22, *aff'd per curiam*, 360 N.C. 57, 620 S.E.2d 674 (2005) (affirming award of sanctions against the plaintiff in a UDTP action when the plaintiff failed to present evidence of damages despite the plaintiff's claim surviving summary judgment). We only hold that in making this argument, plaintiffs have abandoned their assignment of error to attorneys' fees and costs awarded on account of claims that did not survive summary judgment.

of the fact that the defamation claims against defendants Greenhalge and the UDTP claim against defendant Scott Greenhalge have been remanded for new trial.

VI. Conclusion

For the foregoing reasons, ten of plaintiffs' assignments of error are dismissed because plaintiffs did not follow the North Carolina Rules of Appellate Procedure. We reverse the judgment of the trial court dismissing with prejudice plaintiffs' claims for defamation against defendant Peter Hession, defendants McCrary, and defendants Greenhalge and the UDTP claim against defendant Scott Greenhalge, and remand for a new trial. Finally, we reverse and remand the trial court order granting attorneys' fees and costs to defendants Greenhalge.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR NEW TRIAL IN PART.

Judges TYSON and STEPHENS concur.

TOWN OF GREEN LEVEL, A NORTH CAROLINA MUNICIPAL CORPORATION, PLAINTIFF-APPELLANT v. ALAMANCE COUNTY, A BODY POLITIC AND CORPORATE, DEFENDANT-APPELLEE

No. COA06-1304

(Filed 17 July 2007)

1. Cities and Towns— extraterritorial jurisdiction ordinance—arbitrary and capricious act

The trial court erred in a declaratory judgment action by concluding that defendant county had enacted and enforced zoning in plaintiff town's proposed extraterritorial jurisdiction (ETJ) by its 1997 Watershed Protection Ordinance. The county acted arbitrarily and capriciously when it enacted a 2004 amendment to the ordinance, and plaintiff town was not precluded from extending its ETJ under N.C.G.S. § 160A-360(e), because no evidence was presented at trial to show that defendant enacted the 2004 amendment for a health, safety, or welfare purpose.

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

Although defendant county contends that plaintiff's extraterritorial jurisdiction ordinance will not result in the meaningful extension of land use powers by plaintiff, this cross-assignment of error is overruled, because the issue was not properly preserved under N.C. R. App. P. 10(d) when: (1) defendant failed to argue this issue at trial when arguing its motion to dismiss; (2) defendant did not list this issue as part of its pretrial order, and it cannot be determined from the order whether the trial court was presented with any argument on this issue or whether the trial court made any ruling on this issue; and (3) no mention of this issue is made in the trial court's judgment.

3. Appeal and Error— preservation of issues—failure to argue—absence of ruling

Although defendant county contends that plaintiff's extraterritorial jurisdiction ordinance is invalid based on plaintiff's failure to timely adopt official plans under N.C.G.S. § 160A-360(b), this cross-assignment of error is overruled because the issue was not properly preserved under N.C. R. App. P. 10(d) and there was no ruling on this issue in the record.

4. Evidence— expert testimony—question of law—presumed that incompetent evidence disregarded in nonjury trial

Although defendant county contends the trial court erred in a declaratory judgment action by improperly admitting the testimony of plaintiff's expert witness regarding questions of law, this cross-assignment of error is overruled because: (1) assuming arguendo that the testimony was improper, a review of the trial court's judgment does not reveal that the expert's testimony was used to support its findings and conclusions; (2) the trial court's findings and conclusions were in fact contrary to the expert's testimony; and (3) in a nonjury trial, it is presumed that if incompetent evidence was admitted, it was disregarded and did not influence the judge's findings.

Appeal by Plaintiff from judgment entered 9 May 2006 by Judge Narley L. Cashwell in Superior Court, Alamance County. Heard in the Court of Appeals 25 April 2007.

Kennedy Covington Lobdell & Hickman, L.L.P., by Eric M. Braun and Ann M. Anderson, for Plaintiff-Appellant.

Nexsen Pruet Adams Kleemeier, PLLC, by David S. Pokela; and Alamance County Attorney David I. Smith, for Defendant-Appellee.

Asheville City Attorney Robert W. Oast, Jr. for the City of Asheville, amicus curiae.

McGEE, Judge.

The town of Green Level (Green Level) filed a complaint on 18 June 2004 seeking a declaratory judgment (1) validating an ordinance enacted by the Green Level Town Council extending Green Level's extraterritorial jurisdiction (the ETJ ordinance); and (2) invalidating Alamance County's (the County) enactment of an amendment to its Watershed Protection Ordinance (the 2004 ordinance). The ETJ ordinance and the 2004 ordinance purported to assert jurisdiction over the same geographic area (the proposed ETJ area). After a bench trial, the trial court entered judgment on 9 May 2006 in favor of the County.

The evidence at trial tended to show that Green Level and the County each asserted jurisdiction over the proposed ETJ area. Green Level contended that when the County learned that Green Level was taking steps to extend its ETJ, the County enacted the 2004 ordinance, which covered the same area, solely to thwart Green Level's expansion. Green Level further argued that in enacting the 2004 ordinance, the County acted for an improper purpose under our zoning enabling statutes. The County contended that it was responding to a request by citizens residing in the proposed ETJ area to rezone the property, and that the 2004 ordinance was not enacted for an improper purpose.

The uncontroverted facts show that Green Level began researching the statutory process to extend its extraterritorial jurisdiction (ETJ) in or around July 2003. Green Level received a letter from the County dated 19 December 2003. The letter stated the County's position that, pursuant to N.C. Gen. Stat. § 160A-360(e), Green Level was required to obtain the County's permission to extend its ETJ into the proposed ETJ area. After researching the matter, Green Level's Town Administrator, Quentin McPhatter, disagreed with the County's position. Green Level and the County met to discuss the issue, but could not reach an agreement. Green Level initially scheduled a public hearing for 6 May 2004, but moved the public hearing to 22

April 2004 after learning that the County was taking steps to prevent Green Level from proceeding with the ETJ ordinance. Green Level sent the required notices to the affected citizens and published the required legal notices. Green Level enacted the ETJ ordinance on 22 April 2004.

Meanwhile, the County began the process of amending its existing Watershed Protection Ordinance (the 1997 ordinance). The 11 March 2004 minutes of the Alamance County Planning Board show that a citizens' group called "Citizens Against ETJ Expansion" expressed its opposition to Green Level's proposed ETJ expansion. The group requested that the County "zone their property." An Agenda Item Profile, prepared for the 19 April 2004 meeting of the Alamance County Board of Commissioners (the Board) stated that "the Planning Board voted 12 to 2 to instruct staff to come up with a way to extend county zoning into an unzoned area between the current watershed zoning and the city limits of Green Level[.]" The 19 April 2004 minutes of the Board show that a public hearing was held on the 2004 ordinance and was unanimously approved by the Board. The minutes also show that several individuals spoke in favor of the 2004 ordinance, stating that it was "set up to protect the water and to prevent towns from encroaching on the lakes." Others commented that they "want[ed] to live in a rural setting, not a town; that Green Level cannot control what it has; and that Green Level has nothing to offer except taxes."

A bench trial was held on Green Level's complaint on 20 March 2006 and 10-11 April 2006. In its judgment entered 9 May 2006, the trial court made several relevant conclusions of law. First, the trial court concluded that the 1997 ordinance was a "zoning ordinance." Alternatively, the trial court concluded that the 2004 ordinance (1) was enacted in accordance with the County's comprehensive plan; (2) promoted the health and general welfare of the County; (3) was enacted after reasonable consideration was given to Green Level's expansion, development, and orderly growth; and (4) was not arbitrary and capricious. Therefore, the trial court concluded that pursuant to N.C. Gen. Stat. § 160A-360(e), Green Level was precluded from extending its ETJ. The trial court further concluded that Green Level's ETJ ordinance was not valid or enforceable. Green Level and the County each bring assignments of error before this Court.

> When a judgment has been rendered in a non-jury trial, our standard of review 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. Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary.

Sessler v. Marsh, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (citation omitted), *disc. review denied*, 354 N.C. 365, 556 S.E.2d 577 (2001). We review *de novo* the trial court's conclusions of law. *Huyck Corp. v. Town of Wake Forest*, 86 N.C. App. 13, 15, 356 S.E.2d 599, 601 (1987), *aff'd per curiam*, 321 N.C. 589, 364 S.E.2d 139 (1988).

I.

[1] Green Level argues (1) that the 2004 ordinance was enacted arbitrarily and capriciously and for a purpose not authorized by the zoning enabling statutes; (2) that the 2004 ordinance was not enacted "with reasonable consideration to expansion and development of [Green Level] so as to provide for [Green Level's] orderly growth" as required by N.C. Gen. Stat. § 153A-341; (3) that the County was not enforcing zoning over the proposed ETJ area; and (4) that the prior jurisdiction rule invalidates the County's action. We conclude that the trial court erred by concluding that the County had enacted and enforced zoning in the proposed ETJ area by way of the 1997 ordinance. We also conclude that the County acted arbitrarily and capriciously when it enacted the 2004 ordinance.

N.C. Gen. Stat. § 160A-360(e) (2005) governs the conditions under which a municipality may extend its ETJ. This statute provides:

> No city may hereafter extend its extraterritorial powers under this Article into any area for which the county at that time has adopted and is enforcing a zoning ordinance and subdivision regulations and within which it is enforcing the State Building Code. However, the city may do so where the county is not exercising all three of these powers, or when the city and the county have agreed upon the area within which each will exercise the powers conferred by this Article.

Id. Green Level and the County stipulated that the County was enforcing subdivision regulations and the State Building Code in the proposed ETJ area. Therefore, if the County was enforcing a zoning ordinance in the proposed ETJ area under the 1997 ordinance or under the 2004 ordinance, then Green Level was precluded from extending its ETJ without the County's permission.

A. The 1997 ordinance

In 1987, the County adopted a Watershed Protection Ordinance. The 1997 ordinance amended this Watershed Protection Ordinance. The trial court made the following conclusions of law relevant to the 1997 ordinance:

> 1. The 1997 Ordinance expressly created watershed "zones" and regulated land use and development, like zoning does, in certain districts, areas or zones of the county, to wit: stream buffer zones, watershed critical zones and balance of watershed zones.
>
> 2. Boyds Creek and the stream-fed ponds which are perennially full are subject to the buffers provided for by section 204 of the 1997 Ordinance.
>
> 3. The 1997 Ordinance, including Section 204 relating to stream and pond buffers, constitutes a zoning ordinance.
>
> 4. Plaintiff Town of Green Level was precluded under N.C. Gen. Stat. § 160A-360(e) from extending its extra territorial jurisdiction to the proposed ETJ Area because defendant Alamance County had already adopted and was enforcing a zoning ordinance (in the form of the 1997 Ordinance) and subdivision regulations as well as enforcing the State Building Code within the proposed ETJ Area prior to the enactment of the ETJ Ordinance on April 22, 2004.

We conclude that these conclusions of law were erroneous.

In order for a county to exercise its zoning authority, N.C. Gen. Stat. § 153A-344(a) (2005) mandates that a county "create or designate a planning agency" which "shall prepare a proposed zoning ordinance, including both the full text of such ordinance and maps showing proposed district boundaries." Thus, both the text of an ordinance and a map showing proposed district boundaries are required:

> [A] zoning ordinance must contain a map as well as detailed textual instructions. First, the text of the ordinance describes what land uses are permitted in each district, what development standards have to be met in that district, and the like. . . . Second, a map places the land in the jurisdiction into various zoning districts. This map is an official part of the zoning ordinance.

David W. Owens, *Introduction to Zoning* 23-24 (2nd ed. 2001). The County argues that the proposed ETJ area was zoned because the

1997 ordinance established (1) the watershed critical district; (2) the balance of the watershed district; and (3) stream buffers. Further, because the proposed ETJ area contained Boyds Creek, and a number of ponds, the County contends the area was therefore zoned for purposes of N.C. Gen. Stat. § 160A-360(e). We disagree.

Section 201 of the 1997 ordinance is entitled "Establishment of Watershed Zones" and provides:

> The purpose of this Section is to list and describe the watershed zones herein adopted. For purposes of this Ordinance, watersheds in Alamance County are hereby divided into the following zones, as appropriate:
>
> Watershed Critical Area (WCA)
>
> Balance of Watershed (BOW)

Ex. 17, p.4. Section 204 of the 1997 ordinance is entitled "Stream Buffer" and provides:

> A fifty foot (50') stream buffer shall be maintained on both sides of all perennial streams at all times to retard rapid water runoff and soil erosion. Perennial streams are identified as the solid blue lines on United States Geological Survey (U.S.G.S.) maps.

The 1997 ordinance also provides in Section 101 that its provisions "shall be defined and established on the maps entitled, 'Watershed Protection Map of Alamance County, North Carolina' . . . which is adopted simultaneously herewith." A review of the map entitled "Watershed Protection Map of Alamance County" reveals two shaded areas. The watershed critical area is shaded in pink, and the balance of watershed area is shaded in blue.

In light of the text of the 1997 ordinance and the corresponding map, we cannot conclude that the 1997 ordinance extended zoning into the proposed ETJ area. The language of Section 201 of the 1997 ordinance states that its purpose is to "list and describe" the watershed zones established by the ordinance, yet nothing in that section refers to stream buffers. Moreover, the provisions which follow Section 201 describe in detail the watershed critical area and the balance of watershed areas, and list allowed uses, prohibited uses, and density limits. No such description appears in the 1997 ordinance for stream buffers, which the County argues constituted zoning in the proposed ETJ area. Additionally, the proposed ETJ area is unshaded on the Watershed Protection Map adopted as part of

the 1997 ordinance. No stream buffers are shown on the map, nor does the legend contain any designation for streams or stream buffers. Craig Harmon (Harmon), the County's Planning Manager, admitted at trial that neither the watershed critical area nor the balance of watershed overlapped with the proposed ETJ area. Furthermore, although the County also used U.S. Geological Survey (U.S.G.S.) maps, the U.S.G.S. maps were not part of the 1997 ordinance, and in fact, were not maintained or controlled by the County. Therefore, the U.S.G.S. maps could not supply the required map. We are unable to conclude that the 1997 ordinance applied zoning to the proposed ETJ area and we reverse the trial court's relevant findings of fact and conclusions of law.

B. The 2004 ordinance

Next, we consider whether the trial court properly concluded that, pursuant to N.C. Gen. Stat. § 160A-360(e), the County's adoption of the 2004 ordinance precluded Green Level from extending its ETJ. Green Level argues that the 2004 ordinance is invalid because (1) the ordinance was enacted arbitrarily and capriciously, and not for a purpose authorized by the enabling statute; and (2) the ordinance was not enacted with reasonable consideration to Green Level's expansion and development as required by N.C. Gen. Stat. § 153A-341. In support of its arbitrary and capricious argument, Green Level contends that no evidence was presented at trial to show that the County enacted the 2004 ordinance for a health, safety, or welfare purpose. For the reasons set forth below, we must agree.

At the time the 2004 ordinance was enacted, N.C. Gen. Stat. § 153A-340(a) (2003) stated that a county could enact various types of zoning regulations "[f]or the purpose of promoting health, safety, morals, or the general welfare[.]" N.C. Gen. Stat. § 153A-341 (2003) provided:

> Zoning regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; and to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. The regulations shall be made with reasonable consideration as to, among other things, the character of the district and its peculiar suitability for particular uses, and with a view to

> conserving the value of buildings and encouraging the most appropriate use of land throughout the county. In addition, the regulations shall be made with reasonable consideration to expansion and development of any cities within the county, so as to provide for their orderly growth and development.
>
> Our Supreme Court has stated:
>
> Counties are creatures of the General Assembly and have no inherent legislative powers. They are instrumentalities of state government and possess only those powers the General Assembly has conferred upon them.

Craig v. County of Chatham, 356 N.C. 40, 44, 565 S.E.2d 172, 175 (2002) (citations omitted). "County commissioners are authorized to rezone property when reasonably necessary to promote the public health, safety, morals, and welfare; however, this authority may not be exercised in an arbitrary or capricious manner." *Gregory v. County of Harnett*, 128 N.C. App. 161, 164, 493 S.E.2d 786, 788 (1997). A zoning ordinance is presumed valid, and the burden to show otherwise falls upon its challenger. *Durham County v. Addison*, 262 N.C. 280, 282, 136 S.E.2d 600, 602 (1964). Further, although N.C. Gen. Stat. § 153A-4 "mandate[s] that grants of authority to local governments be broadly interpreted, zoning authority cannot be exercised in a manner contrary to the express provisions of the zoning enabling authority." *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 509, 434 S.E.2d 604, 613 (1993). "Any action of a local unit of government that disregards these fundamental zoning concepts may be arbitrary and capricious." *Gregory*, 128 N.C. App. at 164, 493 S.E.2d at 788.

> It is well established that the grant or denial of a rezoning request is purely a legislative decision which will be deemed arbitrary and capricious if "the record demonstrates that it had no foundation in reason and bears no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense."

Ashby v. Town of Cary, 161 N.C. App. 499, 503, 588 S.E.2d 572, 574 (2003) (quoting *Graham v. City of Raleigh*, 55 N.C. App. 107, 110, 284 S.E.2d 742, 744 (1981)).

In *Gregory*, this Court concluded that the Harnett County Board of Commissioners had acted arbitrarily and capriciously when they approved a rezoning application only three days after denying a sim-

ilar application. *Id.* at 164-65, 493 S.E.2d at 788-89. We stated that "there [was] no evidence in the record showing that the Commissioners considered the character of the land, the suitability of the land for the uses permitted in the proposed zoning district, the comprehensive plan, or the existence of changed circumstances justifying the rezoning application." *Id.* at 165, 493 S.E.2d at 789. We find the present case to be similar.

The Agenda Item Profile detailed the action before the 19 April 2004 meeting of the Board and stated that after hearing the citizens' group request, "the Planning Board voted 12 to 2 to instruct staff to come up with a way to extend county zoning into an unzoned area between the current watershed zoning and the city limits of Green Level[.]" Harmon testified that he prepared this profile. Further, the minutes of the 19 April 2004 meeting of the Board reveal that Harmon stated that "a group of citizens presented a petition to the Planning Board asking the County to help in their effort to keep Green Level from extending an Extraterritorial Jurisdiction . . . into their area of the county." The minutes continue:

> The Planning Board instructed staff to look into the issue to come up with a way to put zoning into that area of the county. . . . Mr. Harmon stated the major change [in the 2004 ordinance] is that a new zone is added, the Rural Community District (RCD), which is similar to the Balance of Watershed (BOW) zone that already exists.

Additionally, the legal notice sent by the County to the property owners in the proposed ETJ area stated:

> During the March 2004 Alamance County Planning Board meeting, a community group (Citizens Against ETJ Expansions) brought a petition before the board asking the county to extend zoning into its community. This community group hopes that by [the] county extending zoning into this area it will prevent the Town of Green Level from establishing an ETJ (Extraterritorial Jurisdiction) in their area.

No mention of the County's comprehensive plan was made in the minutes of the meeting at which the County adopted the 2004 ordinance. Although the minutes reflect that members of the audience supported the 2004 ordinance because it "was set up to protect the water," the record lacks any evidence to support that statement. Harmon testified that he could not identify any references to the com-

prehensive plan in the minutes of any meetings of the planning board, or in the minutes of any meetings of the Board, nor in the "agenda packets, public notice letters, or any other item . . . prepared in relation" to the 2004 ordinance.

Further, the County argues that the 2004 ordinance promoted the public welfare by preserving rural property uses, but the testimony of Harmon, as the Rule 30(b)(6) designee of the County, contradicts this contention. Harmon testified that automobile manufacturing plants, chemical manufacturing plants, meat-packing plants, and construction and debris landfills were permitted uses in the proposed ETJ area under the 2004 ordinance, and that "[s]ome of those uses [are] probably not" consistent with a rural community character.

For the above reasons, we conclude that the enactment of the 2004 ordinance was arbitrary and capricious and that the trial court erred by concluding otherwise. Therefore, since the 1997 ordinance did not extend zoning into the proposed ETJ area, and the 2004 zoning ordinance was enacted arbitrarily and capriciously, we conclude that Green Level was not precluded from extending its ETJ pursuant to N.C. Gen. Stat. § 160A-360(e).

II.

Because we conclude that neither the 1997 ordinance nor the 2004 ordinance precluded Green Level from extending its ETJ, we now determine the County's cross-assignments of error.

A. Meaningful extension of land use powers

[2] The County argues that because Green Level's "ETJ ordinance will not result in the meaningful extension of land use powers by Green Level, Green Level has not substantially complied with N.C. Gen. Stat. § 160A-360." Green Level argues (1) that this argument was not properly preserved for appellate review; and (2) alternatively, that it has no merit.

Rule 10 of the Rules of Appellate Procedure mandates that a party

> present[] to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion.

N.C.R. App. P. 10(b)(1). To be properly made the basis of a cross-assignment of error, an action or omission of the trial court must have been properly preserved for appellate review. N.C.R. App. P. 10(d).

At the close of Green Level's evidence, the County moved to dismiss under N.C. Gen. Stat. § 1A-1, Rule 41, stating "for all the arguments . . . in our trial brief[.]" The County proceeded to argue the various issues raised in Green Level's assignments of error discussed above, but did not present any argument as to whether Green Level had provided meaningful extension of land use powers under N.C. Gen. Stat. § 160A-360. The County did list this issue as part of its pretrial order, and this order is contained in the record, but we are unable to determine from the order whether the trial court was presented with any argument on this issue or whether the trial court made any ruling on this issue. No mention of this issue is made in the trial court's judgment. Therefore, we cannot address this issue and we overrule this cross-assignment of error.

B. Timely adoption of official plans

[3] In its next cross-assignment of error, the County argues that Green Level's ETJ ordinance is invalid because Green Level failed to timely adopt official plans pursuant to N.C. Gen. Stat. § 160A-360(b). Green Level argues (1) that this argument is not properly preserved for our review; and (2) alternatively, that it lacks merit. For the same reasons stated above, we can find no ruling on this issue in the record. Therefore, this cross-assignment of error is overruled.

C. Expert witness testimony

[4] In its third and final cross-assignment of error, the County argues that the trial court improperly admitted the testimony of Donald Lee Clark (Clark), an expert witness for Green Level. The County argues that Clark improperly testified regarding questions of law, specifically, whether the stream buffers in the 1997 ordinance constituted zoning in the proposed ETJ area.

Assuming *arguendo* that Clark's testimony was improper, our review of the trial court's judgment does not reveal that Clark's testimony was used to support its findings and conclusions. In fact, the trial court's findings and conclusions were contrary to Clark's testimony. "In a nonjury trial, it is presumed that if incompetent evidence was admitted, it was disregarded and did not influence the judge's findings." *Gunther v. Blue Cross/Blue Shield*, 58 N.C. App. 341, 344, 293 S.E.2d 597, 599 (1982), *disc. review denied*, 306 N.C. 556, 294

S.E.2d 370 (1982). We find nothing to overcome that presumption. Therefore, we overrule this cross-assignment of error.

Reversed.

Judges LEVINSON and JACKSON concurred.

Judge Levinson concurred in this opinion prior to 7 July 2007.

PAULA ANN HOFFMAN, PLAINTIFF v. SHAWN CHERRI OAKLEY AND DAVID READE OAKLEY, DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. CATHERINE MICHELLE HOFFMAN, THIRD-PARTY DEFENDANT

No. COA06-932

(Filed 17 July 2007)

1. Motor Vehicles— automobile accident—expert testimony—speed—stopping distance

The trial court did not err in a negligence case arising out of an automobile accident by admitting the testimony of the defendants' accident reconstruction expert even though plaintiff contends it constituted improper expert testimony regarding the speed third-party defendant driver was traveling, because: (1) although our legislature has recently amended N.C.G.S. § 8C-1, Rule 702 to overturn the doctrine that an expert witness may not testify regarding the speed of a vehicle unless he personally observed the vehicle, the amendment applies only to offenses committed on or after 1 December 2006, and the automobile collision in this case occurred on 13 March 2003; and (2) the expert's testimony did not amount to an opinion on third-party defendant's speed, but rather was the type of testimony admissible even under the previously existing law when he used his scientific expertise to perform an experiment that demonstrated stopping distances at various speeds.

2. Motor Vehicles— contributory negligence—speeding—sufficiency of evidence

The trial court did not err by denying motions by plaintiff and third-party defendant for a directed verdict on the issue of contributory negligence in a case arising out of an automobile acci-

dent, because: (1) evidence that a party was exceeding the posted speed limit is sufficient to send the issue of contributory negligence to the jury, and the jury could have drawn this inference based on an accident reconstruction expert's testimony as to stopping distances at various speeds; and (2) the evidence was sufficient to allow a jury to find that had third-party defendant not been speeding, she would have been able to stop in less than 54 feet which would have brought her vehicle to a halt prior to any impact, thus demonstrating a causal connection between her excessive speed and the resulting accident.

3. Costs— arbitration fee—deposition fee—expert witness fee

The trial court did not abuse its discretion in a negligence case arising out of an automobile accident by awarding costs to third-party plaintiffs on various grounds, because: (1) plaintiff and third-party defendant have not cited any authority suggesting that costs are unavailable when paid for by defendants' insurance carrier under the insurance policy, and at least one other jurisdiction has rejected this argument; (2) N.C.G.S. § 6-1 should not preclude a recovery of costs under these circumstances when it identifies to whom costs may be awarded, but does not limit recovery to unreimbursed costs; (3) although plaintiff and third-party defendant point to N.C.G.S. § 7A-305(d) for the notion that certain specified expenses when incurred are recoverable as costs, they do not suggest defendants would not have been liable for the expenses had the carrier not paid them; (4) the arbitration fee was recoverable as it is specifically enumerated in N.C.G.S. § 7A-305(d); (5) although there is no statutory authority for awarding deposition fees as costs, these fees have been allowed as common law costs, and there has been no showing of an abuse of discretion; and (6) although plaintiff and third-party defendant contest the expert witness fee of $1,060 including the expert's time spent reviewing the case materials, talking with the investigating police officer, and conducting the stopping-distance experiment, our appellate courts have previously upheld the award of an expert witness fee for time spent outside of testifying.

Appeal by plaintiff and third-party defendant from judgment entered 19 September 2005 and orders entered 5 January 2006 by Judge James R. Fullwood in Wake County District Court. Heard in the Court of Appeals 21 February 2007.

E. Gregory Stott for plaintiff-appellant and third-party defendant-appellant.

Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P., by Kathrine Downing Fisher and Heather R. Wilson, for defendants-appellees and third-party plaintiffs-appellees.

GEER, Judge.

Plaintiff Paula Ann Hoffman and her daughter, third-party defendant Catherine Michelle Hoffman (the "Hoffmans"), appeal from a judgment in favor of defendants/third-party plaintiffs, Shawn Cherri Oakley and David Reade Oakley, entered in accordance with a jury verdict, concluding that Catherine Michelle Hoffman had been contributorily negligent in an automobile collision. The primary issue on appeal is whether the trial court erred by admitting the testimony of the defendant/third-party plaintiffs' accident reconstruction expert, which, the Hoffmans contend, constituted improper expert testimony regarding the speed Catherine was traveling.

It has long been the law, in North Carolina, that an expert witness may not testify regarding the speed of a vehicle unless he or she personally observed the vehicle. *See* 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 183, at 37-38 n.166 (6th ed. 2004) (urging elimination of limitations on accident reconstruction expert testimony). Although our legislature has recently amended Rule 702 to overturn this doctrine,[1] the amendment applies only to "offenses" committed on or after 1 December 2006. 2006 N.C. Sess. Laws 253, sec. 33. Since the automobile collision in this case occurred on 13 March 2003, we must apply the former law. Nevertheless, we hold that the expert's testimony did not amount to an opinion on Catherine Hoffman's speed, but rather was the type of testimony admissible even under the previously existing law.

In addition, the Hoffmans challenge the trial court's award of costs. We believe the trial court properly determined costs in accordance with *Miller v. Forsyth Mem'l Hosp., Inc.*, 173 N.C. App. 385, 618 S.E.2d 838 (2005). The amounts awarded either fell within N.C. Gen. Stat. § 7A-305(d) (2005) or constituted a "common law cost." As to the latter costs, we find no abuse of discretion.

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1. "A witness qualified as an expert in accident reconstruction who has performed a reconstruction of a crash, or has reviewed the report of investigation, with proper foundation may give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving." N.C.R. Evid. 702(i).

Facts

At approximately 7:30 a.m. on 13 March 2003, Catherine Hoffman was driving her mother's 1996 Honda Civic on Brooks Avenue in Raleigh, North Carolina. As Catherine approached the defendant Oakleys' home on Brooks Avenue, Shawn Oakley was backing David Oakley's mini-van out of their driveway when the two cars collided.

On 28 April 2003, Paula Hoffman filed suit against the Oakleys, in Wake County District Court, for losses resulting from the property damage to her car. She alleged that Shawn Oakley had been negligent in backing the mini-van out of her driveway and had caused the collision. The Oakleys filed an answer denying the relevant allegations of Paula Hoffman's complaint and, subsequently, filed an amended answer and a third-party complaint against Catherine Hoffman. The Oakleys' third-party complaint alleged that Catherine's negligence had been the sole cause of the collision or, alternatively, that her contributory negligence precluded her mother's recovery.

The case was tried before a jury on 8 and 9 August 2005 in Wake County District Court, with the parties stipulating that any negligence by Catherine Hoffman was to be imputed to Paula Hoffman. After hearing testimony from the Hoffmans, Shawn Oakley, the police officers who arrived on the scene after the collision, and an expert in accident reconstruction, the jury determined that although Paula Hoffman's vehicle was damaged by Shawn Oakley's negligence, Catherine Hoffman—and, therefore, Paula Hoffman—was contributorily negligent. Accordingly, the trial court entered judgment ordering that the Hoffmans recover nothing from the Oakleys.

The Hoffmans' subsequent motions for a new trial or judgment notwithstanding the verdict were denied, and the trial court awarded the Oakleys certain specified "reasonable costs and expenses." The Hoffmans filed a timely appeal to this Court.

I

[1] The Hoffmans first argue that the trial court erred in admitting the testimony of the Oakleys' expert on accident reconstruction. They contend that the witness gave impermissible opinion testimony regarding the speed Catherine Hoffman was traveling. We disagree.

Typically, an expert witness may testify in the form of an opinion if that expert's "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine

a fact in issue . . . ." N.C.R. Evid. 702(a). "[E]xpert testimony in the field of accident reconstruction has been widely accepted as reliable by the courts of this State." *State v. Holland*, 150 N.C. App. 457, 463, 566 S.E.2d 90, 94 (2002), *cert. denied*, 356 N.C. 685, 578 S.E.2d 316 (2003).

Nevertheless, our appellate courts held, prior to the amendment to add Rule 702(i), "that 'with respect to the speed of a vehicle, the opinion of a[n] . . . expert witness will not be admitted where he did not observe the accident, but bases his opinion on the physical evidence at the scene.' " *Marshall v. Williams*, 153 N.C. App. 128, 135, 574 S.E.2d 1, 5 (quoting *Hicks v. Reavis*, 78 N.C. App. 315, 323, 337 S.E.2d 121, 126 (1985), *cert. denied*, 316 N.C. 553, 344 S.E.2d 7 (1986)), *appeal dismissed and disc. review denied*, 356 N.C. 614, 574 S.E.2d 683 (2002). Accordingly, unless an accident reconstruction expert actually observed the accident, the expert may not testify as to the speed a vehicle was traveling. *See Van Reypen Assocs., Inc. v. Teeter*, 175 N.C. App. 535, 542, 624 S.E.2d 401, 405 (noting that, under this rule, "our trial courts are forced to exclude accident reconstruction testimony regarding speed"), *disc. review improvidently allowed*, 361 N.C. 107, 637 S.E.2d 536 (2006).

Here, the Oakleys' expert, Sean Dennis, testified that he had performed several "skid test[s]" at the accident scene using a 1997 two-door Honda Civic that Mr. Dennis considered to be a "sister or clone" of the 1996 four-door Honda Civic that Catherine Hoffman was driving at the time of the accident. Because the speed limit at the scene of the accident was 35 miles per hour, Mr. Dennis' skid tests included "full, panic-stop application of the brake pedal" at 33, 34.2, 40, 46, and 50 miles per hour. According to Mr. Dennis, his test results indicated that if a vehicle like the one driven by Catherine Hoffman was traveling at 35 miles per hour, it would be able to stop "in just under 54 feet." The Hoffmans argue that this testimony, when viewed in conjunction with that of a responding police officer who found skid marks at the scene measuring 80 feet in length, was merely "evidence of speed through the 'back door.' "

Our Supreme Court has, however, specifically held that such testimony about stopping distances is admissible. *See State v. Gray*, 180 N.C. 697, 702, 104 S.E. 647, 650 (1920) ("Admitting, then, that each of the particular witnesses was an expert in regard to the matter about which he was examined, testimony as to the distance within which such a truck, as [the] truck [at issue,] could be stopped when going at a rate of speed 20 to 25 miles an hour was plainly admissible."). *See*

also Draper v. Atl. Coast Line R.R. Co., 161 N.C. 308, 312, 77 S.E. 231, 232-33 (1913) (holding that testimony was competent when witness testified that train traveling at particular speed could have stopped within 200 yards). Under *Gray* and *Draper*, Mr. Dennis' testimony about stopping distances at various speeds was admissible.

These decisions are consistent with subsequent Supreme Court decisions holding that expert testimony about speed is inadmissible. In *Shaw v. Sylvester*, 253 N.C. 176, 180, 116 S.E.2d 351, 355 (1960), the Court held that "[a] witness who investigates but does not see a wreck may describe to the jury the signs, marks, and conditions he found at the scene, including damage to the vehicle involved. From these, however, he cannot give an opinion as to its speed. The jury is just as well qualified as the witness to determine what inferences the facts will permit or require." The Court stressed, however, that "[t]he qualified expert, the nonobserver, may give an opinion in answer to a proper hypothetical question in matters involving science, art, skill and the like. . . . An automobile, like any other moving object, follows the laws of physics . . . ." *Id.*

This Court has held that the restriction on expert testimony set out in *Shaw* "is limited to opinions regarding *speed*; it does not apply to opinions concerning other elements of an accident." *State v. Purdie*, 93 N.C. App. 269, 276, 377 S.E.2d 789, 793 (1989). Thus, an expert's testimony is properly admitted when he gives no opinion as to the actual speed of a vehicle. *Id. See also McKay v. Parham*, 63 N.C. App. 349, 353, 304 S.E.2d 784, 786-87 (1983) (holding admissible expert testimony that applied the law of physics to post-collision movement of two cars), *disc. review denied*, 310 N.C. 477, 312 S.E.2d 885 (1984).

Here, Mr. Dennis never gave an opinion as to the speed that Catherine Hoffman was traveling. He used his scientific expertise to perform an experiment that demonstrated stopping distances at various speeds. *See, e.g.*, *Addison v. Moss*, 122 N.C. App. 569, 571-73, 471 S.E.2d 89, 90-92 (holding result of experiment involving vehicle admissible on question of contributory negligence), *disc. review denied*, 345 N.C. 179, 479 S.E.2d 203 (1996). It was left up to the jury to determine Catherine Hoffman's stopping distance—which was a subject of dispute at trial—and make the ultimate determination of the speed of her car, precisely as required by *Shaw*. The trial court, therefore, did not err in admitting Mr. Dennis' testimony.[2]

2. The Hoffmans also argue that the trial court erred by refusing to instruct the Oakleys' attorney not to argue the issue of speed in his closing argument. Because Mr.

II

[2] The Hoffmans next argue that the trial court erred by denying their motions for a directed verdict on the issue of contributory negligence and for judgment notwithstanding the verdict ("JNOV"). When considering a motion for a directed verdict, a trial court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of every reasonable inference arising from the evidence. *Clark v. Moore*, 65 N.C. App. 609, 610, 309 S.E.2d 579, 580 (1983). Any conflicts and inconsistencies in the evidence must be resolved in favor of the non-moving party. *Davis & Davis Realty Co. v. Rodgers*, 96 N.C. App. 306, 308-09, 385 S.E.2d 539, 541 (1989), *disc. review denied*, 326 N.C. 263, 389 S.E.2d 112 (1990). If there is more than a scintilla of evidence supporting each element of the non-moving party's claim, the motion for a directed verdict should be denied. *Clark*, 65 N.C. App. at 610, 309 S.E.2d at 580-81. The same standard applies to motions for JNOV. *Smith v. Price*, 315 N.C. 523, 527, 340 S.E.2d 408, 411 (1986).

Because contributory negligence is an affirmative defense, the burden was on the Oakleys to prove that there was more than a scintilla of evidence supporting each element of contributory negligence. *Snead v. Holloman*, 101 N.C. App. 462, 464, 400 S.E.2d 91, 92 (1991). Evidence that a party was exceeding the posted speed limit is sufficient to send the issue of contributory negligence to the jury. *See, e.g.*, *Whisnant v. Herrera*, 166 N.C. App. 719, 723, 603 S.E.2d 847, 850 (2004) (evidence that plaintiff was "exceed[ing] the speed limit" justified submission of issue of plaintiff's contributory negligence to the jury).

In the present case, the parties stipulated at trial that any negligence by Catherine Hoffman was to be imputed to Paula Hoffman. The speed limit on Brooks Avenue was 35 miles per hour. Shawn

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Dennis' testimony was properly admitted, and the jury could infer from that testimony and evidence of the skid marks that Catherine Hoffman was exceeding the speed limit, the trial court properly denied the Hoffmans' request. The Hoffmans further contend that counsel's actual argument—that the amount of damage to the car suggested Catherine was speeding—was improper. *Shaw*, however, indicates that a jury may draw inferences regarding speed from "the signs, marks, and conditions" at the scene "including damage to the vehicle involved." 253 N.C. at 180, 116 S.E.2d at 355. *See also King v. Bonardi*, 267 N.C. 221, 227, 148 S.E.2d 32, 37 (1966) (holding that extent of damage, along with other evidence, was sufficient to support inference that car was being operated at dangerous and unlawful rate of speed). Under the circumstances of this case, counsel's argument was not improper.

Oakley testified that Catherine Hoffman told her that she was traveling "about" 40 miles per hour. In addition, as discussed in the prior section, the Oakleys' evidence included expert testimony that a car like the one driven by Catherine Hoffman would be able to stop "in just under 54 feet" if it was traveling at 35 miles per hour, the road's speed limit. Some of the measurements taken at the scene of the accident indicated that the skid marks from the Hoffman car measured 80 feet in length. If the jury accepted the accuracy of those measurements, then the jury could draw the inference, based on the accident reconstruction expert's testimony, that Catherine Hoffman was exceeding the speed limit. The issue of her contributory negligence was, therefore, properly submitted to the jury.

The Hoffmans nevertheless argue that Catherine Hoffman's speed was not a proximate cause of the collision. "In order for a contributory negligence issue to be presented to the jury, the defendant must show that plaintiff's injuries were proximately caused by his own negligence." *McGill v. French*, 333 N.C. 209, 217, 424 S.E.2d 108, 113 (1993). In other words, " '[t]here must be not only negligence on the part of the plaintiff, but *contributory* negligence, a real causal connection between the plaintiff's negligent act and the injury, or it is no defense to the action.' " *Whisnant*, 166 N.C. App. at 722, 603 S.E.2d at 850 (quoting *West Constr. Co. v. Atl. Coast Line R.R. Co.*, 184 N.C. 179, 180, 113 S.E. 672, 673 (1922) (emphasis original)).

According to the Hoffmans, because the jury found that Shawn Oakley had been negligent, and Shawn herself testified that she did not see the Hoffmans' car before the collision, she must have backed into the roadway without looking. Therefore, the Hoffmans argue, regardless of Catherine Hoffman's speed, Shawn Oakley's negligence must have been the sole proximate cause of the collision. In support of their argument, the Hoffmans point to *Ellis v. Whitaker*, 156 N.C. App. 192, 576 S.E.2d 138 (2003), in which this Court noted that a plaintiff is not required to anticipate a defendant's negligence and " 'has a right to assume that any motorist approaching from his left on the intersecting street will stop in obedience to the red light [or a stop sign] facing him unless and until something occurs that is reasonably calculated to put him on notice that such motorist will unlawfully enter the intersection.' " *Id.* at 196, 576 S.E.2d at 141 (alteration in original) (quoting *Cicogna v. Holder*, 345 N.C. 488, 490, 480 S.E.2d 636, 637 (1997)). The *Ellis* Court concluded that, although the evidence suggested that the plaintiff may have been speeding, the defendant had failed to show a "real causal connection" between

the plaintiff's speed and the accident, and, therefore, the plaintiff's speed was not a proximate cause of the collision. *Id.*

Unlike *Ellis*, however, in which no evidence was presented indicating that the collision could have been avoided had the plaintiff been traveling the posted speed limit, the evidence in the present case was sufficient to allow a jury to find that had Catherine Hoffman not been speeding, she would have been able to stop in less than 54 feet, which would have brought her vehicle to a halt prior to any impact. This is sufficient to demonstrate a causal connection between Catherine Hoffman's excessive speed and the resulting accident. *See Whisnant*, 166 N.C. App. at 723-24, 603 S.E.2d at 851 (distinguishing *Ellis* and concluding that defendant demonstrated real causal connection between collision and plaintiff's speed when evidence showed plaintiff was speeding while approaching defendant's vehicle and, by the time plaintiff saw defendant, plaintiff was unable to stop). The trial court, therefore, properly denied the Hoffmans' motion for a directed verdict and motion for JNOV.[3]

III

[3] Finally, the Hoffmans challenge the trial court's award of costs to the Oakleys on various grounds. N.C. Gen. Stat. § 6-1 (2005) provides: "To the party for whom judgment is given, costs shall be allowed as provided in Chapter 7A and this Chapter." N.C. Gen. Stat. § 7A-305 (2005), in turn, governs costs assessable in civil actions. With respect to negligence actions, costs "may be allowed or not, in the discretion of the court, unless otherwise provided by law." N.C. Gen. Stat. § 6-20 (2005). "The costs referred to in section 6-20 are the items enumerated in section 7A-305(d)." *Smith v. Cregan*, 178 N.C. App. 519, 525, 632 S.E.2d 206, 210 (2006).

After trial, the Oakleys stipulated that State Farm Mutual Automobile Insurance Company had paid all of their costs in accordance with an automobile insurance policy, and, as a result, they had "not personally paid any court costs as a result of the filing, hearing and trial of this case." According to the Hoffmans, because N.C. Gen. Stat. § 6-1 provides that costs shall be allowed "[*t*]*o the party* for whom judgment is given," the trial court erred by taxing as costs expenses actually paid by the Oakleys' insurer. (Emphasis added.)

3. For these reasons, we also reject plaintiff's contention that the trial court erred in instructing the jury on contributory negligence and on speed as a basis for finding contributory negligence.

This issue has not been specifically addressed by North Carolina courts. The Hoffmans have cited no authority suggesting that costs are unavailable when paid for by the insurance carrier pursuant to the insurance policy. At least one other jurisdiction has, however, rejected this argument. *See Hough v. Huffman*, 555 So. 2d 942, 943-44 (Fla. Dist. Ct. App. 1990) (despite insurer's payment of prevailing party's costs, prevailing party could still receive costs under statutory provision granting costs to "party recovering judgment"). *See also Aspen v. Bayless*, 564 So. 2d 1081, 1083 (Fla. 1990) (approving *Hough*).

Based on the plain language of the statute,[4] we do not believe N.C. Gen. Stat. § 6-1 should be construed as precluding a recovery of costs under these circumstances. By its express terms, N.C. Gen. Stat. § 6-1 identifies *to whom* costs may be awarded, but does not limit recovery to unreimbursed costs. As the trial court awarded costs to the Oakleys—who are the parties "for whom judgment [was] given"—we conclude that the court's award complies with N.C. Gen. Stat. § 6-1.

The Hoffmans point to N.C. Gen. Stat. § 7A-305(d), which provides that certain specified expenses "when incurred" are recoverable as costs. The Oakleys, however, did incur the expenses—the Hoffmans do not suggest that the Oakleys would not have been liable for the expenses had the carrier not paid them.

The Hoffmans alternatively contend that the trial court erred by awarding the Oakleys their arbitration fee, deposition fee, and expert witness fees as "costs." In analyzing whether the trial court properly assessed costs we must undertake a three-step analysis. *Miller*, 173 N.C. App. at 391, 618 S.E.2d at 843. First, we must determine whether the cost sought is one enumerated in N.C. Gen. Stat. § 7A-305(d); if so, the trial court is required to assess the item as a cost. *Miller*, 173 N.C. App. at 391, 618 S.E.2d at 843. Second, if the cost is not an item listed under N.C. Gen. Stat. § 7A-305(d), we must determine if it is a "common law cost." *Miller*, 173 N.C. App. at 391, 618 S.E.2d at 843. Third, if the cost sought to be recovered is a "common law cost," we must determine whether the trial court abused its discretion in awarding or denying the cost under N.C. Gen. Stat. § 6-20. *Miller*, 173 N.C. App. at 391, 618 S.E.2d at 843.

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4. *See In re Brooks*, 143 N.C. App. 601, 606, 548 S.E.2d 748, 752 (2001) (looking to "plain language" of statute in case of first impression).

With respect to the arbitration fee, N.C. Gen. Stat. § 7A-305(d)(7) designates as costs "[f]ees of guardians ad litem, referees, receivers, commissioners, surveyors, *arbitrators*, appraisers, and other similar court appointees, as provided by law." (Emphasis added.) As the Oakleys' arbitration fee is specifically enumerated in N.C. Gen. Stat. § 7A-305(d), the trial court properly assessed the fee as a cost. *Miller*, 173 N.C. App. at 391, 618 S.E.2d at 843.

As for the deposition fee, the Oakleys concede there is no statutory authority for awarding deposition fees as costs. *See also Oakes v. Wooten*, 173 N.C. App. 506, 519, 620 S.E.2d 39, 48 (2005) ("[T]here [i]s no statutory authority for the award of deposition costs."). "[T]his Court [has] held that '[e]ven though deposition expenses do not appear expressly in the statutes they may be considered as part of 'costs' and taxed in the trial court's discretion.' " *Muse v. Eckberg*, 139 N.C. App. 446, 447, 533 S.E.2d 268, 269 (2000) (alteration in original) (quoting *Dixon, Odom & Co. v. Sledge*, 59 N.C. App. 280, 286, 296 S.E.2d 512, 516 (1982)). Consequently, as deposition fees have been allowed as common law costs, we may overturn the trial court's award only upon a showing of abuse of discretion. *Miller*, 173 N.C. App. at 391, 618 S.E.2d at 843. We discern no abuse of discretion by the trial court, and the Hoffmans have made no showing of an abuse of discretion. Accordingly, we hold the trial court did not err by awarding the Oakleys their deposition fee.

Finally, with respect to expert witness fees, the Hoffmans purport to contest awards of $1,060.00 and $625.00, both for Mr. Dennis' fees. The trial court, however, actually denied the Oakleys' motion for Mr. Dennis' $625.00 fee. The sole issue before this Court is the propriety of the trial court's award of the $1,060.00 fee. This fee included Mr. Dennis' time spent reviewing the case materials, talking with the investigating police officer, and conducting the stopping-distance experiment.

Our appellate courts have previously upheld the award of an expert witness fee for time spent outside of testifying. *See, e.g.*, *Oakes*, 173 N.C. App. at 520, 620 S.E.2d at 49 (finding no abuse of discretion when trial court awarded expert witness fee in part for time spent on preparation); *Lewis v. Setty*, 140 N.C. App. 536, 539, 537 S.E.2d 505, 507 (2000) (allowing taxation of expert witness fee for review of medical records); *Campbell v. Pitt County Mem'l Hosp., Inc.*, 84 N.C. App. 314, 328, 352 S.E.2d 902, 910 (allowing recovery as cost time spent by expert witnesses outside of trial), *aff'd in part*

and disc. review improvidently allowed in part, 321 N.C. 260, 362 S.E.2d 273 (1987), *overruled on other grounds by Johnson v. Ruark Obstetrics & Gynecology Assocs.*, 327 N.C. 283, 395 S.E.2d 85 (1990). We are bound by these prior decisions, and, therefore, uphold the trial court's award of a $1,060.00 expert witness fee. Consequently, we hold that the trial court did not err in awarding costs.

No error.

Judges TYSON and ELMORE concur.

PROGRESSIVE AMERICAN INSURANCE COMPANY AND TIMOTHY DASSINGER, PLAINTIFFS v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, THERESA DASSINGER, TAMI PHILLIPS, AND JAMES STOKELY, DEFENDANTS

No. COA06-1032

(Filed 17 July 2007)

1. Gifts— donation of car to son—title still in mother

A mother who donated a car to her son owned the car at the time of an accident where the mother never transferred title of the car to the son.

2. Insurance— automobile—donated car—policy not automatically terminated

The automobile policy of a mother who donated a car to her son did not automatically terminate when the son purchased insurance on the car where the automatic termination clause of the mother's policy applied only if the named insured (the mother) obtained other insurance on the car, and the two policies at issue were procured by different persons.

3. Insurance— automobile—donated car—liability coverage—donee's policy—excess coverage

Where a mother donated a car to her son but never transferred title to the son, liability coverage under the son's automobile policy was excess over the liability coverage provided by the mother's policy since both policies made coverage excess with respect to a vehicle not owned by the named insured.

4. Insurance— automobile—donated car—collision coverage—pro rata coverage by donor's and donee's policies

Where a mother donated a car to her son but never transferred title to the son, and both the mother and son had collision insurance on the car, both policies provided collision coverage for the car on a pro rata basis because the car was not a "non-owned auto" within the meaning of clauses in each policy making collision coverage excess with respect to "a non-owned auto" because the car was still owned by the mother and it was furnished for the regular use of the son.

5. Appeal and Error— preservation of issues—summary judgment—failure to assign error to specific conclusion

In reviewing a summary judgment order, a party's failure to assign error to a specific conclusion of law made by the trial court does not bind the appellate court to the result reached by the lower court.

6. Unjust Enrichment— insurance benefits—payment under mistaken belief

Where a mother donated a car to her son but never transferred title to him, the son and his automobile insurer were entitled to restitution based upon unjust enrichment from the mother, her insurer and an accident victim for insurance benefits paid by the son's insurer under the mistaken belief that the mother had transferred title to the son because the son and his insurer conferred a readily measurable benefit and did not do so officiously or gratuitously.

Appeal by Plaintiffs from judgment entered 25 April 2006 by Judge Orlando F. Hudson, Jr., in Wake County Superior Court. Heard in the Court of Appeals 8 March 2007.

Young Moore and Henderson P.A., by Brian O. Beverly, for Plaintiffs-Appellants.

Hall, Rodgers, Gaylord & Millikan, PLLC, by Kathleen M. Millikan and Jonathan E. Hall, for Defendants-Appellees State Farm Mutual Insurance Company and Theresa Dassinger.

STEPHENS, Judge.

On or about 11 January 2003, Defendant State Farm Mutual Automobile Insurance Company ("State Farm") issued a personal

automobile insurance policy to Defendant Theresa Dassinger covering her 1993 Mazda automobile ("the Mazda"). The State Farm policy period was from 11 January 2003 through 31 August 2003. In March 2003, Theresa Dassinger gave the Mazda to her son, Plaintiff Timothy Dassinger, as a gift. Although Timothy Dassinger took possession of the Mazda at the time of the gift, Theresa Dassinger never transferred the Mazda's title to Timothy Dassinger.

On 17 March 2003, Plaintiff Progressive American Insurance Company ("Progressive") issued a personal automobile insurance policy covering the Mazda to Timothy Dassinger and Defendant Tami Phillips as co-insureds. At that time, Tami Phillips was Timothy Dassinger's girlfriend. The Progressive policy period was from 17 March 2003 through 17 September 2003. The terms of the State Farm and Progressive policies were identical in all applicable respects. Both policies provided bodily injury and property damage liability coverage with limits of $100,000.00 per person and $300,000.00 per accident, as well as collision coverage.

On 8 May 2003, Defendant Tami Phillips was involved in a two-car accident with a vehicle being driven by Defendant James Stokely. The accident resulted in personal injury to Mr. Stokely, property damage to the Stokely vehicle, and collision damage to the Mazda. Having been informed of the accident, State Farm and Progressive entered into an informal agreement ("the agreement") to share responsibility for the claims arising out of the accident. Before reaching the agreement, Progressive "was informed" that Timothy Dassinger owned the Mazda.

Pursuant to the agreement, Progressive paid $3,201.25 for collision damage sustained to the Mazda and $240.00 for rental car expenses incurred by Timothy Dassinger as a result of the accident. Additionally, Progressive paid the owner of the Stokely vehicle $3,792.81 for damage to that vehicle. State Farm paid Progressive $1,896.41, one-half of the amount paid by Progressive for damage to the Stokely vehicle. Timothy Dassinger incurred a $250.00 deductible for damages to the Mazda. After paying the amounts agreed upon under the agreement, Progressive discovered that Theresa Dassinger had never transferred the Mazda's title to Timothy Dassinger.

By complaint filed 22 March 2005, and under a theory of unjust enrichment, Plaintiffs sought restitution in the amount of $7,484.06, the total amount paid by Progressive and incurred by Timothy Dassinger. Plaintiffs also sought declaratory judgment that (1)

Theresa Dassinger was the owner of the Mazda at the time of the accident, (2) the State Farm policy provided primary coverage for all claims arising out of the accident, and (3) the Progressive policy provided excess coverage for all claims arising out of the accident. In their answer filed 25 May 2005, Defendants sought declaratory judgment that (1) the Progressive policy provided primary coverage for all claims or, in the alternative, shared a *pro rata* obligation under all coverage provisions, and (2) the State Farm policy provided excess coverage for all claims. Defendants further asked that Progressive recover nothing. Plaintiffs filed a motion for summary judgment on 11 January 2005, and a hearing on the motion was held on 23 January 2006. State Farm moved for summary judgment at the hearing.

In its summary judgment order entered 25 April 2006, the trial court made twenty findings of fact and five conclusions of law. The trial court denied Plaintiffs' motion for summary judgment and granted summary judgment in favor of Defendants. The trial court declared that only the Progressive policy provided liability and collision coverage on the Mazda at the time of the accident. Thus, the trial court ordered Progressive to pay State Farm $1,896.41, the amount paid by State Farm under the agreement. From the trial court's summary judgment order, Plaintiffs appeal. We reverse the trial court's order and remand for the entry of an order consistent with this opinion.

I. STANDARD OF REVIEW

Our standard of review from an order denying summary judgment

> "is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. Further, the evidence presented by the parties must be viewed in the light most favorable to the non-movant. The court should grant summary judgment 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. Farm Bureau Ins. Co. v. Nationwide Mut. Ins. Co., 168 N.C. App. 585, 586, 608 S.E.2d 112, 113 (2005) (quoting *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998)) (quotations and citation omitted).

II. DECLARATORY JUDGMENT

Plaintiffs assert that the trial court erred in holding that (1) the State Farm policy automatically terminated when the Progressive policy was issued, (2) the Progressive policy provided primary liability and collision coverage for the accident, and (3) the State Farm policy did not provide either liability or collision coverage for the accident. We agree.

A. OWNERSHIP OF THE MAZDA

[1] Since Timothy Dassinger never obtained title to the Mazda, Theresa Dassinger owned the Mazda at the time of the accident. *See* N.C. Gen. Stat. § 20-4.01(26) (2005) (defining "[o]wner" as the person holding the vehicle's legal title); *see also* N.C. Gen. Stat. § 20-72(b) (2005) (explaining requirements for transferring interest in a motor vehicle).

B. AUTOMATIC TERMINATION

[2] Insurance policies are considered contracts between two parties. *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 152 S.E.2d 436 (1967). "Insurance contracts are construed according to the intent of the parties, and in the absence of ambiguity, we construe them by the plain, ordinary and accepted meaning of the language used." *Integon General Ins. Corp. v. Universal Underwriters Ins. Co.*, 100 N.C. App. 64, 68, 394 S.E.2d 209, 211 (1990) (citing *Williams v. Nationwide Mut. Ins. Co.*, 269 N.C. 235, 238, 152 S.E.2d 102, 105-06 (1967)). "In construing an insurance policy, 'nontechnical words, not defined in the policy, are to be given the same meaning they usually receive in ordinary speech, unless the context requires otherwise.' " *Brown v. Lumbermens Mut. Cas. Co.*, 326 N.C. 387, 392, 390 S.E.2d 150, 153 (1990) (quoting *Grant v. Emmco Ins. Co.*, 295 N.C. 39, 42, 243 S.E.2d 894, 897 (1978)). "[I]t is the duty of the court to construe an insurance policy as it is written, not to rewrite it and thus make a new contract for the parties." *Allstate*, 269 N.C. at 346, 152 S.E.2d at 440 (citations omitted).

Under its General Provisions, the State Farm policy contained the following "Automatic Termination" clause:

> If *you* obtain other insurance on **your covered auto**, any similar insurance provided by this policy will terminate as to that auto on the effective date of the other insurance.

(Emphasis added and emphasis in original.) In the State Farm policy's "Definitions" section, "you" is defined as the " 'named insured' shown in the Declarations[]" and "[t]he spouse if a resident of the same household[,]" and "[y]our covered auto" is defined as "[a]ny vehicle shown in the Declarations." The Declarations to the State Farm policy show Theresa Dassinger as named insured and the Mazda as a covered vehicle.

The State Farm policy's automatic termination clause is unambiguous. Construing the clause and related definitions by the plain, ordinary, and accepted meaning of the language used, the automatic termination clause only applies if Theresa Dassinger obtains other insurance on the Mazda. Defendants' reliance on *State Farm Mut. Auto. Ins. Co. v. Atlantic Indem. Co.*, 122 N.C. App. 67, 468 S.E.2d 570 (1996), is misplaced. In that case, the two insurance policies at issue were procured by the same person, who was the named insured under both policies. In this case, since the State Farm policy and the Progressive policy were procured by different persons, the State Farm policy did not automatically terminate on 17 March 2003, and the State Farm policy was in effect at the time of the accident.

C. LIABILITY COVERAGE

[3] "[A]n insurer by the terms of its policy could exclude liability coverage under [the owner's] policy if the driver of a vehicle . . . was covered under his own policy for the minimum amount of liability coverage required by the Motor Vehicle Financial Responsibility Act, N.C.G.S. § 20-279.1 *et seq.* [Act]." *United Services Auto. Ass'n v. Universal Underwriters Ins. Co.*, 332 N.C. 333, 334, 420 S.E.2d 155, 156 (1992). "[W]here two policies satisfy the Act's coverage requirements, the driver's insurance carrier, *depending on the language of the policies*, provides primary coverage." *Metropolitan Property and Cas. Ins. Co. v. Lindquist*, 120 N.C. App. 847, 850, 463 S.E.2d 574, 576 (1995) (citations omitted) (emphasis added). "Therefore, whether [State Farm] (owner's insurer) or [Progressive] (driver's insurer) provides primary coverage for the [a]ccident is controlled by the terms and exclusions within each policy." *Id.*

By the "Insuring Agreement" of the policies' liability coverage provisions, both State Farm and Progressive agree to "pay damages for **bodily injury** or **property damage** for which any **insured** becomes legally responsible because of an auto accident." (Emphasis in original.) For purposes of the insuring agreements, an "[i]nsured" is defined, in part, as "[y]ou" or "[a]ny person using **your covered**

auto." (Emphasis in original.) By these terms, both policies provided liability coverage for the 8 May 2003 accident.

Having determined that both policies provided liability coverage at the time of the accident, we must next determine the relative obligations under each policy in light of the policies' identical "Other Insurance" clauses:

> If there is other applicable liability insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance.

The Mazda was a vehicle Timothy Dassinger "d[id] not own" at the time of the accident, and thus Progressive's liability coverage is "excess over any other collectible insurance." Since we determined above that the State Farm policy provides liability coverage for the accident, the State Farm policy constitutes "other collectible insurance." Thus, the Progressive policy only provides coverage under its liability provisions when the limit of the State Farm policy's coverage is met. The State Farm policy provided primary liability coverage for the accident. The Progressive policy's liability coverage was excess. The trial court's judgment that the State Farm policy did not provide liability coverage for the accident is reversed.

D. COLLISION COVERAGE

[4] By the terms of the policies' collision coverage provisions, both State Farm and Progressive agree to "pay for direct and accidental loss to **your covered auto** or any **non-owned auto**, including their equipment." (Emphasis in original.) Additionally, the collision coverage provisions of both policies contain the following "Other Insurance" clause:

> If other insurance also covers the loss we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a **non-owned auto** shall be excess over any other collectible insurance.

(Emphasis in original.) Under both policies, a "[n]on-owned auto" is defined, in part, as:

> Any private passenger auto, station wagon type, pickup truck, van or **trailer** not owned by or furnished or available for the

> regular use of you or any **family member** while in the custody of or being operated by you or any **family member**.

(Emphasis in original.)

Under the Progressive policy, the Mazda is not a "non-owned auto" because it was furnished for the regular use of Timothy Dassinger. *See Hernandez v. Nationwide Mut. Ins. Co.*, 171 N.C. App. 510, 512, 615 S.E.2d 425, 426 ("[A]ll cars which are not owned within the meaning of G.S. 20-72(b) are insured 'non-owned' automobiles except those which are furnished for the regular use of the insured or his relative.") (quotations and citation omitted), *disc. review denied*, 360 N.C. 63, 621 S.E.2d 624 (2005). Thus, the Progressive policy's collision coverage is not "excess over any other collectible insurance." Under the State Farm policy, the Mazda is not a "non-owned auto" because the Mazda was owned by Theresa Dassinger. Since each policies' "share of the loss" is limited to the "proportion that [the] limit of liability bears to the total of all applicable limits[,]" and since both policies have the same limit, State Farm and Progressive must share *pro rata* in the damages to the Mazda. The trial court's judgment that the State Farm policy did not provide collision coverage for the accident is reversed.

III. UNJUST ENRICHMENT

[5] Having determined the extent of the insurance policies' coverage, we must now determine whether the trial court erred in denying Plaintiffs' motion for summary judgment on their restitution claim, as Plaintiffs contend.

"When one [party] confers a benefit upon another which is not required by a contract either express or implied or a legal duty, the recipient thereof is often unjustly enriched and will be required to make restitution therefor." *Siskron v. Temel-Peck Enterprises, Inc.*, 26 N.C. App. 387, 390, 216 S.E.2d 441, 444 (1975). Unjust enrichment is "a claim in quasi contract or a contract implied in law." *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556, *reh'g denied*, 323 N.C. 370, 373 S.E.2d 540-41 (1988).

> In order to establish a claim for unjust enrichment, a party must have conferred a benefit on the other party. The benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. The benefit must not be gratuitous and it must be measurable.

Id. (citations omitted). Additionally, "the defendant must have consciously accepted the benefit." *Booe*, 322 N.C. at 570, 369 S.E.2d at 556.

We first address Defendants' argument that Plaintiffs' failure to assign error to one of the trial court's conclusions of law binds this Court to the result reached by the lower court. In its summary judgment order, the trial court concluded as a matter of law that "any payments made by Progressive were made voluntarily and/or gratuitously[.]" Plaintiffs did not specifically assign error to this conclusion. Thus, Defendants argue, this Court must affirm the trial court's decision to deny summary judgment on Plaintiffs' unjust enrichment claim, "even if it is determined by this Court that Progressive's policy did not provide primary liability coverage[.]" We disagree with Defendants' assertion.

Our standard of review is *de novo*. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004). Furthermore, our Supreme Court has held:

> The purpose of summary judgment is to eliminate formal trial when the only questions involved are questions of law. Thus, although the enumeration of findings of fact and conclusions of law is technically unnecessary and generally inadvisable in summary judgment cases, summary judgment, by definition, is always based on two underlying questions of law: (1) whether there is a genuine issue of material fact and (2) whether the moving party is entitled to judgment. On appeal, review of summary judgment is necessarily limited to whether the trial court's conclusions as to these questions of law were correct ones. It would appear, then, that notice of appeal adequately apprises the opposing party and the appellate court of the limited issues to be reviewed. *Exceptions and assignments of error add nothing.*

Ellis v. Williams, 319 N.C. 413, 415, 355 S.E.2d 479, 481 (1987) (internal citations omitted) (emphasis added); s*ee also Nelson v. Hartford Underwriters Ins. Co.*, 177 N.C. App. 595, 603, 630 S.E.2d 221, 227 (2006) ("This Court is required to follow the decisions of our Supreme Court. . . . Accordingly, we follow *Ellis*[.]"); *but see Shook v. County of Buncombe*, 125 N.C. App. 284, 285, 480 S.E.2d 706, 707 (1997) ("In our view, *Ellis* is no longer the law."). We conclude that, in reviewing a summary judgment order, a party's failure to assign error to a specific conclusion of law made by the trial court does not

bind this Court to the result reached by the lower court. *Ellis*, *supra*; *Nelson*, *supra*.

[6] From our review of the record, it is clear that the amounts paid by Plaintiffs were paid under the mistaken belief that Timothy Dassinger owned the Mazda at the time of the accident. Our analysis of the parties' obligations under the insurance policies, above, reveals that Plaintiffs thus conferred a benefit on Defendants. The benefit was not conferred officiously or gratuitously and is readily measurable. The trial court erred in denying Plaintiffs' motion for summary judgment on their claim for restitution, in granting summary judgment in favor of Defendants, and in ordering Progressive to pay State Farm $1,896.41.

For these reasons, the order of the trial court is reversed. The State Farm policy provided primary liability coverage for the accident. The Progressive policy provided excess liability coverage for the accident. Both the State Farm policy and the Progressive policy provided collision coverage for the accident. Plaintiffs are entitled to restitution for payments made which were not owed under the Progressive policy. This case is remanded for the entry of an order consistent with this opinion.

REVERSED and REMANDED.

Judges McGEE and CALABRIA concur.

CORA ELIZABETH McINTOSH, PLAINTIFF v. DANNY TILMON McINTOSH, DEFENDANT

No. COA06-691

(Filed 17 July 2007)

1. Continuances denied— no abuse of discretion

The trial court did not abuse its discretion by denying a continuance for an equitable distribution trial in light of the numerous and lengthy delays in hearing the case, and of the court's notice to plaintiff to hire an attorney and be ready to move forward.

2. Judgments— consent—voluntariness

The trial court did not err by finding that the parties had entered into a valid consent judgment in an equitable distribution case where plaintiff agreed that she had made a choice, albeit between two unappealing options (settling or proceeding to trial without counsel).

3. Civil Procedure— Rule 60 motion for relief—denied—well-reasoned decision

The trial judge did not err by denying plaintiff's Rule 60 motion for relief from a consent judgment where the judge entered a nine-page order, with a timeline and transcript attached, and made 25 relevant and detailed findings and seven conclusions. The decision was well-reasoned and based on the judge's lengthy experience with the parties and the case.

Appeal by plaintiff from judgment entered 6 September 2005 and order entered 17 March 2006 by Judge Rebecca B. Knight in District Court, Buncombe County. Heard in the Court of Appeals 19 March 2007.

The Sutton Firm, P.A., by April Burt Sutton, for plaintiff-appellant.

Mary Elizabeth Arrowood, for defendant-appellee.

WYNN, Judge.

In this appeal arising from a consent judgment for equitable distribution, the plaintiff argues that the trial court erred in a number of respects relating to her lack of counsel at trial and her subsequent need to represent herself. After a careful review of the record, we find no error.

Plaintiff Cora Elizabeth McIntosh and Defendant Danny Tilmon McIntosh married in 1977 and separated on December 31, 2000. The two divorced on 27 June 2002, and Ms. McIntosh filed a complaint against Mr. McIntosh on 2 May 2002, for child custody and support, alimony, post-separation support, equitable distribution and writ of possession. On 2 December 2002, the trial court ordered Ms. McIntosh to file her equitable distribution affidavit on or before 3 January 2003, and told both parties and their respective counsel to be present at a pre-trial conference set for 6 February 2003.

At the 6 February pre-trial conference, Mr. McIntosh filed a motion to dismiss the complaint for insufficiency of process and service of process; Ms. McIntosh did not attend the pre-trial conference. At another hearing on 6 March 2003, the trial court found that Ms. McIntosh had failed to comply with the 2 December order and had not offered just cause for such failure; the trial court ordered Ms. McIntosh to file her equitable distribution affidavit by 14 March 2003, or the cause of action would be dismissed with prejudice. On 13 March 2003, the trial court denied Mr. McIntosh's motion to dismiss, finding that service had been proper; Ms. McIntosh filed her equitable distribution affidavit on that same day.

Following an answer and counter-complaint from Mr. McIntosh, as well as an appeal of the denial of his motion to dismiss that he elected not to pursue, the equitable distribution claim was scheduled for trial on 22 March 2004. However, in early March, a new attorney filed a notice of appearance as counsel for Ms. McIntosh and requested a continuance due to insufficient time to prepare for the trial and a need for additional time for a financial expert to review documents received in discovery. Ms. McIntosh's former counsel, from Legal Aid of North Carolina, also filed a motion to withdraw as attorney of record, stating that Ms. McIntosh "had hired other counsel, that [she] had been uncooperative with the attorney . . ., that [she] and the attorney were no longer able to maintain a meaningful relationship or effectively communicate[.]" The trial court granted the motion to withdraw and continued the equitable distribution trial, first to 4 May 2004, and then, after an amended order, to 21 June 2004.

On 7 June 2004, Ms. McIntosh filed another motion to continue to allow her expert additional time to obtain and review documents; the trial was continued to 14 September 2004. Mr. McIntosh then filed a motion to continue so that his expert could be available to testify, and the trial was continued to January 2005. On 31 March 2005, after the January trial, an equitable distribution judgment was entered, but it was subsequently set aside on 28 June 2005, due to inadequate stipulations at trial. A new trial was scheduled for 8 August 2005.

Prior to the August trial, Ms. McIntosh's second attorney filed a motion to withdraw, citing as the reason Ms. McIntosh's failure to pay for her services. The trial court allowed the motion and continued the case to 6 September 2005, to allow Ms. McIntosh time to find a new lawyer. At that time, the trial court also instructed Ms. McIntosh that she needed to be ready to proceed on 6 September; Ms. McIntosh

informed the trial court that she was expecting to have a loan approved that afternoon and would hire an attorney within the week, so would be ready to move forward on 6 September.

Nevertheless, Ms. McIntosh faxed a motion for continuance to the court on 29 August 2005, which the trial court stated was not seen until the time of the hearing on 6 September. The trial court denied the motion to continue "based upon the prior reasons that this was why the case was continued last time." Ms. McIntosh informed the trial court that she "certainly [was] not qualified to represent [herself] and [she] would beg the Court to allow [her] to get the loan and get an attorney to represent [her][,]" as "it would be such an unfair advantage . . . not to have an attorney."

The trial court noted that Ms. McIntosh had had "a month to make arrangements to hire an attorney[]" and the case was "no closer today than we were a month ago[.]" Ms. McIntosh and the defense counsel both mentioned to the trial court that each had made settlement offers to the other. The defense counsel also informed the trial court that she "[does not] think there's going to be a whole lot of difference from what we had last time. So I certainly don't think it's a surprise to anybody."

The trial court then refused to delay the proceedings and instructed Ms. McIntosh that she was "present during the last trial and so [she] understand[s] the format and how things proceeded . . . the things [she] testified about." The trial court suggested to Ms. McIntosh that:

> So, if you are totally at a loss, . . . you either settle your case and agree that you're going to give up some things that you didn't think you were going to give up before and just at least know what you're going to get, or you're going to have to . . . come up with a way of how you're going to offer your evidence. But you've been through this entire proceeding before so it's not the first time that you've gone through this. So it's up to you. You're welcome to settle your case, you're welcome to try your case. But if I have no evidence and you offer no evidence, I can't proceed. I can't enter an order. And I can dismiss your claim.

Ms. McIntosh subsequently entered into negotiations with Mr. McIntosh's attorney, and the two parties reached an agreement for a consent judgment of equitable distribution. The trial court ques-

tioned Ms. McIntosh as to the voluntariness of her entry into the consent judgment; she responded that she felt she was "left with no other choice but to do this," and the trial court noted that it was still Ms. McIntosh's choice. Ms. McIntosh stated that it was "the best [she] could do because [she] can't argue [her] own case" and acknowledged that she was not threatened into signing the judgment. After likewise questioning Mr. McIntosh, the trial court entered the judgment.

On 5 October 2005, Ms. McIntosh filed a Rule 60 motion, seeking to have the consent judgment set aside for excusable neglect or "for any other reason justifying relief from the operation of the judgment," including alleged duress and pressure applied by the trial court due to her lack of representation. The trial court denied the Rule 60 motion on 17 March 2006, entering a nine-page order recounting the procedural history of the case and the reasons for the denial of the motion to continue, and attaching a six-page timeline and the entire trial transcript.

Ms. McIntosh now appeals, arguing that (I) the trial court abused its discretion in denying her motion for continuance of the equitable distribution trial; (II) the evidence does not support the trial court's finding that the parties entered into a valid consent judgment; and (III) the trial court erred in denying her Rule 60 motion for relief from the 6 September 2005 consent judgment.

I.

[1] First, Ms. McIntosh argues that the trial court abused its discretion in denying her motion for continuance of the equitable distribution trial. We disagree.

Under the North Carolina Rules of Civil Procedure, "[a] continuance may be granted only for good cause shown and upon such terms and conditions as justice may require." N.C. Gen. Stat. § 1A-1, Rule 40 (2005). Moreover, a motion for continuance is "ordinarily addressed to the sound discretion of the trial judge and not subject to review on appeal absent an abuse of that discretion." *State v. Parton*, 303 N.C. 55, 68, 277 S.E.2d 410, 419 (1981), *overruled on other grounds*, *State v. Freeman*, 314 N.C. 432, 437-38, 333 S.E.2d 743, 746-47 (1985); *see also Caswell Realty Assocs. I, L.P. v. Andrews Co., Inc.*, 128 N.C. App. 716, 721, 496 S.E.2d 607, 612 (1998) ("Absent an abuse of discretion, the court's ruling [on a motion for continu-

ance] will not be disturbed on appeal." (citation omitted)). This Court will find such an abuse of discretion only if the trial court's decision was "unsupported by reason and could not have been a result of competent inquiry." *Wiencek-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992).

Here, Ms. McIntosh attempts to argue that the trial court's denial of her motion for a continuance violated her right to counsel, and, as such, the decision is a reviewable question of law. *See Parton*, 303 N.C. at 68, 277 S.E.2d at 419 ("However, when the motion [for continuance] is based on a right guaranteed by the United States or North Carolina Constitutions, the question presented is a reviewable question of law."). Nevertheless, we observe that there is no liberty interest at stake in an equitable distribution trial; accordingly, there is no constitutional right to counsel. *See King v. King*, 144 N.C. App. 391, 393, 547 S.E.2d 846, 847 (2001) (holding that no right to counsel in trial for modification of child support because due process requires appointed counsel only where an individual "cannot afford counsel on his own and where the litigant may lose his physical liberty if he loses the litigation" (citation and quotation omitted)). Thus, we review the trial court's decision only for an abuse of discretion.

The record before us shows that Ms. McIntosh filed her equitable distribution claim in May 2002, yet due to a number of delays and continuances by both parties, the trial was not held until September 2005, over three years later. After granting Ms. McIntosh a continuance in August 2005, the trial court instructed Ms. McIntosh to be ready for trial in September; despite this direction, Ms. McIntosh still requested another continuance, based on her continuing failure to hire a new attorney—the same reason as previously—at the September trial date. The record further indicates that the 31 March 2005 equitable distribution judgment was set aside by the trial court for procedural, not substantive, reasons, and the September trial was likely to be almost identical to the earlier proceedings.

In light of the numerous and lengthy delays in hearing this case, and of the trial court's notice to Ms. McIntosh to hire an attorney and be ready to move forward at the September trial date, we agree with the trial court that Ms. McIntosh did not show good cause for, nor did justice require, another continuance. Accordingly, we see no abuse of discretion in the court's denial of Ms. McIntosh's motion for a continuance. This assignment of error is overruled.

II.

[2] Next, Ms. McIntosh argues that the trial court erred by finding that the parties entered into a valid consent judgment of equitable distribution. We disagree.

> This Court has repeatedly held:
>
> The authority of a court to sign and enter a consent judgment depends upon the unqualified consent of the parties thereto, and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement of the parties and promulgates it as a judgment.

Hill v. Hill, 97 N.C. App. 499, 501, 389 S.E.2d 141, 142 (1990) (citing *Lynch v. Lynch*, 74 N.C. App. 540, 329 S.E.2d 415 (1985), and *Overton v. Overton*, 259 N.C. 31, 129 S.E.2d 593 (1963)); *see also Buckingham v. Buckingham*, 134 N.C. App. 82, 87, 516 S.E.2d 869, 873-74, *disc. review denied*, 351 N.C. 100, 540 S.E.2d 353 (1999). However, in order to be valid, consent judgments do not require the parties to appear in court and acknowledge to the court their continuing consent to the entry of the judgment. *Tevepaugh v. Tevepaugh*, 135 N.C. App. 489, 492, 521 S.E.2d 117, 120 (1999). Indeed, "absent any circumstances to put the court on notice that one of the parties does not actually consent thereto, a judge may properly rely upon the signatures of the parties as evidence of consent to a judgment." *Wachovia Bank & Trust Co., N.A. v. Bounous*, 53 N.C. App. 700, 706, 281 S.E.2d 712, 715 (1981); *see also Ledford v. Ledford*, 229 N.C. 373, 376, 49 S.E.2d 794, 796 (1948) (noting that, if supported by some evidence, the findings of fact made by the trial judge in determining whether a party gave consent to a judgment as entered are binding on appeal because the court is the judge of the weight and credibility of the evidence).

In the instant case, Ms. McIntosh concedes that she signed the consent judgment of equitable distribution that was presented to the trial court for approval and entry. However, she contends that there were "circumstances to put the court on notice" that she did not actually consent to the agreement and in fact signed only under the threat and duress of the possibility of having her complaint dismissed. When questioned by the trial court as to the voluntariness of her consent to the judgment, Ms. McIntosh answered that she felt she was "left with no other choice but to do this" and that she decided the consent judgment "was the best that I could do because I can't argue my own case."

The transcript also makes clear, however, that Ms. McIntosh acknowledged that she had still made a choice, waiving her option of going to trial in favor of having a certain outcome with the consent judgment, albeit a choice between what she believed to be two unappealing options. Moreover, Ms. McIntosh informed the trial court that she had not been threatened, intimidated, or bullied in any way into signing the consent judgment. Ms. McIntosh participated in negotiations with opposing counsel throughout the day, and the consent judgment ultimately agreed to was substantially similar to the one entered and subsequently set aside by the trial court in March 2005.

We find that, notwithstanding her displeasure at the circumstances, Ms. McIntosh signed the agreement in the absence of threat, coercion, intimidation, or duress, and her consent was therefore voluntary. The consent judgment is valid, and this assignment of error is overruled.

III.

[3] Ms. McIntosh's final argument on appeal is that the trial court erred by denying her Rule 60 motion for relief from the consent judgment, because the judgment was void or, alternatively, because her lack of preparation for the equitable distribution trial was due to excusable neglect. We disagree.

Rule 60 offers parties the opportunity to have a final judgment set aside due to clerical and other mistakes, inadvertence, excusable neglect, newly discovered evidence, fraud on the court, or "[a]ny other reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60 (2005). Further, "it is well settled that Rule 60(b)(6) does not include relief from errors of law or erroneous judgments," and is therefore not a substitute for appellate review. *Baxley v. Jackson*, 179 N.C. App. 635, 634 S.E.2d 905, 907 (citing *Garrison ex rel. Chavis v. Barnes*, 117 N.C. App. 206, 210, 450 S.E.2d 554, 557 (1994)), *disc. review denied*, 360 N.C. 644, 638 S.E.2d 462 (2006). Such motions are "addressed to the sound discretion of the trial court and its ruling will not be disturbed absent an abuse of that discretion." *Gibson v. Mena*, 144 N.C. App. 125, 128, 548 S.E.2d 745, 747 (2001).

Because we have concluded that the consent judgment was not void as a matter of law, we consider Ms. McIntosh's Rule 60 motion only on the grounds of excusable neglect. The issue of "what constitutes 'excusable neglect' is a question of law which is fully reviewable

on appeal." *In re Hall*, 89 N.C. App. 685, 687, 366 S.E.2d 882, 884, *disc. review denied*, 322 N.C. 835, 371 S.E.2d 277 (1988). As held by our Supreme Court,

> While there is no clear dividing line as to what falls within the confines of excusable neglect as grounds for the setting aside of a judgment, what 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.

Thomas M. McInnis & Assocs., Inc. v. Hall, 318 N.C. 421, 425, 349 S.E.2d 552, 554-55 (1986). Thus, we have previously noted that "[d]eliberate or willful conduct cannot constitute excusable neglect, nor does inadvertent conduct that does not demonstrate diligence." *Couch v. Private Diagnostic Clinic*, 133 N.C. App. 93, 103, 515 S.E.2d 30, 38 (citations omitted), *aff'd*, 351 N.C. 92, 520 S.E.2d 785 (1999). We have also held that the failure of a party to obtain an attorney is not excusable neglect. *See Creasman v. Creasman*, 152 N.C. App. 119, 124-25, 566 S.E.2d 725, 729 (2002); *Hall*, 89 N.C. App. at 688-89, 366 S.E.2d at 885.

Here, Ms. McIntosh was put on notice by the trial court on 8 August 2005 that she needed to hire an attorney and be prepared to proceed with trial on 6 September 2005. She assured the trial court that she planned to hire an attorney within the week; although the record suggests that she was having financial difficulties, it also shows that these proceedings had been going on for over three years, and she had contributed to those delays.

In her order denying Ms. McIntosh's Rule 60 motion, the trial court recounted the long history of this case and also made numerous findings in concluding that Ms. McIntosh's failure to hire an attorney "[did] not rise to the level of excusable neglect." That nine-page order, with a timeline of the case and the trial transcript attached, included twenty-five relevant and detailed findings of fact and seven conclusions of law to support the trial court's denial of Ms. McIntosh's Rule 60 motion. Under those circumstances, we can find no abuse of discretion, as the trial court clearly made a well-reasoned decision based on her lengthy experience with these parties and this case. Accordingly, this assignment of error is overruled.

Affirmed.

Chief Judge MARTIN and Judge GEER concur.

STATE OF NORTH CAROLINA v. EUVASHII IMANI CARTER, DEFENDANT

No. COA06-1322

(Filed 17 July 2007)

1. Drugs— knowingly maintaining a dwelling for keeping or selling controlled substances—sufficiency of evidence

The trial court erred by denying defendant's motion to dismiss the charge of knowingly or intentionally maintaining a dwelling for the keeping or selling of controlled substances because the State presented insufficient evidence for a rational juror to conclude that defendant either lived at the residence or was maintaining the same when: (1) the State presented no evidence indicating that defendant owned the property, bore any expense for renting or maintaining the property, or took any other responsibility for the residence; (2) the only evidence specifically relating to the maintenance of the property was the utility bill in the name of defendant's brother; (3) the State's evidence indicated only that defendant occupied the property from time to time and provided no indication that defendant kept possession over a duration of time; and (4) the affidavit filed in support of the search warrant indicating that defendant and his brother were in the business of selling cocaine from the residence was not admitted at trial, and is thus immaterial.

2. Continuances— motion for continuance—failure to show prejudice

The trial court did not abuse its discretion in a possession of cocaine with intent to sell or distribute, knowingly maintaining a dwelling for the keeping of controlled substances, possession of drug paraphernalia, and possession of up to one-half of an ounce of marijuana case by denying defendant's motion for a continuance one week before trial, nearly a year after defendant was indicted, in order to locate a former girlfriend to testify on defendant's behalf, because: (1) defendant had ample opportunity to notify counsel of the need to have his ex-girlfriend present to testify and failed to do so in a timely manner; (2) defendant failed to advise the court why the witness was necessary; and (3) defendant failed to show that the lack of additional time prejudiced his case when he argues only that his ex-girlfriend's testimony would show where he resided at the time of the arrest, the charge of knowingly maintaining a dwelling for the keeping or

selling of controlled substances conviction was reversed, and defendant made no effort to explain how the testimony would have made a difference with respect to the possession charges.

Appeal by defendant from judgments entered 13 April 2006 by Judge V. Bradford Long in Guilford County Superior Court. Heard in the Court of Appeals 25 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General Hope D. Murphy, for the State.

James M. Bell for defendant-appellant.

GEER, Judge.

Defendant Euvashii Imani Carter appeals from convictions of possession of cocaine with intent to sell or distribute, knowingly keeping a dwelling for the keeping of controlled substances, possession of drug paraphernalia, and possession of up to one-half of an ounce of marijuana. We agree with defendant's contention that the State presented insufficient evidence that he knowingly kept or maintained a dwelling for the keeping of controlled substances and that his conviction on that charge must be reversed.

At trial, the State's evidence at most established only that defendant from time to time was present in the house at issue. Under the controlling precedent, we are required to reverse defendant's conviction of that charge. Defendant has not, however, presented any persuasive basis for overturning any of his remaining convictions.

Facts

The State's evidence at trial tended to show the following facts. At approximately 8:20 p.m. on 9 December 2004, Detective Jamie Castle of the High Point Police Department and several other officers executed a search warrant at a residence at 805 Tryon Avenue in High Point, North Carolina. After the officers knocked at the door and announced their presence, Detective Castle observed a figure inside the home move in front of and then away from a window.

When it was apparent that no one was going to answer the door, the officers forcibly entered the home. Although the lights were on inside, the officers initially encountered no one in the residence. The officers discovered a closed door in a hallway that appeared to be barricaded from the inside. After forcing this door open, officers

found defendant hiding beneath an overturned recliner. Tucked inside the edge of the recliner's seat was a plastic bag containing 19.8 grams of crack cocaine. Officers also seized $380.00 from defendant's person.

The room in which defendant was hiding appeared to be a bedroom. Sitting out in plain view in that room were defendant's birth certificate, social security card, and North Carolina State Identification Card. These documents all listed defendant's home address as being different from the address of the house being searched. Officers also found three photographs of defendant at various locations in the residence. In addition, the search uncovered a City of High Point utility bill for 805 Tryon Avenue addressed to defendant's brother; two separate quantities of marijuana, one weighing 3.4 grams and the other 3.0 grams; a plastic bottle containing 17 hydrocodone pills; an electronic scale covered in a "white powdery substance"; a box of plastic sandwich bags; two counterfeit $100.00 bills; and a cell phone. No one other than defendant was present in the house.

On 16 May 2005, defendant was indicted for possession of a controlled substance with intent to manufacture, sell, and deliver; maintenance of a place to keep and sell controlled substances; misdemeanor possession of drug paraphernalia; and misdemeanor possession of a controlled substance. Following a trial during the 10 April 2006 criminal session of Guilford County Superior Court, a jury found defendant guilty of possession with the intent to sell and deliver cocaine, knowingly keeping a dwelling for the keeping of controlled substances, possession of drug paraphernalia, and possession of less than one-half of an ounce of marijuana. The trial court imposed a presumptive range sentence of 11 to 14 months and a consecutive presumptive range sentence of 45 days. Defendant timely appealed to this Court.

I

[1] Defendant argues that the trial court erred in denying his motion to dismiss the charge of knowingly or intentionally maintaining a place for the keeping or selling of controlled substances. In ruling on a defendant's motion to dismiss, the trial court must determine whether the State presented substantial evidence (1) of each essential element of the offense and (2) of the 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, 123 S. Ct. 488 (2002). "Substantial evidence is such relevant evidence as a reason-

able mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). When deciding a motion to dismiss, the trial court must view all of the evidence presented "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818, 115 S. Ct. 2565 (1995).

To obtain a conviction for knowingly or intentionally keeping or maintaining a place for the keeping or selling of controlled substances, the State has the burden of proving a defendant: "(1) knowingly or intentionally kept or maintained; (2) a building or other place; (3) being used for the keeping or selling of a controlled substance." *State v. Frazier*, 142 N.C. App. 361, 365, 542 S.E.2d 682, 686 (2001). *See also* N.C. Gen. Stat. § 90-108(a)(7) (2005). Defendant contests only the first element, arguing that the State presented insufficient evidence for a rational juror to conclude that defendant "either lived at the residence or was maintaining the same." We agree.

Whether a person "keeps or maintains" a place, within the meaning of N.C. Gen. Stat. § 90-108(a)(7), requires consideration of several factors, none of which are dispositive. *Frazier*, 142 N.C. App. at 365, 542 S.E.2d at 686. "Factors which may be taken into consideration in determining whether a person keeps or maintains a dwelling include ownership of the property, occupancy of the property, repairs to the property, payment of utilities, payment of repairs, and payment of rent." *State v. Baldwin*, 161 N.C. App. 382, 393, 588 S.E.2d 497, 506 (2003).[1] Furthermore, the word "keeping" in the context of N.C. Gen. Stat. § 90-108(a)(7) "denotes not just possession, but possession that occurs over a duration of time." *State v. Mitchell*, 336 N.C. 22, 32, 442 S.E.2d 24, 30 (1994).

Here, the State presented only the following evidence to establish that defendant kept or maintained the residence at 805 Tryon Avenue:

1. The State misreads *Frazier* when it argues that "the finding of large amounts of cash and numerous amounts of drug paraphernalia" are also factors to be considered in determining whether a defendant kept or maintained premises. *Frazier* only held that such evidence is relevant in determining *the purpose* for which a defendant used a building. *Frazier*, 142 N.C. App. at 366, 542 S.E.2d at 686 ("Factors to be considered in determining whether a particular place is used to 'keep or sell' controlled substances include: a large amount of cash being found in the place; a defendant admitting to selling controlled substances; and the place containing numerous amounts of drug paraphernalia."). Defendant does not challenge the "purpose" element on appeal.

(1) defendant was the sole occupant of the residence at the time of the search warrant's execution; (2) three photographs found in the bedroom showed defendant at various locations within the home; and (3) defendant's North Carolina State Identification Card, social security card, and birth certificate were also discovered in the residence, although none of those items listed 805 Tryon Avenue as defendant's home address.

The State presented no evidence indicating that defendant owned the property, bore any expense for renting or maintaining the property, or took any other responsibility for the residence. In fact, the only evidence specifically relating to the maintenance of the property was the utility bill in the name of defendant's brother.

This Court has routinely held similar evidence to be insufficient to survive a motion to dismiss. *See*, *e.g.*, *State v. Harris*, 157 N.C. App. 647, 651-53, 580 S.E.2d 63, 66-67 (2003) (evidence was insufficient when it showed only that defendant was seen at dwelling several times, bedroom contained some of defendant's personal property, and none of defendant's personal papers listed dwelling as defendant's address); *State v. Kraus*, 147 N.C. App. 766, 768-69, 557 S.E.2d 144, 147 (2001) (evidence was insufficient when defendant was sole occupant of hotel room, possessed access key to that room, and had spent prior evening in room, but no evidence indicated defendant bore expense of renting room); *State v. Bowens*, 140 N.C. App. 217, 221-22, 535 S.E.2d 870, 873 (2000) (evidence was insufficient when defendant was present at dwelling on several occasions; men's clothing, not identified as belonging to defendant, was found in dwelling; and State had made no effort to determine who paid the rent, utilities, or telephone bills), *disc. review denied*, 353 N.C. 383, 547 S.E.2d 417 (2001).

The State's evidence in the present case indicates only that defendant "occupied the property from time to time," *Harris*, 157 N.C. App. at 652, 580 S.E.2d at 66, and provides no indication that defendant kept possession over a duration of time or otherwise took any responsibility whatsoever for the property. The State, however, on appeal, points to the affidavit filed in support of the application for the search warrant, in which the officer stated that a confidential informant had informed him that defendant and his brother were in the business of selling cocaine from 805 Tryon Avenue. Since this affidavit was not admitted at trial, it is immaterial in deciding whether the trial court erred in denying defendant's motion to dismiss.

The trial court thus erred in denying the motion to dismiss the charge of keeping or maintaining a dwelling house for keeping and selling controlled substances, and we reverse defendant's conviction of that charge. Given our resolution of this issue, we need not consider defendant's additional argument that the trial court erred in its instructions on that charge.

II

[2] Defendant next argues that the trial court erred by denying his motion for a continuance. A week before the trial was scheduled to start and nearly a year after defendant was indicted, defendant moved for a continuance in order to locate a former girlfriend to testify on defendant's behalf. The trial court entered a written order signed 10 April 2006, denying defendant's motion.

A motion for a continuance is generally a matter within the trial court's discretion, and a denial is not error absent an abuse of that discretion. *State v. Massey*, 316 N.C. 558, 572, 342 S.E.2d 811, 819-20 (1986). Defendant, therefore, bears the burden of showing that the trial court's ruling was "so arbitrary that it 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).[2]

Here, defendant has not assigned error to any of the findings of fact in the trial court's ruling, and, consequently, those findings are binding on appeal. *State v. Lacey*, 175 N.C. App. 370, 376, 623 S.E.2d 351, 355 (2006). In pertinent part, those findings of fact state:

> 2) That counsel has been court-appointed to represent the defendant for approximately one (1) year;
>
> 3) That sometime during March of 2006, the defendant informed counsel that he wished for an ex-girlfriend to be present to testify;

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2. We note that when the denial of a motion to continue raises a constitutional issue, it presents a question of law that is fully reviewable on appeal. *Massey*, 316 N.C. at 572, 342 S.E.2d at 819-20. Although defendant's brief suggests we should exercise this more stringent standard of review, defendant's assignment of error makes no mention of any constitutional errors, and, therefore, he has waived review of any constitutional error. *See State v. Pendleton*, 175 N.C. App. 230, 231-32, 622 S.E.2d 708, 709 (2005) ("Although defendant argues in his brief that the court's denial [of his motion for a continuance] implicated his constitutional rights, his assignment of error does not refer to any constitutional errors. Defendant has thus waived our consideration of any constitutional error here.").

4) That counsel state[d] in his motion to continue . . . that defense counsel had spoken with defendant several times prior to this matter being raised;

5) That based upon the statements of counsel, the girlfriend is unable to be located prior to [defendant's] trial scheduled to begin this week;

6) That the Court specifically finds that the defendnt [sic] had ample opportunity to notify counsel of the need to have his ex-girlfriend present to testify at this trial and failed to do so in a timely manner, and now she is unable to be located. The Court is not privy to what information this witness has or whether the witness is a necessity for for [sic] the trial.

Based on these findings of fact, focusing on defendant's delay in notifying his attorney, we cannot conclude that the trial court's decision to deny defendant's motion to continue was an abuse of discretion, especially in light of defendant's failure to advise the court why the witness was necessary. *See T.D.R.*, 347 N.C. at 504, 495 S.E.2d at 708-09 (finding no abuse of discretion when defendant failed to explain to trial judge why more than three months was insufficient time for him to secure any necessary evidence, and defendant submitted no affidavits to trial judge indicating what facts might be proven by witness if continuance granted).

In any event, the denial of a motion to continue will be grounds for a new trial only if the "denial was erroneous and [the defendant's] case was prejudiced as a result . . . ." *State v. Gardner*, 322 N.C. 591, 594, 369 S.E.2d 593, 596 (1988). To show prejudice, a defendant must demonstrate that he did not have sufficient time to confer with counsel and to investigate, prepare, and present his defense. *State v. Williams*, 355 N.C. 501, 540, 565 S.E.2d 609, 632 (2002), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808, 123 S. Ct. 894 (2003). To establish that the time allowed was inadequate, the defendant must show how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion. *Id.* at 540-41, 565 S.E.2d at 632.

Here, with respect to prejudice, defendant argues only that his former girlfriend's testimony was "critically important" to establish where defendant actually resided at the time of the arrest. We have, however, reversed defendant's conviction on the charge of knowingly or intentionally maintaining a place for the keeping or selling of con-

trolled substances, and defendant has made no effort to explain how his ex-girlfriend's testimony would have made a difference with respect to the possession charges. As a result, even if the trial court had abused its discretion by denying defendant's motion to continue, "[d]efendant has shown no evidence that the lack of additional time prejudiced his case." *Id.* at 540, 565 S.E.2d at 632. This assignment of error is, therefore, overruled.

No error in part; reversed in part.

Judges HUNTER and ELMORE concur.

GARY P. RAMSEY, PETITIONER v. N.C. DIVISION OF MOTOR VEHICLES, RESPONDENT

No. COA06-931

(Filed 17 July 2007)

1. Appeal and Error— contested case—guidelines

Appellate review of the superior court's consideration of a contested case petition was to determine whether the trial court exercised the appropriate scope of review and whether it did so properly.

2. Administrative Law— contested case-appeal to superior court—standard of review

The superior court applied the correct standard of review to a contested case involving a dismissed DMV enforcement officer where the State Personnel Commission did not adopt the ALJ's decision. The superior court was therefore required to review the official record de novo and to make its own findings of fact and conclusions of law.

3. Public Officers and Employees— dismissal of employee—violation of rule not willful

The superior court did not err on de novo review of the dismissal of a DMV enforcement officer by holding that the officer had violated a rule when he solicted car dealerships for funding for two captains' meetings, but not willfully, and by concluding that his actions did not rise to the level of just cause for dismissal.

Appeal by respondent from judgment entered 6 February 2006 by Judge Nathaniel J. Poovey in Buncombe County Superior Court. Heard in the Court of Appeals 21 February 2007.

Roy Cooper, Attorney General, by Allison A. Pluchos, Assistant Attorney General, for respondent.

Long, Parker, Warren & Jones, P.A., by W. Scott Jones and Robert B. Long, Jr., for petitioner.

ELMORE, Judge.

On 23 May 2002, the North Carolina Division of Motor Vehicles (DMV or respondent) dismissed Gary P. Ramsey (petitioner) from his employment as a Captain with the Enforcement Section of the DMV in District VIII. Respondent dismissed petitioner because petitioner violated a written work order known as General Order No. 24.

General Order No. 24, in relevant part, states:

> Members shall neither solicit nor accept from any person, business or organization any bribe, gift or gratuity, for the benefit of the member, their family or the Enforcement Section if it may reasonably be inferred that the person, business or organization giving the gift:
>
> a. seeks to influence the action of an official nature, or
>
> b. seeks to affect the performance or non-performance of an official duty, or
>
> c. has an interest which may be substantially affected, either directly or indirectly, by the performance or non-performance of an official duty.

At the time the events in question occurred, the Enforcement Section of the DMV held "Captains' Meetings" outside of Raleigh one or two times per year at different locations around the state. All DMV captains and lieutenants from the eight DMV districts attended these meetings, along with personnel from DMV headquarters and representatives from the DMV Commissioner's office. The meetings typically included training sessions and recreational golf outings. Attendees generally stayed at the facility hosting the meeting and were provided some meals. Each attendee paid for his own meals and lodging, but "[t]he evidence is conflicting as to how many, if any, attendees paid out of pocket for golf at the various

Captains' meetings. Golfing fees were not furnished or reimbursed by the State."

Each Captains' Meeting was planned by the captain in charge of the district in which the meeting would be held. Petitioner planned the 1998 and 1999 Captains' Meetings, which were held at the Waynesville Country Club. Petitioner determined that he would not be able to keep the cost per attendant below $52.00 per day, which was the applicable *per diem* allowance at the time. Petitioner then raised additional funds from automobile dealers throughout his district, and used the funds to cover the difference between the actual cost of the meeting and the *per diem* allowance. Petitioner raised a total of $3,500.00 for the 1998 Captains' Meeting and $2,950.00 for the 1999 Captains' Meeting. Automobile dealers also contributed door prizes of greater than *de minimis* value. This fundraising was sanctioned by one of petitioner's supervisors, Lt. Col. William Brinson, who told petitioner "that he should talk to his 'dealer friends' and that 'no Captain was worth his salt' who couldn't get some help from his dealers." The "dealers" referenced by Brinson are automobile dealers regulated by the DMV. Several witnesses corroborated this conversation. In addition, "It was apparent to any reasonable person attending and participating in either the 1998 or 1999 . . . Captains' Meetings that all of the rooms, meals, golf, refreshments, prizes, and gifts provided could not have been provided for within the state per diem [sic] allowance." Previous Captains' Meetings, which petitioner had attended, sometimes provided meals, alcohol, and door prizes without charge.

Brinson's immediate successor, Lt. Col. Michael Sizemore, ordered that certain documents related to questionable fundraising, including petitioner's, "disappear." On Sizemore's order, another DMV employee "brought the documents back to Asheville and ordered that they be thrown away by one of the inmates of the N.C. Department of Correction working for DMV, who placed the documents in a garbage dumpster." Before the dumpster was emptied, the documents "were discovered by another employee of DMV who removed them from the dumpster and provided them to Petitioner's counsel."

Petitioner was dismissed because his solicitation of funds for the 1998 and 1999 Captains' Meetings violated General Order No. 24. He filed a petition for contested case hearing, which was heard before an administrative law judge (ALJ). The ALJ made extensive findings of fact and concluded that "a reasonable person in Petitioner's circumstances existing at the time would more likely than not expect to be

warned that conduct which he had observed as a pattern and practice at DMV, with apparent acceptance by superiors in DMV, was sufficient to compel his discharge." The ALJ found "that sufficient evidence ha[d] been produced to constitute just cause for Petitioner's dismissal but that, considering Petitioner's outstanding work record and his good faith belief that his actions were within the accepted pattern and practice of the DMV Enforcement Section . . . [p]etitioner should be reinstated to his position." In addition, the ALJ ordered respondent to "pay Petitioner back pay and all benefits to which he would have been entitled but for his dismissal from the date of his dismissal on May 23, 2002 until the date of his reinstatement . . . ." Petitioner did not receive any attorneys' fees in connection with this case and was disciplined by receipt of a written warning.

Respondent appealed the ALJ's decision to the State Personnel Commission (the Commission), who reversed the ALJ's decision after a brief hearing. The Commission adopted the ALJ's findings of fact, but concluded that respondent had just cause to dismiss petitioner.

Petitioner then appealed to the Buncombe County Superior Court pursuant to N.C. Gen. Stat. § 150B-51(c). The superior court made substantial and detailed findings of fact and conclusions of law. It ordered that petitioner be reinstated to his position at the DMV; that respondent "pay Petitioner back pay and all benefits to which he would have been entitled . . . from the date of his dismissal on 23 May 2002 until the date of his reinstatement"; that petitioner receive a written warning; that respondent pay costs, except for petitioner's attorneys' fees; and that the matter be remanded to the State Personnel Commission. Respondent appeals from the order.

Respondent argues that the superior court erred by reversing the Commission's order. Specifically, respondent notes that, "Like OAH and the SPC[,] the trial court concluded that Petitioner's actions violated a known work rule, General Order No. 24." However, "the trial court concluded that DMV did not have just cause to dismiss Petitioner thereby ordering his reinstatement along with a written warning." Respondent argues that the trial court misapplied 25 N.C.A.C. 1B.0431 by ordering reinstatement, back pay, and benefits without finding a lack of substantive just cause. Respondent also argues that the superior court applied the wrong standard of review. We disagree.

[1] Our review of the superior court's order is governed by N.C. Gen. Stat. § 150B-52, which states, in relevant part, "The scope of review to

be applied by the appellate court under this section is the same as it is for other civil cases. In cases reviewed under G.S. § 150B-51(c), the court's findings of fact shall be upheld if supported by substantial evidence." N.C. Gen. Stat. § 150B-52 (2005). "N.C. Gen. Stat. § 150B-51(c) (2005) governs judicial review in contested case petitions filed after 1 January 2001. The provision was added to the North Carolina Administrative Procedures Act (APA) in 2000 . . . ." *Rainey v. N.C. Dep't of Pub. Instruction*, 181 N.C. App. 666, 670, 640 S.E.2d 790, 794 (2007). Petitioner commenced this case on 4 October 2002; therefore we apply section 150B-51(c). In turn, N.C. Gen. Stat. § 150B-52 "governs our Court's review of the trial court's judgment in a case arising from a contested case petition . . . ." *Id.* Accordingly, because this case arises from a contested case petition, our review is bound by the guidelines set out in section 150B-52.

"Pursuant to N.C. Gen. Stat. § 150B-52, our review of a trial court's consideration of a final agency decision is to determine whether the trial court committed any errors of law which would be based upon its failure to properly apply the review standard set forth in N.C. Gen. Stat. § 150B-51." *Sherrod v. N.C. Dept. of Human Resources*, 105 N.C. App. 526, 530, 414 S.E.2d 50, 53 (1992). Our review of the superior court's order for errors of law is a "twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Rainey*, 181 N.C. App. at 671, 640 S.E.2d at 794 (citation omitted).

[2] Accordingly, we first determine whether the superior court "exercised the appropriate scope of review." According to its order, the superior court conducted "a complete de novo review of the entire record." N.C. Gen. Stat. § 150B-51(c) provides that when a superior court reviews

> a final decision in a contested case in which an administrative law judge made a decision, in accordance with G.S. 150B-34(a), and the agency does not adopt the administrative law judge's decision, the court shall review the official record, *de novo*, and shall make findings of fact and conclusions of law. In reviewing the case, the court shall not give deference to any prior decision made in the case and shall not be bound by the findings of fact or the conclusions of law contained in the agency's final decision. The court shall determine whether the petitioner is entitled to the relief sought in the petition, based upon its review of the official record. The court reviewing a final decision under this subsection

> may adopt the administrative law judge's decision; may adopt, reverse, or modify the agency's decision; may remand the case to the agency for further explanations under G.S. 150B-36(b1), 150B-36(b2), or 150B-36(b3), or reverse or modify the final decision for the agency's failure to provide the explanations; and may take any other action allowed by law.

N.C. Gen. Stat. § 150B-51(c) (2005). In this contested case, the Commission did not adopt the ALJ's decision, and therefore the superior court was required to review the official record *de novo* and to make its own findings of fact and conclusions of law. We therefore hold that the superior court applied the correct standard of review, and we now proceed to the second prong of our analysis, whether the superior court "properly exercised" its *de novo* review.

[3] Although respondent assigns error to the superior court's findings of fact, it argues that the superior court erred by concluding that petitioner's actions did not rise to the level of "just cause" for his dismissal. Respondent's arguments seem to hinge on a perceived inconsistency between the trial court concluding that petitioner violated General Order No. 24, and also concluding that this violation did not rise to the level of unacceptable personal conduct. This apparent disconnect is easily resolved by reference to the Administrative Code.

An employee "may be warned, demoted, suspended or dismissed by the appointing authority" only for "just cause." 25 N.C.A.C. 1J.0604(a) (2006). "There are two bases for the discipline or dismissal of employees under the statutory standard for 'just cause' as set out in G.S. 126-35." 25 N.C.A.C. 1J.0604(b) (2006). The relevant basis here is "[d]iscipline or dismissal imposed on the basis of unacceptable personal conduct." 25 N.C.A.C. 1J.0604(b)(2) (2006). Unacceptable personal conduct is defined, in relevant part, as:

> (1) conduct for which no reasonable person should expect to receive prior warning; or
>
> (2) job-related conduct which constitutes a violation of state or federal law; or
>
> * * *
>
> (4) the willful violation of known or written work rules; or
>
> (5) conduct unbecoming a state employee that is detrimental to state service

25 N.C.A.C. 1J.0614(i)(1)-(2), (4)-(5) (2006).

Although the superior court concluded that petitioner "did violate General Order Number 24," it also concluded that petitioner "held a good faith belief that his actions were within the accepted pattern and practice of employees in the DMV Enforcement Section in funding captains' meetings . . . ." The superior court further concluded that "a reasonable person in Petitioner's position at that time (1998 and 1999) would have expected to be warned before being dismissed for the actions described herein." In relevant part, the Administrative Code defines unacceptable personal conduct as "*willful* violation of known or written work rules." 25 N.C.A.C. 1J.0614(i)(4) (2006) (emphasis added). Here, the superior court concluded only that petitioner violated the rule, not that petitioner violated the rule *willfully*. This is consistent with the superior court's other conclusions because one cannot simultaneously have a "good faith belief" that he is following a rule and willfully violate that rule. Accordingly, we hold that the superior court did not misapply the law by concluding that petitioner both violated the rule and did not commit unacceptable personal conduct.

Respondent also argues that the superior court erred by "second guessing" the "disciplinary actions it cho[se] to take against an employee when the employee's conduct constitutes 'just cause' within the meaning of 25 N.C.A.C. 1J.0604." Having already determined that the superior court did not err in concluding that petitioner's conduct did not constitute "just cause," this argument is moot. Furthermore, N.C. Gen. Stat. § 150B-51(c) states that "[t]he court reviewing a final decision under this subsection may adopt the administrative law judge's decision; may adopt, reverse, or modify the agency's decision . . . and may take any other action allowed by law." N.C. Gen. Stat. § 150B-51(c) (2005). The superior court adopted the decision made by the ALJ,[1] a proper action anticipated by the statute.

Accordingly, we affirm the decision of the superior court.

Affirmed.

Judges TYSON and GEER concur.

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1. We note that the superior court did not find just cause for petitioner's dismissal, but the ALJ did. However, the ALJ nevertheless ordered petitioner to be reinstated with back pay and benefits because of his "outstanding work record and his good faith belief that his actions were within the accepted pattern and practice of the DMV Enforcement Section."

CB&H BUSINESS SERVICES, L.L.C., PLAINTIFF v. J.T. COMER CONSULTING, INC. AND CBH PENSIONS, INC., DEFENDANTS

No. COA06-1383

(Filed 17 July 2007)

Contracts— sale of business—change of name

Changing the name of a business which had been sold from "CB&H" to "CBH" did not comply with the agreement's provision allowing the buyer to use the seller's "CB&H" name for only one year and requiring the buyer to change the name after that time. The clear purpose of the agreement was to allow the buyer to transition the business to itself, ceasing use of the old name (the letters were not random, but stood for the name of the established firm) and using its own name. Defendant attempted instead the subterfuge of removing the ampersand from the name. The trial court should have enforced the agreement, and erred by granting summary judgment for defendants.

Judge STEPHENS dissenting.

Appeal by plaintiff from judgment entered 28 July 2006 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 April 2007.

Hamilton Moon Stephens Steele & Martin, P.L.L.C., by T. Jonathan Adams and Mark R. Kutny, and McSweeny, Crump, Childress & Gould, P.C., by R. Paul Childress, Jr. and Katrina Clark Forrest, for plaintiff-appellant.

Arthurs & Foltz, by Douglas P. Arthurs, for defendants-appellees.

STEELMAN, Judge.

The presence of quotation marks around a phrase in a contract does not require a court to construe the phrase in a technical sense. The trial court erroneously granted summary judgment for defendants in this matter.

Background

The facts in this matter are not in dispute. On 14 December 2001, CB&H Business Services, L.L.C. ("plaintiff"), and J.T. Comer Consulting, Inc. ("Comer"), entered into an Asset Purchase

Agreement ("agreement"). The agreement provided for plaintiff to sell to Comer its pension administration division, CB&H Employee Benefits Group, in exchange for $400,000.00. The term "CB&H" refers to the accounting firm Cherry, Bekaert and Holland, LLP, which joined in the agreement for the sole purpose of agreeing not to compete with Comer for a period of five years. Two sections of the agreement referenced Comer's use of the name CB&H:

> 2.6 Goodwill. The goodwill associated with the Business, the exclusive right of Buyer to represent itself as carrying on the Business previously conducted by Seller, except as otherwise agreed herein, the right for one (1) year following closing to use the names CB&H Employee Benefits Group and CB&H Pension Services, Inc. owned by seller. . . .
>
> 13.2 Successors and Assigns. Neither this Agreement nor any of the rights or obligations hereunder may be assigned by a party without the written consent of the other party. Subject to the foregoing, the provisions hereof shall inure to the benefit of, and be binding upon, the successors, permitted assigns, heirs, executors and administrators of the parties hereto. Provided, however, Buyer is hereby authorized to assign its rights under this contract to an affiliate which is in the process of being formed under the name of CB&H Pension Services, Inc. so long as the name of this corporation is changed one (1) year following Closing to remove "CB&H" from its name.

On or about 11 December 2001, CB&H Pension Services, Inc., a new North Carolina corporation, was formed by filing of articles of incorporation with the Secretary of State. Comer assigned its rights under the agreement to the new corporation. By letter dated 13 August 2002, the North Carolina CB&H Pension Services, Inc., submitted to plaintiff its new logo and proposed name of "CBH Pensions" (with no ampersand). The letter stated "Please advise that the change is acceptable under our CB&H contract." On 28 August 2002, plaintiff wrote to counsel for Comer and the North Carolina CB&H Pension Services, Inc. (together, hereinafter "defendants"), and advised "we do not believe that the elimination of the ampersand sign, retaining CBH is in the spirit of our agreement per Section 13.2." By subsequent letter, plaintiff advised defendants that plaintiff's former clients were confused as to whether plaintiff was still handling their accounts. Under the terms of the agreement defendants were required to remove "CB&H" from the name of the North Carolina CB&H Pension

Services, Inc., by 14 December 2002. On 5 February 2003, the name of the North Carolina CB&H Pension Services, Inc., was changed to CBH Pensions, Inc.

On 30 November 2005, plaintiff filed a complaint against Comer and its assignee CBH Pensions, Inc., seeking: (1) specific performance of the terms of the agreement; (2) a declaratory judgment that defendants breached the agreement and should be required to remove any reference to CBH or any variation from their corporate name; (3) costs; (4) attorney fees; and (5) interest. Plaintiff asserted no claim for monetary damages. On 7 June 2006, defendants filed a motion for summary judgment. On 30 June 2006, plaintiff filed a motion for summary judgment. On 25 July 2006, the trial court granted defendants' motion for summary judgment and dismissed plaintiff's complaint with prejudice. Plaintiff appeals.

Analysis

In its sole argument on appeal, plaintiff contends that the trial court erroneously denied its motion for summary judgment. We agree.

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). "On appeal, an order allowing summary judgment is reviewed *de novo*." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004).

Contracts must be interpreted according to their entirety or "four corners." *Stephens Co. v. Lisk*, 240 N.C. 289, 293, 82 S.E.2d 99, 102 (1954) (internal citation omitted). "It is well settled that where the language of a contract is plain and unambiguous, it is for the court and not the jury to declare its meaning and effect." *Lowe v. Jackson*, 263 N.C. 634, 636, 140 S.E.2d 1, 2 (1965). "The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Gould Morris Electric Co. v. Atlantic Fire Insurance Co.*, 229 N.C. 518, 520, 50 S.E.2d 295, 297 (1948). "[P]unctuation or the absence of punctuation in a contract is ineffectual to control its construction as against the plain meaning of the language." *Huffman v. Occidental Life Ins. Co.*, 264 N.C. 335, 337-38, 141 S.E.2d 496, 498 (1965); *see also* 17A Am.

JUR. 2d *Contracts* § 366 (2006).

Defendants assert that because the term "CB&H" is surrounded by quotation marks in section 13.2 of the agreement that this requires that we give it a technical meaning. They argue that any modification of the term "CB&H" changes the term, and that the removal of the ampersand complies with the agreement. In support of this argument, defendants cite the case of *Rawls v. Rideout*, 74 N.C. App. 368, 328 S.E.2d 783 (1985), for the concept that: "Generally words set off in quotation marks should be given their technical meanings." We have thoroughly reviewed *the Rawls* case and can find no such holding, either express or implied, in that opinion. *Rawls* does discuss punctuation, but discusses parentheses, and not quotation marks. It holds that "parentheses are used to set off supplementary or illustrative material; they 'tend to minimize the importance of the elements they enclose.' " *Id.* at 372, 328 S.E.2d at 786 (internal citation omitted). We find this holding to be inapplicable to the issues presented in the instant case.

A review of the entire agreement in the case *sub judice* reveals that Comer or its assigns could use the names "CB&H Employee Benefits Group" and "CB&H Pension Services, Inc.," for a period of one year following 14 December 2001. The clear purpose of this provision was to allow Comer to transition the business from plaintiff to itself. The letters "CB&H" were not random letters in the names of these entities. They stood for "Cherry, Bekaert & Holland," a well-known and established firm of certified public accountants. At the end of one year, Comer and its assigns were to cease using "CB&H" in their name, and use their own name. This, defendants were not willing to do. Instead, defendants attempted to engage in the subterfuge of removing the ampersand from the name, and asserting that this complied with the provisions of section 13.2 of the agreement. This is nonsense. The critical portion of the name was not the ampersand, but the letters C-B-H, which stood for Cherry, Bekaert & Holland. It is clear from reading the entire agreement which includes the non-compete clause executed by Cherry, Bekaert & Holland, LLP, that this was the intent of the parties. The trial court should have enforced the agreement and its failure to do so was error.

We do not reach defendant's argument that ambiguities in an agreement should be construed against the drafter because we hold that there is no ambiguity in the agreement. *See Novacare Orthotics & Prosthetics E., Inc. v. Speelman*, 137 N.C. App. 471, 476, 528 S.E.2d 918, 921 (2000).

Conclusion

The trial court's order granting summary judgment in favor of defendants and dismissing plaintiff's complaint is reversed. This matter is remanded to the trial court for entry of judgment in favor of plaintiff, directing that defendants shall immediately remove any reference to "CBH" or any variation thereof from their corporate names or aliases. There being no basis for attorney's fees asserted in the complaint, and there being no claim for monetary damages, and thus no basis for an award of interest, the trial court's dismissal of these claims is affirmed.

REVERSED in part, AFFIRMED in part.

Chief Judge MARTIN concurs.

Judge STEPHENS dissents in a separate opinion.

STEPHENS, Judge, dissenting.

In its sole argument on appeal, Plaintiff contends that the trial court erroneously denied its motion for summary judgment. I disagree.

"It is the simple law of contracts that as a man consents to bind himself, so shall he be bound." *Troitino v. Goodman*, 225 N.C. 406, 414, 35 S.E.2d 277, 283 (1945) (quotations and citations omitted). "Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution." *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973) (citations omitted). "If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) (citing *Lane*, 284 N.C. at 410, 200 S.E.2d at 624-25). "When the language of a contract is clear and unambiguous, effect must be given to its terms, and the court, under the guise of constructions, cannot reject what the parties inserted *or insert what the parties elected to omit*." *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962) (emphasis added) (citing *Hartford Acc. & Indem. Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946)).

The language of the contract in the case at bar is plain, unambiguous, and clear. One year following closing, CB&H Pension

Services, Inc. was required "to remove 'CB&H' from its name." The contract does not require CB&H Pension Services, Inc. to change its name such that it cannot "easily be confused with a CB&H entity[,]" nor does it require CB&H Pension Services, Inc. "to remove 'CB&H' *or 'CBH'* from [its] name[,]" (emphasis added) as Plaintiff contends. The majority takes Plaintiff's contentions one step further, however, concluding that Defendants must "remove any reference to 'CBH' *or any variation thereof* from their corporate names or aliases." (Emphasis added). This is illogical. Surely the contract does not prevent Defendants' use of "BHC"—a "variation" of "CBH"—in a corporate name. Plaintiff and the majority would have this Court insert words into an otherwise plain and unambiguous agreement. It would have been a simple matter for the parties themselves to insert such words into their agreement. This, the parties did not do. This Court should not do it for them. I vote to affirm the trial court.

ELROY FRINK, ADMINISTRATOR OF THE ESTATE OF DEWAYNE DEVON FRINK; AND THE STATE OF NORTH CAROLINA, EX REL. ELROY FRINK, ADMINISTRATOR OF THE ESTATE OF DEWAYNE DEVON FRINK, PLAINTIFFS v. CHRIS BATTEN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF FOR COLUMBUS COUNTY; COLUMBUS COUNTY, NORTH CAROLINA, A BODY POLITIC; KENNETH SEALEY, IN HIS OFFICIAL CAPACITY AS SHERIFF FOR ROBESON COUNTY; ROBESON COUNTY, NORTH CAROLINA, A BODY POLITIC; ALEXANDER SINGLETARY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COLUMBUS COUNTY JAIL ADMINISTRATOR; TERRY HARRIS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHIEF JAILER, ROBESON COUNTY DETENTION CENTER; TAMMY BRITT, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS MEDICAL OFFICER FOR ROBESON COUNTY DETENTION CENTER, JAIL HEALTH SERVICES; CONNIE HALL, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS NURSE, ROBESON COUNTY DETENTION CENTER, JAIL HEALTH SERVICES; BILLY JOE FARMER, IN HIS OFFICIAL CAPACITY AS COUNTY ADMINISTRATOR OF COLUMBUS COUNTY; AND WESTERN SURETY COMPANY, SURETY FOR SHERIFF CHRIS BATTEN AND SURETY FOR SHERIFF KENNETH SEALEY, DEFENDANTS

No. COA06-633

(Filed 17 July 2007)

Venue— suicidal inmate held in two counties—venue where action arose in part

The trial court appropriately found venue to be proper in Robeson County in a wrongful death action against Robeson and Columbus Counties and county officials where an inmate who had been held in both counties committed suicide in the Columbus County jail. Under N.C.G.S. § 1-77(2), actions against a public

officer must be tried in the county where the cause, or some part thereof, arose. Here, one set of defendants will be required to litigate the case outside their home county, but the cause of action arose at least in part in Robeson County and venue was proper in that county.

Appeal by defendants from order entered 7 March 2006 by Judge Jack A. Thompson in Robeson County Superior Court. Heard in the Court of Appeals 7 February 2007.

Becton, Slifkin & Bell, by Charles L. Becton and Judith M. Pope; and Thigpen, Blue, Stephens & Fellers, by Daniel T. Blue, for plaintiffs-appellees.

Womble Carlyle Sandridge & Rice, PLLC, by Mark A. Davis, for defendants-appellants Chris Batten, Columbus County, Alexander Singletary, and Billy Joe Farmer.

Sumrell, Sugg, Carmichael, Hicks & Hart, P.A., by Scott C. Hart, for defendants-appellees Kenneth Sealey, Robeson County, Terry Harris, Tammy Britt, and Connie Hall.

GEER, Judge.

Defendants Columbus County, Chris Batten (the Columbus County Sheriff), Alexander Singletary (the Columbus County Jail Administrator), and Billy Joe Farmer (the Columbus County Administrator) (collectively, the "Columbus County defendants") appeal the denial of their motion to transfer venue. This action arises out of the suicide of Dewayne Devon Frink, which plaintiffs allege was the result of acts and omissions of the Columbus County defendants and the defendants employed by Robeson County (collectively, the "Robeson County defendants").

Under N.C. Gen. Stat. § 1-77 (2005), actions against public officers "must be tried in the county where the cause, *or some part thereof*, arose . . . ." (Emphasis added.) Significantly, in this case, the defendants come from two counties. As a result, one of the sets of defendants will be required to litigate the case outside their home county. While plaintiffs could have filed suit in Columbus County, we agree with the trial court that plaintiffs' causes of action arose at least in part in Robeson County and venue is, therefore, proper in that county. Accordingly, we affirm the denial of the Columbus County defendants' motion to transfer venue to Columbus County Superior Court.

Background

Plaintiffs brought this action in Robeson County Superior Court to recover for the alleged wrongful death of Dewayne Devon Frink. The named defendants include Robeson County, Columbus County, and various public officials and employees of the respective counties. In the complaint, plaintiffs allege that the following events took place.

On 21 April 2003, Frink, the decedent, was taken into custody at the Columbus County jail and, shortly afterwards, was transferred to the Robeson County Detention Center pursuant to an agreement between the two counties. In approximately June 2003, while housed at the Robeson County facility, Frink began complaining that his "mind [was] just not right." Over the course of several weeks, Frink made apparent attempts to commit suicide by trying to hang himself. Plaintiffs allege that in early July 2003, officials at the Robeson County facility contacted the Columbus County jail, explained to their Columbus County counterparts that Frink was suicidal, and indicated that they wished to return Frink to Columbus County's custody.

On 7 July 2003, Frink was transported back to the Columbus County jail by a Columbus County official without his medical records also being transferred. Upon his arrival at the jail, he was placed within the general inmate population, which, at that time, exceeded the jail's capacity by 40 inmates. Frink hung himself and died in the early morning hours of 9 July 2003.

The Columbus County defendants filed a motion to transfer venue to Columbus County Superior Court or, in the alternative, to sever plaintiffs' claims. In a written order, Judge Jack A. Thompson denied the motion, concluding that severance of the action was not warranted and that "Robeson County is a proper venue for the claims asserted against all defendants in this action, pursuant to N.C.G.S. §§ 1-77(2) and 1-83 . . . ." The Columbus County defendants have appealed the denial of their motion to change venue.

Discussion

Since the Columbus County defendants argue only that the motion to transfer venue was wrongly denied and present no argument regarding their alternative motion to sever plaintiffs' claims, the sole matter before us is the question of venue. Although the order denying the motion to change venue is an interlocutory order, defend-

ants are entitled to immediate appellate review because "a denial of a motion to transfer venue affects a substantial right." *Hyde v. Anderson*, 158 N.C. App. 307, 309, 580 S.E.2d 424, 425, *disc. review denied*, 357 N.C. 459, 585 S.E.2d 759 (2003).

On appeal, the Columbus County defendants assert a right to remove the trial to Columbus County under N.C. Gen. Stat. § 1-77(2):

> Actions for the following causes *must be tried in the county where the cause, or some part thereof, arose*, subject to the power of the court to change the place of trial, in the cases provided by law:
>
> . . . .
>
> (2) Against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid does anything touching the duties of such officer.

(Emphasis added.) Where, as here, a "defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county," N.C. Gen. Stat. § 1-83 (2005), "the court is given the authority to change the place of trial if 'the county designated for that purpose is not the proper one.' " *Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 122, 535 S.E.2d 397, 401 (2000) (quoting N.C. Gen. Stat. § 1-83(1)).

The Columbus County defendants argue that plaintiffs' causes of action arose solely in Columbus County because the only tangible injury in this case—namely, Frink's death—occurred in Columbus County. Not surprisingly, the Robeson County defendants object to having "the entirety of this case . . . moved to Columbus County." They contend that "actionable conduct took place in two specific locations at two specific times i.e., Plaintiff claims the Robeson County Defendants acted wrongfully while Plaintiff's decedent was an inmate in the Robeson County Jail, and that the Columbus County Defendants acted wrongfully while he was an inmate in the Columbus County Jail." Because "all of the actions alleged against [the Robeson County defendants] by Plaintiff[s] took place in the course of their official duties in Robeson County," they argue that venue is proper in Robeson County.

The Columbus County defendants' argument rests solely on their contention that an action arises, for purposes of venue, where the injury occurred. Our courts have, however, long recognized, in apply-

ing § 1-77, a general rule that " 'the cause of action arises in the county where the *acts or omissions* constituting the basis of the action occurred.' " *Wells v. Cumberland County Hosp. Sys., Inc.*, 150 N.C. App. 584, 589, 564 S.E.2d 74, 77 (2002) (emphasis added) (quoting *Coats v. Sampson County Mem'l Hosp., Inc.*, 264 N.C. 332, 334, 141 S.E.2d 490, 492 (1965)).

The Columbus County defendants' contention was specifically rejected in *Cecil v. City of High Point*, 165 N.C. 431, 433, 81 S.E. 616, 617 (1914), in which our Supreme Court construed a predecessor version of N.C. Gen. Stat. § 1-77 that included the same phrase at issue here: "where the cause of action or *some part thereof* arose." The plaintiff in *Cecil* was a Davidson County landowner who brought suit in Davidson County against the City of High Point, a Guilford County municipality, for the city's sewage discharges in Guilford County that ultimately injured the plaintiff's lands downstream in Davidson County. In holding that Guilford County was the proper venue because that county was where the city's harmful conduct took place, the Court recognized "that where the cause of an alleged grievance is situate or exists in one State or county and the injurious results take effect in another, the courts of the former have jurisdiction." *Id. See also Murphy v. City of High Point*, 218 N.C. 597, 600, 12 S.E.2d 1, 3 (1940) (where the "alleged negligent and wrongful acts" of the Guilford County-based municipality "were committed by the city through its officers and employees within Davidson County[,] . . . the cause of action, if any, 'arose' in [Davidson] [C]ounty"); *Wells*, 150 N.C. App. at 589, 564 S.E.2d at 78 (where "plaintiff alleged no acts or omissions in other locations" except Cumberland County, transfer of venue to Cumberland County was proper).

The Columbus County defendants cite only *Morris v. Rockingham County*, 170 N.C. App. 417, 612 S.E.2d 660 (2005), in support of their position. *Morris* involved a plaintiff who had sued Rockingham County and two emergency medical technicians ("EMTs") in Forsyth County for injuries suffered when the Rockingham County EMTs negligently unloaded the plaintiff from an ambulance at a Forsyth County hospital. Consistent with the long-standing rule, this Court stressed: "The paramedics' official duties brought them to Forsyth County, and their acts or omissions gave rise to a cause of action in Forsyth County." *Id.* at 420, 612 S.E.2d at 663.

The Columbus County defendants, however, seize on the Court's further observation in *Morris* that any negligence was not actionable

until plaintiff was injured, and the plaintiff's "injury occurred and the cause of action arose in Forsyth County." *Id.* We do not believe that the *Morris* panel intended to alter the "general rule" set forth in *Wells* especially since the Court stated: "Moreover, '[a] broad, general rule . . . is that the cause of action arises in the county where the acts or omissions constituting the basis of the action occurred.' " *Id.* (quoting *Coats*, 264 N.C. at 334, 141 S.E.2d at 492). Indeed, the actual holding of the Court was: "The cause of action arose in Forsyth County because 'the acts [and] omissions constituting the basis of the action occurred' in Forsyth County." *Id.* at 421, 612 S.E.2d at 664 (alteration in original) (quoting *Coats*, 264 N.C. at 334, 141 S.E.2d at 492).[1]

In accordance with the longstanding general rule, the pertinent question under N.C. Gen. Stat. § 1-77 is the geographical location of the acts and omissions giving rise to plaintiffs' cause of action. Moreover, § 1-77, by providing that venue exists "where the cause, or some part thereof, arose," acknowledges that those acts and omissions may arise in multiple counties.

Here, the Columbus County defendants do not seriously dispute that plaintiffs have alleged acts and omissions by the Robeson County defendants that occurred in Robeson County. Although the Columbus County defendants contend that the trial court made inadequate findings of fact, we believe that the court's finding that acts of negligence began while Mr. Frink was incarcerated in Robeson County is sufficient to support its ultimate determination that venue existed in Robeson County under N.C. Gen. Stat. § 1-77(2).[2]

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1. Although *Morris* could not overrule Supreme Court or prior Court of Appeals precedent, there is no reason, given this holding, to presume that the opinion attempted to do so. In *Morris*, the "injury" occurred simultaneously with the negligent "acts and omissions" that gave rise to the cause of action. The Court noted that the plaintiff "was injured when the paramedics failed to properly remove the stretcher, allowing 'the head of the stretcher containing [plaintiff] to bounce off the center step of the ambulance and slam to the ground some three to four feet below.' " 170 N.C. App. at 420, 612 S.E.2d at 663. The language relied upon by the Columbus County defendants then followed immediately thereafter: "Thus, the injury occurred and the cause of action arose in Forsyth County." *Id.*

2. The Columbus County defendants also challenge the trial court's determination that the two sets of County defendants are "joint tortfeasors and, as such, are jointly and severally liable." Because this finding of fact is not necessary to a determination of where the action arose, it is immaterial to our consideration whether the trial court erred in denying the motion to transfer venue. The Columbus County defendants' remaining challenges to the findings of fact hinge on their erroneous contention that the place of injury determines where a cause of action arose for venue purposes and, therefore, are resolved by our discussion above.

In short, even though the complaint also alleges acts and omissions that occurred in Columbus County, since "some part" of plaintiffs' cause of action arose in Robeson County, the trial court appropriately found venue to be proper in Robeson County. We, therefore, affirm the order denying the motion to change venue.

Affirmed.

Judges TYSON and ELMORE concur.

RETHEA C. MASSEY, PETITIONER v. DOUGLAS A. HOFFMAN, RESPONDENT

No. COA06-1338

(Filed 17 July 2007)

1. Pleadings— motion to amend—allowance after trial—failure to state a claim added

The trial court abused its discretion in an action seeking access to grave sites by allowing respondent's motion to amend to add a motion to dismiss for failure to state a claim after a trial. N.C.G.S. § 1A-1, Rule 12(h)(2) clearly provides that a motion to dismiss under Rule 12 (b)(6) may be made in a pleading or at a trial on the merits; here, although the trial court had not entered a written judgment, a judgment had been rendered in favor of petitioner and the trial on the merits had concluded.

2. Cemeteries— access to grave site—not a taking

In a case decided on other grounds, the Court of Appeals stated that N.C.G.S. § 65-74 (which provides for access to another's property for the purposes of discovering, restoring, maintaining or visiting a grave) is a proper exercise of a police power and therefore not subject to the constitutional and fundamental provision that private property shall not be taken for a public use without just compensation.

Appeal by petitioner from order entered 28 April 2006 by Judge Orlando F. Hudson, Jr., in Wake County Superior Court. Heard in the Court of Appeals 26 April 2007.

Kirk, Kirk, Howell, Cutler & Thomas, L.L.P, by C. Terrell Thomas, Jr., and John W. Welch, Jr., for petitioner appellant.

Boxley, Bolton, Garber & Haywood, L.L.P, by Ronald H. Garber, for respondent appellee.

Attorney General Roy Cooper, by Solicitor General Christopher G. Browning, Jr., and Special Deputy Attorney General Mark A. Davis, for the State.

McCULLOUGH, Judge.

On 27 September 2004, Rethea Massey ("petitioner") filed a petition with the Wake County Clerk of Superior Court seeking access to Douglas Hoffman's ("respondent") property at 3524 Hopkins Chapel Road in Zebulon, North Carolina, for the purpose of restoring, maintaining and visiting the grave sites of her relatives under N.C. Gen. Stat. § 65-75 (2005). An amended petition was thereafter filed on 4 October 2004 which alleged that respondent is the owner of property located at 3524 Hopkins Chapel Road which was formerly owned by petitioner's grandparents, Early Thomas Carter and Mary Amanda Ferrell Carter, and is the current site of petitioner's grandparents' graves. The allegations in the petition further set forth that two or three stillborn children born to petitioner's aunt, Mabel Carter Perry, were also buried on the subject property beside the grave sites of petitioner's grandparents. Respondent refused to consent to allow petitioner to access his property for the purpose of restoring, maintaining and visiting the grave sites of her relatives and petitioner is unable to access the grave sites without entering upon respondent's property. Neither the order nor transcript is contained in the record. However, both parties agree that the clerk entered an order granting petitioner access to the grave sites at the hearing before the clerk and respondent gave notice of appeal.

A bench trial was thereafter held in Wake County Superior Court on 7 March 2006. At the close of the evidence and after hearing oral arguments, the court announced its ruling granting petitioner access to respondent's property for the purpose of restoring, maintaining and visiting the grave sites of her relatives and directed counsel for petitioner to draw up an order. Before a written order was entered by the court, but after the close of the evidence and rendition of judgment by Judge Orlando Hudson, respondent filed a motion to dismiss, a motion for relief from judgment or order, and a motion to amend on 21 March 2006. The motion sought to amend respondent's answer by adding allegations with regard to N.C. Gen. Stat. § 65-75; a motion to dismiss for failure to state a claim upon which relief can be granted

under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2005); the defense that N.C. Gen. Stat. § 65-75 is unconstitutional, unenforceable and in violation of the fundamental law of North Carolina; and seeking a declaratory judgment. On 28 April 2006, Judge Orlando Hudson entered an order in which he allowed the motion to amend the answer and dismissed the petition for failure to state a claim upon which relief may be granted, ruling that N.C. Gen. Stat. § 65-75 "violates the fundamental law, the common law, Article I, Section 19 of the Constitution of the State of North Carolina, and Amendments 5 and 14 of the Constitution of the United States of America[.]" From entry of that order, petitioner appeals.

[1] Petitioner contends on appeal that the trial court abused its discretion in allowing respondent's motion to amend after the hearing on the merits and erred in granting respondent's untimely motion under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

"Whether a motion to amend a pleading is allowed or denied is addressed to the sound discretion of the trial court and is accorded great deference." *North River Ins. Co. v. Young*, 117 N.C. App. 663, 670, 453 S.E.2d 205, 210 (1995). A motion to amend is not reviewable on appeal absent a showing of abuse of discretion. *Dept. of Transportation v. Bollinger*, 121 N.C. App. 606, 609, 468 S.E.2d 796, 797-98 (1996). "Although a trial court is not required to state specific reasons for denial of a motion to amend, reasons that would justify a denial are '(a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments.' " *Chicopee, Inc. v. Sims Metal Works*, 98 N.C. App. 423, 430, 391 S.E.2d 211, 216 (citations omitted), *disc. reviews denied*, 327 N.C. 426, 395 S.E.2d 674, *disc. review allowed*, 327 N.C. 426, 395 S.E.2d 675 (1990), *withdrawn*, 328 N.C. 329, 402 S.E.2d 826 (1991).

N.C. Gen. Stat. § 1A-1, Rule 12(h)(2) states that a party may make a motion to dismiss for failure to state a claim under which relief may be granted under Rule 12(b)(6) "in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." N.C. Gen. Stat. § 1A-1, Rule 12(h)(2). While our Court has long afforded great deference to trial courts in granting motions to amend, where there is a clear abuse of discretion, this Court must reverse the ruling of the lower court.

In the instant case, the trial court granted the motion to amend allowing respondent to amend the pleading to include a motion to dis-

miss for failure to state a claim upon which relief may be granted under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Rule 12(h)(2) clearly provides that a motion to dismiss under Rule 12(b)(6) may be made in a pleading or at the trial on the merits. It is clear that the trial on the merits had concluded where the trial judge announced his ruling granting the relief sought by petitioner and ordering petitioner to draft an order which would thereafter be entered as the written order by the court. See *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737, *disc. review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997) (stating that the judge renders judgment when the judge announces a ruling in open court). It was not until after completion of the trial and rendition of judgment by the trial court that respondent motioned the court to dismiss under Rule 12(b)(6).

The United States Supreme Court has stated, "the objection that a complaint '[f]ails to state a claim upon which relief can be granted,' Rule 12(b)(6), **may not be asserted post trial**." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 507, 163 L. Ed. 2d 1097, 1105 (2006) (emphasis added); Fed. R. Civ. P. 12(b)(6). "Under Rule 12(h)(2), that objection endures up to, but not beyond, trial on the merits[.]" *Id.* We find this reasoning persuasive. Even though the trial court had not entered a written judgment, a judgment had been rendered in favor of petitioner and the trial on the merits had concluded. Allowing the motion to amend was an abuse of discretion and caused undue prejudice to petitioner, therefore we must reverse the order of the trial court.

[2] While we have held that the trial court erred in granting the motion to dismiss and could remand on this issue alone, we will address the constitutionality of N.C. Gen. Stat. § 65-75 on its face, recognizing that the issue is likely to arise at later proceedings.

Under N.C. Gen. Stat. § 65-74, a descendent of a person whose remains are reasonably believed to be interred in a grave on private property may enter the property for the purpose of discovering, restoring, maintaining or visiting the grave with the consent of the property owner. N.C. Gen. Stat. § 65-74(1) (2005). However, if the consent of the private property owner cannot be obtained, the descendent may petition the clerk of the superior court for an order allowing the petitioner to enter the property for the purpose of discovering, restoring, maintaining or visiting the grave. N.C. Gen. Stat. § 65-75(a). The statute further states that the clerk shall issue such an order where the clerk finds the following:

(1) There are reasonable grounds to believe that the grave or abandoned public cemetery is located on the property or that it is reasonably necessary to enter or cross the landowner's property to reach the grave or abandoned public cemetery.

(2) The petitioner, or his designee, is a descendant of the deceased, or that the petitioner has a special interest in the grave or abandoned public cemetery.

(3) The entry on the property would not unreasonably interfere with the enjoyment of the property by the landowner.

N.C. Gen. Stat. § 65-75(a)(1-3).

Respondent contends that the aforementioned statute amounts to a taking of private property without just compensation. However, if an " ' "act is a proper exercise of the police power, the constitutional provision that private property shall not be taken for public use, unless compensation is made, is not applicable." ' " *City of Concord v. Stafford*, 173 N.C. App. 201, 204, 618 S.E.2d 276, 278 (citations omitted), *disc. review denied*, 360 N.C. 174, 625 S.E.2d 785 (2005). Our Courts have long held that preservation of the sanctity of grave sites is a proper exercise of police power by the State of North Carolina. *See Shields v. Harris*, 190 N.C. 520, 527, 130 S.E. 189, 192 (1925) ("Rights of burial are peculiar and are somewhat of a public nature and are subject to the police power[]"); *Strickland v. Tant*, 41 N.C. App. 534, 537, 255 S.E.2d 325, 328, *cert. denied*, 298 N.C. 304, 259 S.E.2d 917 (1979) ("It is undisputed that the State has a legitimate interest in the disposition of dead bodies and the preservation of the sanctity of the grave.").

Moreover, this Court has expressly held that "[p]rotection of the public health, safety, morals and general welfare" are the goals commonly included as within the lawful scope of the State's police powers. *Eastern Appraisal Services v. State of North Carolina*, 118 N.C. App. 692, 696, 457 S.E.2d 312, 314, *appeal dismissed*, *disc. review denied*, 341 N.C. 648, 457 S.E.2d 312 (1995). In *Mills v. Cemetery Park Corp.*, 242 N.C. 20, 27, 86 S.E.2d 893, 898 (1955), the Supreme Court stated:

> The sentiment of all civilized peoples, since earliest Biblical times, has held in great reverence the resting places of the dead as hallowed ground. In such matters we deal with concerns that basically are spiritual. Awe toward the dead was a most pow-

erful force in forming primitive systems for grappling with the supernatural. "It is a sound public policy to protect the burying place[] of the dead."

Id. (citation omitted).

Where the statute provides for access to another's property for the purposes of discovering, restoring, maintaining or visiting a grave, the act is a proper exercise of a police power and therefore not subject to the constitutional and fundamental provision that private property shall not be taken for a public use without just compensation.

It is unnecessary to address appellant's remaining assignments of error on appeal where the order of the trial court must be reversed.

Accordingly, we reverse the order of the trial court allowing respondent's motion to amend and dismissing the action, and remand for entry of an order consistent with the oral order rendered by the trial court at the close of the hearing on the merits.

Reversed and remanded.

Judges BRYANT and STROUD concur.

STATE OF NORTH CAROLINA v. OTRELL DESHONE EVANS

No. COA06-1283

(Filed 17 July 2007)

Appeal and Error— appealability—transfer of juvenile's case to superior court—guilty plea—absence of jurisdiction

Although defendant contends the trial court erred in a second-degree murder and assault with a deadly weapon with intent to kill case by automatically transferring defendant's case from district court to superior court for trial as an adult, the merits of this issue are not reached based on lack of jurisdiction, because: (1) defendant's appeal following his guilty plea does not fall within any of the categories of appeal permitted under N.C.G.S. § 15A-1444; (2) defendant has not petitioned for a writ of certio-

rari; and (3) N.C.G.S. § 7B-2603(d) does not establish an exception to N.C.G.S. § 15A-1444(e).

Judge LEVINSON dissenting.

Appeal by Defendant from judgment dated 6 October 2005 and oral order rendered 6 October 2005 by Judge Paul L. Jones in Superior Court, Lenoir County. Heard in the Court of Appeals 25 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General Robert M. Curran, for the State.

Charlotte Gail Blake for Defendant-Appellant.

McGEE, Judge.

Otrell Deshone Evans (Defendant) was charged with first-degree murder, assault with a deadly weapon with intent to kill, and possession of a handgun by a minor. Defendant was fifteen years old at the time. The District Court held a probable cause hearing on 22 March 2005 and found probable cause that Defendant committed the offenses with which he was charged, one of which was a Class A felony.

Defendant filed a "motion against juvenile being transferred and tried as an adult" on 22 March 2005. Defendant argued that N.C. Gen. Stat. § 7B-2200 was unconstitutional. N.C. Gen. Stat. § 7B-2200 provides:

> After notice, hearing, and a finding of probable cause the court may, upon motion of the prosecutor or the juvenile's attorney or upon its own motion, transfer jurisdiction over a juvenile to superior court if the juvenile was 13 years of age or older at the time the juvenile allegedly committed an offense that would be a felony if committed by an adult. *If the alleged felony constitutes a Class A felony and the court finds probable cause, the court shall transfer the case to the superior court for trial as in the case of adults.*

N.C. Gen. Stat. § 7B-2200 (2005) (emphasis added). At the conclusion of the 22 March 2005 hearing, the District Court stated that it would "find that [it was] mandated by [N.C. Gen. Stat. §] 7B-2200 to transfer this case to Superior Court for trial as an adult." The District Court then stated that all of the charges against Defendant would "be transferred to Superior Court for trial by this order today." In

open court, Defendant's counsel appealed this decision to the Superior Court.

Subsequently, on 13 July 2005, Defendant was indicted in Superior Court on charges of first-degree murder and assault with a deadly weapon with intent to kill. Defendant filed a motion and brief on 6 October 2005 requesting that he not be tried as an adult in Superior Court. Defendant specifically incorporated in this motion and brief his prior motion and brief filed in District Court on 22 March 2005, which had also requested that he not be transferred and tried as an adult. The Superior Court held a hearing on Defendant's motion and stated: "[I]n compliance with the law the Court hereby affirms the District Court finding and the Court ORDERS this case continue in Superior Court for the crime of first-degree murder as well as the other charge with it." Defendant's counsel excepted and objected to this decision. However, the record on appeal does not contain any written order denying Defendant's motion.

Defendant pleaded guilty on 22 March 2006 to second-degree murder and assault with a deadly weapon with intent to kill. Defendant attempted to preserve the right to appeal issues related to his transfer from District Court to Superior Court for trial as an adult. At the conclusion of the plea hearing, the Superior Court delayed sentencing.

The Superior Court held a sentencing hearing on 25 May 2006. In open court, the Superior Court sentenced Defendant to a mitigated term of 112 months to 144 months in prison, and Defendant gave oral notice of appeal.

Defendant argues that the automatic transfer of his case to Superior Court upon a finding of probable cause violated his federal and state constitutional rights to due process and equal protection. However, we do not reach the merits of Defendant's appeal. " 'In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute.' " *State v. Jamerson*, 161 N.C. App. 527, 528, 588 S.E.2d 545, 546 (2003) (quoting *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002)). Pursuant to N.C. Gen. Stat. § 15A-1444(e) (2005):

> Except as provided in subsections (a1) and (a2) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not en-

> titled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari.

Our Court has recognized that pursuant to N.C. Gen. Stat. § 15A-1444 (2005),

> a defendant who has pled guilty has only the right to appeal the following issues: (1) whether the sentence is supported by the evidence (if the minimum term of imprisonment does not fall within the presumptive range); (2) whether the sentence results from an incorrect finding of the defendant's prior record level under N.C. Gen. Stat. § 15A-1340.14 or the defendant's prior conviction level under N.C. Gen. Stat. § 15A-1340.21; (3) whether the sentence constitutes a type of sentence not authorized by N.C. Gen. Stat. § 15A-1340.17 or § 15A-1340.23 for the defendant's class of offense and prior record or conviction level; (4) whether the trial court improperly denied the defendant's motion to suppress; and (5) whether the trial court improperly denied the defendant's motion to withdraw his guilty plea.

State v. Carter, 167 N.C. App. 582, 584, 605 S.E.2d 676, 678 (2004). In the present case, Defendant's appeal following his guilty plea does not fall within any of the categories of appeal permitted under the statute. Moreover, Defendant has not petitioned for a writ of certiorari. Therefore, we lack jurisdiction to consider Defendant's appeal and we dismiss his appeal. *See State v. Waters*, 122 N.C. App. 504, 504-05, 470 S.E.2d 545, 546 (1996) (holding that this Court lacked jurisdiction to review the defendant's appeal where none of the exceptions in N.C.G.S. § 15A-1444 applied and the defendant did not file a petition for writ of certiorari).

The dissent relies upon N.C. Gen. Stat. § 7B-2603(d) to argue that Defendant has a right to appeal the transfer decision after his plea of guilty in Superior Court. N.C. Gen. Stat. § 7B-2603(d) (2005) provides: "The superior court order [upholding the transfer decision] shall be an interlocutory order, and the issue of transfer may be appealed to the Court of Appeals only after the juvenile has been convicted in superior court." The dissent argues that this section does not limit the term "convicted" to circumstances where a defendant has been convicted by a jury and, therefore, a defendant has a right to appeal a transfer decision even after a plea of guilty. We disagree.

It is true that the term "conviction" includes a plea of guilty accepted and entered by a court. *See State v. Robinson*, 224 N.C. 412, 414, 30 S.E.2d 320, 321 (1944) (citation omitted) (recognizing that " '[a] plea of guilty, accepted and entered by the court, is a conviction or the equivalent of a conviction of the highest order, the effect of which is to authorize the imposition of the sentence prescribed by law on a verdict of guilty of the *crime sufficiently charged in the indictment or information*.' ").

However, we do not interpret N.C.G.S. § 7B-2603(d) as establishing an exception to N.C.G.S. § 15A-1444(e). Although N.C.G.S. § 7B-2603(d) uses the term "convicted," it does not specifically address a situation where a defendant has pleaded guilty. In contrast, one of the stated exceptions listed under N.C.G.S. § 15A-1444(e), which deals with the right to appeal decisions regarding motions to suppress, does specifically address this situation. *See* N.C. Gen. Stat. § 15A-979 (2005). N.C. Gen. Stat. § 15A-979(b) specifically provides: "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*." N.C. Gen. Stat. § 15A-979(b) (2005) (emphasis added). We find it significant that the General Assembly included the clarification that the term "conviction" used in this section includes a judgment entered upon a plea of guilty. By contrast, the General Assembly did not use this phraseology in N.C.G.S. § 7B-2603(d). We hold that the applicable statute determining Defendant's right to appeal is N.C.G.S. § 15A-1444. Under N.C.G.S. § 15A-1444, Defendant has no right to appeal a transfer decision upon a plea of guilty. Therefore, we hold that Defendant does not have the right to appeal his transfer decision after pleading guilty in Superior Court. It is the role of the General Assembly to determine statutory rights of criminal defendants to appeal a transfer decision after pleading guilty in Superior Court. Without an amendment to N.C.G.S. § 15A-1444 providing for such an appeal, we are without jurisdiction to hear the case presently before us and must dismiss this appeal.

Dismissed.

Judge JACKSON concurs.

Judge LEVINSON dissents with a separate opinion.

Judge Levinson dissented in this opinion prior to 7 July 2007.

LEVINSON, Judge dissenting.

Consistent with the specific, express allowance found in N.C. Gen. Stat. § 7B-2603(d) (2005), the defendant has a right to appeal the transfer decision. This is, in fact, the necessary application of this Court's decision in *State v. Brooks*, 148 N.C. App. 191, 557 S.E.2d 195 (2001).

As a part of the transfer order by the district court, the trial court necessarily rejected defendant's constitutional challenge to the transfer statute. Defendant has taken appeal from a final judgment—the one as regards his conviction for second degree murder—and, as a part of his appeal, he may challenge the transfer order from the district court. Section 7B-2603(d) does not limit the term "convicted" to circumstances where defendant was convicted by jury; it therefore includes circumstances, like these, where defendant was "convicted" by virtue of his guilty plea in superior court.

I would reach the merits of this appeal and conclude that the requirement that juveniles be transferred to superior court where there is probable cause to believe they committed a Class A felony offense does not run afoul of the Constitution.

BARRIER GEOTECHNICAL CONTRACTORS, INC., PLAINTIFF v. RADFORD QUARRIES OF BOONE, INC., DEFENDANT

No. COA06-1401

(Filed 17 July 2007)

1. Appeal and Error— appealability—denial of change of venue—possibility of inconsistent verdicts—substantial rights

Although the denial of motions for change of venue and to consolidate are generally not immediately appealable, the denials are immediately appealable in this case because: (1) the right to venue established by statute is a substantial right; and (2) a substantial right is affected in this case when the same factual issues would be present in both trials and the possibility of inconsistent verdicts on those issues exists.

2. Abatement— motion to consolidate actions—relation back rule

The trial court did not abuse its discretion by denying defendant subcontractor's motion under N.C.G.S. § 1A-1, Rule 42 to consolidate this action with its action against plaintiff general contractor in a different county to enforce its claim of lien, because: (1) in North Carolina, where a prior action is pending between the same parties for the same subject matter in a court within the state having like jurisdiction, the prior action serves to abate the subsequent action; (2) although N.C.G.S. § 44A-10 causes the claim of lien to relate back to the first date defendant provided materials, it has nothing to do with the effective date of the action to enforce the claim; and (3) plaintiff's action, filed in Mecklenburg County, predates defendant's action filed in Watauga County, and thus the latter action is abated.

3. Venue— denial of motion to change—necessary party—principal place of business

The trial court did not err by denying defendant's motion for change of venue, because: (1) the only basis defendant claims for its basis to change venue is that Watauga County is a necessary party to its action to enforce its liens, and the county can no longer be deemed a necessary party to the action when that action has abated; and (2) Mecklenburg County was a proper venue under N.C.G.S. § 1-79(a)(1) when plaintiff stated its principal place of business is in Mecklenburg County.

Appeal by defendant from an order entered 28 July 2006 by Judge Timothy L. Patti in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 May 2007.

Smith, Cooksey & Vickstrom, PLLC, by Neil C. Cooksey and Steven L. Smith, for plaintiff-appellee.

Sigmon, Clark, Mackie, Hutton, Hanvey, & Ferrell, P.A., by Warren A. Hutton and Nancy L. Huegerich, for defendant-appellant.

HUNTER, Judge.

Radford Quarries of Boone, Inc. ("defendant") appeals from an order denying its motion for change of venue and motion to consolidate this action with another action pending against it in Watauga County. After careful review, we affirm.

Barrier Geotechnical Contractors, Inc. ("plaintiff"), entered into a contract with Watauga County to perform stream channel and slope stabilization services to certain pieces of real property in the county. The individual owners of the pieces of property had granted easements to the county to facilitate the project. Plaintiff then entered into a contract as general contractor with defendant as subcontractor to provide dirt for the projects. The contract was executed on 13 October 2005.

In early 2006, a dispute arose between plaintiff and defendant as to payments made under the contract. On 24 February 2006, defendant filed claims of lien in Watauga County against the real property; on 3 March 2006, plaintiff filed suit against defendant in Mecklenburg County alleging a variety of misdeeds, including breach of contract and fraud. Defendant filed an action to enforce its liens in Watauga County on 5 April 2006, and on 13 April 2006 filed motions in Mecklenburg County to, among other things, change venue and consolidate this action with its action for liens against plaintiff. These motions were denied, and defendant appeals.

[1] We first note that one general exception to the rule that the denial of motions for change of venue and to consolidate is interlocutory and not generally immediately appealable is where such denial affects a substantial right. *See* N.C. Gen. Stat. § 7A-27(d)(1) (2005). "[T]he 'right to venue established by statute is a substantial right,' the denial of which is 'immediately appealable.' " *Grant v. High Point Reg'l Health Sys.*, 172 N.C. App. 852, 854, 616 S.E.2d 688, 690 (2005) (quoting *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980)). In addition, "[a] substantial right is affected when '(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists[,]' " which appears to be the case here. *In re Estate of Redding v. Welborn*, 170 N.C. App. 324, 328-29, 612 S.E.2d 664, 668 (2005) (quoting *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 735-36, 460 S.E.2d 332, 335 (1995)). The appeal of the denial of these motions is therefore properly before us.

I. Consolidation Motion

[2] Defendant made its motion to consolidate under Rule 42 of the North Carolina Rules of Civil Procedure, which states "when actions involving a common question of law or fact are pending in one division of the court, the judge may order a joint hearing or trial of any or

all the matters in issue in the actions; he may order all the actions consolidated[.]" N.C. Gen. Stat. § 1A-1, Rule 42 (2005).

"Whether or not consolidation of cases for trial, where permissible, will be ordered is in the discretion of the court." *Phelps v. McCotter*, 252 N.C. 66, 66, 112 S.E.2d 736, 737 (1960) (per curiam). Thus, defendant must not only show a clear abuse of discretion by the trial court in denying its motion, but must also "show injury or prejudice arising therefrom." *In re Moore*, 11 N.C. App. 320, 322, 181 S.E.2d 118, 120 (1971); *see also Markham v. Nationwide Mut. Fire Ins. Co.*, 125 N.C. App. 443, 448, 481 S.E.2d 349, 353 (1997) ("[a] trial court's ruling on a Rule 42 motion will not be reversed on appeal absent a manifest abuse of discretion. Indeed, when the trial court's failure to consolidate is assigned as error, the appellant must establish that it was injured or prejudiced") (citation omitted).

The parties agree that the two actions concern the same subject matter. Plaintiff claims that the two actions cannot be consolidated because its action, filed in Mecklenburg County, predates defendant's action filed in Watauga County, and thus the latter action is abated. We agree.

In North Carolina, our courts have made it clear that "where a prior action is pending between the same parties for the same subject matter in a court within the state having like jurisdiction, the prior action serves to abate the subsequent action." *Eways v. Governor's Island*, 326 N.C. 552, 558, 391 S.E.2d 182, 185 (1990). The question before us, therefore, is whether defendant's action does in fact predate plaintiff's.

Defendant filed its claim of lien in Watauga County on 24 February 2006. Plaintiff filed this action in Mecklenburg County on 3 March 2006. Defendant filed an action in Watauga County to enforce its liens on 5 April 2006. Defendant argues that the filing of the action in April relates back to the date of the filing of the claim of lien, and thus its action predates plaintiff's. This argument is without merit.

Defendant's argument skews the meaning of N.C. Gen. Stat. § 44A-10 (2005), which states "[a] claim of lien on real property . . . shall relate to and take effect from the time of the first furnishing of labor or materials at the site of the improvement by the person claiming the claim of lien on real property." *Id.* The statute thus causes the claim of lien (from 24 February) to relate back to the first date

defendant provided materials, but has nothing to do with the effective date of the action to enforce the claim. A lien is not an action; that is why the lien must be enforced by the filing of an action.

Plaintiff's action predates defendant's, and as such abates defendant's. The trial court was thus correct in denying defendant's motion to consolidate the two.

II. Change of Venue Motion

[3] Defendant argues that venue should be changed to Watauga County because the county itself is a party to the lawsuit: The liens filed by defendant are filed against the county itself. This argument is without merit.

Plaintiff argues that the liens were invalid from the beginning because they concerned a public project. Regardless of whether this is true, however, the liens have been discharged and cancelled by a 26 May 2006 order of a Watauga County Superior Court, pursuant to N.C. Gen. Stat. § 44A-16(6) (2005) (stating that a claim of lien can be discharged by posting of a surety bond for an amount one and one-fourth times the amount of the claim).

The only basis defendant claims for its argument to change venue is that Watauga County is a necessary party to its action to enforce its liens. Because, as discussed above, that action is abated, the county can no longer be deemed a necessary party to the action, and this argument fails.

Per N.C. Gen. Stat. § 1-82 (2005), "the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement[.]" *Id.* In its complaint, plaintiff states that its principal place of business is in Mecklenburg County. Per statute, the residence of a domestic business for purposes of suing or being sued is the location of its principal place of business. N.C. Gen. Stat. § 1-79(a)(1) (2005). As such, Mecklenburg County was a proper venue, and the trial court's denial of the motion to change venue was not error.

III. Conclusion

Because defendant's action initiated in Watauga County was abated and the county is not a necessary party to the action pending in Mecklenburg County, we affirm the trial court's order denying defendant's motions to consolidate and change venue.

Affirmed.

Judges ELMORE and GEER concur.

STATE OF NORTH CAROLINA v. DANNY BAILEY

No. COA06-1461

(Filed 17 July 2007)

Motor Vehicles— felony death by vehicle—instruction—contributory negligence not a defense in criminal action

The trial court did not err in a felony death by vehicle case by denying defendant's requested jury instruction on contributory negligence, because: (1) contributory negligence is not a defense in a criminal action, and defendant's proposed instruction is counter to the jurisprudence of this state; (2) intervening negligence would be relevant as to whether defendant's actions were the proximate cause of decedent's death, but defendant did not request such an instruction; (3) even assuming decedent was negligent, her negligence, if any, would be, at most, a concurring proximate cause of her own death, and negligence must be such as to break the causal chain of defendant's negligence in order for negligence of another to insulate defendant from criminal liability; and (4) the State's evidence tended to show that defendant's blood alcohol content was over twice the legal limit, and this impairment inhibited defendant's ability to exercise due care and to keep a reasonable and proper lookout in the direction of travel.

Appeal by defendant from judgments entered 26 April 2006 by Judge W. Robert Bell in Burke County Superior Court. Heard in the Court of Appeals 23 May 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General John W. Congleton, for the State.

Thorsen Law Office, by Haakon Thorsen, for defendant-appellant.

HUNTER, Judge.

Danny Bailey ("defendant") appeals his conviction for felony death by vehicle entered on 26 April 2006. *See* N.C. Gen. Stat. § 20-141.4(a1) (2005). He argues that the trial court committed reversible error by denying his request for a jury instruction on contributory negligence. We disagree and find no error.

Shortly after noon on 9 June 2003, defendant was operating a vehicle southbound on Highway 18/64 in Burke County, North Carolina. The highway is a two-lane road with a solid yellow line on the southbound lane and a broken yellow line in the northbound lane.

The State's evidence tended to show that defendant's vehicle was traveling behind a blue Ford Aspire being operated by Kathy Baker ("Baker"). David Henschen ("Henschen") was traveling in the direction opposite to defendant and Baker. As Henschen approached the intersection of Highway 18/64 and Antioch Road, he observed Baker's vehicle come to a stop in the roadway in the southbound lane. Henschen testified to seeing smoke come from the tires of defendant's vehicle as defendant was approaching Baker's car. Henschen also witnessed defendant's vehicle collide with the rear of Baker's vehicle. The collision pushed Baker's vehicle into Henschen's travel lane. According to Henschen, he had no time to take evasive maneuvers and struck Baker's vehicle. Defendant's vehicle left 122 feet of skid marks prior to the point of impact with Baker's car and traveled another 102 feet after the collision. Baker was ejected from her car and died at the scene from her injuries.

Defendant was transported to the hospital. Once there, hospital personnel drew a blood sample from defendant. Tests of the blood sample yielded a blood alcohol concentration of 0.22. Defendant told hospital staff that he had consumed two beers and was taking Valium.

Approximately three and a half hours after the collision, Trooper W. A. Martin ("Trooper Martin") arrived at the hospital and interviewed defendant. Defendant told the trooper that he had consumed two beers. Trooper Martin observed that defendant had a strong odor of alcohol on his breath and that defendant was "mushmouthed." Trooper Martin then requested a second blood sample be tested which yielded a blood alcohol concentration of 0.18. Trooper Martin also administered psychophysical tests to defendant in an effort to determine whether defendant was intoxicated. On the walk-and-turn

test, defendant missed the line once. On the sway test, defendant did not follow all of Trooper Martin's instructions. On the finger-to-nose test, defendant missed his nose once and used the wrong hand twice. Trooper Martin concluded that defendant's performance on the tests was "[f]air."

John Hennings, an expert in accident reconstruction analysis, testified that the damage to the cars was consistent with defendant's vehicle traveling slower than forty miles per hour when it struck Baker's car. Defendant testified that he had been drinking the night before and into the early morning of 9 June 2003. He said that he had been following Baker for some time and that she had been driving erratically before suddenly stopping in the highway. Defendant stated that he could not stop in time nor could he swerve to the side because there was a ditch off the shoulder of the road.

Defendant presents one issue for this Court's review: Whether defendant is entitled to a new trial because the trial court denied his request for a jury instruction on contributory negligence.

I.

Defendant argues that the trial court erred in denying his request for a jury instruction on contributory negligence when the trial court submitted the charge of felony death by vehicle to the jury. The elements of felony death by vehicle are: (1) defendant unintentionally causes the death of another; (2) while driving impaired as defined by N.C. Gen. Stat. §§ 20-138.1 or 20-138.2 (2005); and (3) the impairment was the proximate cause of the death. N.C. Gen. Stat. § 20-141.4(a1). At trial, defendant argued that Baker was contributorily negligent in that she signaled to the right, did not pull off, and stopped in the middle of the road. In other words, defendant alleged that the proximate cause of Baker's death was not his impairment, but rather Baker's own negligence.

Defendant's proposed instruction would have required the jury to find defendant not guilty were the defense able to prove by a preponderance of the evidence that Baker was contributorily negligent. Specifically, defense counsel asked the trial court to instruct the jurors as follows:

> "Next, did the decedent, Kathy Baker, by her own negligence, contribute to her injury? On this issue, the burden of proof is on the Defendant. This means that the Defendant must prove, by the greater weight of the evidence, that Kathy Baker was negligent

> and that such negligence was the proximate cause of Baker's own injury. If Kathy Baker's negligence joins with any negligence of the Defendant in proximately causing Baker's injuries, it is called contributory negligence, and you would return a verdict of Not Guilty of Felony Death by Motor Vehicle."

It is well settled, however, that " '[c]ontributory negligence is no defense in a criminal action.' " *State v. Tioran*, 65 N.C. App. 122, 124, 308 S.E.2d 659, 661 (1983) (quoting *State v. Harrington*, 260 N.C. 663, 666, 133 S.E.2d 452, 455 (1963)). Thus, defendant's proposed instruction is counter to the jurisprudence of this state.

Intervening negligence in cases such as this is relevant as to whether defendant's actions were the proximate cause of the decedent's death. *Harrington*, 260 N.C. at 666, 133 S.E.2d at 455. An instruction to that effect, if denied, would have warranted a new trial. *See State v. Hollingsworth*, 77 N.C. App. 36, 40, 334 S.E.2d 463, 466 (1985). Accordingly, this Court has granted a new trial where defendant requested an instruction on intervening negligence because the question of whether defendant's conduct was the proximate cause of death is a question for the jury. *Id.* In the instant case, however, defendant did not seek such an instruction. Moreover, the trial court accurately instructed the jury by stating that, " '[t]here may be more than one proximate cause of an injury. The State must prove beyond a reasonable doubt only that the defendant's negligence was a proximate cause.' " Accordingly, we find that the trial court did not err in denying defendant's requested instruction.

Even assuming Baker was negligent, "[i]n order for negligence of another to insulate defendant from criminal liability, that negligence must be such as to break the causal chain of defendant's negligence; otherwise, defendant's culpable negligence remains *a* proximate cause, sufficient to find him criminally liable." *Id.* at 39, 334 S.E.2d at 465. In the instant case, Baker's negligence, if any, would be, at most, a *concurring* proximate cause of her own death. *See id.* at 39, 334 S.E.2d at 466. This is especially true here, where the State's evidence tended to show that defendant's blood alcohol content was over twice the legal limit. This impairment inhibited defendant's ability to "exercise [] due care [and] to keep a reasonable and proper lookout in the direction of travel[.]" *Id.*

II.

In summary, we find that the trial court did not err when it denied defendant's requested jury instruction on contributory negligence

because such an instruction would not have been proper under the law of this state.

No error.

Judges ELMORE and GEER concur.

IN THE MATTER OF: J.L. AND C.L.

No. COA06-1144

(Filed 17 July 2007)

Appeal and Error— notice of appeal—failure to give proper notice

The trial court did not err by granting the guardian ad litem's motion to dismiss respondent mother's appeal of the denial of her motion to set aside the judgment terminating her parental rights because, although the trial court improperly based its denial on respondent's notice of appeal being untimely under N.C. R. App. P. 3 when it was in fact timely, the error was harmless when it could have based its grant of the motion on respondent's failure to issue proper notice of her appeal to the guardian ad litem attorney advocate as required by N.C. R. App. P. 25(a).

Appeal by respondent from an order entered 28 February 2006 by Judge A. Elizabeth Keever in Cumberland County District Court. Heard in the Court of Appeals 11 April 2007.

Elizabeth Kennedy-Gurnee for petitioner-appellee Cumberland County Department of Social Services; Beth A. Hall for appellee Guardian ad Litem.

Richard E. Jester for respondent-appellant.

HUNTER, Judge.

Tina Louise L. ("respondent-mother") appeals from an order granting a motion to dismiss her appeal of the denial of her motion to set aside the judgment terminating her parental rights. After careful review, we affirm.

On 27 April 2004, a Cumberland County district court entered an order terminating respondent-mother's parental rights to both J.L. and C.L. On 27 April 2005, respondent-mother filed a motion pursuant to Rule 60 to set aside the order, arguing that she did not receive service of process or notice of the trial date. Respondent-mother's counsel filed a second motion to set aside the order on 29 July 2005. On 3 August 2005, the court held a hearing on the motion and entered its order denying the motion on 19 September 2005.

Respondent-mother gave oral notice at that hearing that she would appeal the court's ruling, then filed written notice of appeal on 16 August 2005. The court entered a written order to the same effect as its order given at the 3 August hearing on 12 September 2005.

On 20 January 2006, the guardian ad litem moved the trial court to dismiss respondent-mother's appeal.[1] The juvenile court held a hearing on 1 February 2006 and on 28 February 2006 entered an order granting the motion on the basis that respondent-mother "failed to file a written Notice of Appeal within 10 days after the entry of the Order Denying her Rule 60 Motion as required by N.C.G.S. 7B-1001." Respondent-mother appeals this order.

I.

Per N.C. Gen. Stat. § 7B-1001, notice of appeal must be given "within 10 days of any order of disposition following an order adjudicating a juvenile as neglected." *In re Padgett*, 156 N.C. App. 644, 647-48 n.3, 577 S.E.2d 337, 340 n.3 (2003). The question before this Court is whether respondent-mother's oral notice of appeal in court on 3 August fulfills this requirement, given that she did not later give written notice of appeal within ten days of the court's written order of 19 September.

This issue has arisen previously before this Court. In *Stachlowski v. Stach*, 328 N.C. 276, 401 S.E.2d 638 (1991), which also concerned modification of a child custody order, the trial court announced its judgment in open court on 17 January and entered a written order to the same effect on 6 April. *Id.* at 277, 401 S.E.2d at 639. Plaintiff did not give oral notice of appeal at that time, but gave written notice of

1. The trial court retained jurisdiction to hear this motion pursuant to Rule 25(a) of the North Carolina Rules of Appellate Procedure, which states that "[p]rior to the filing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been filed in an appellate court motions to dismiss are made to that court." N.C.R. App. P. 25(a).

appeal on 6 April, the same day the written order was filed. *Id.* at 278, 401 S.E.2d at 640. This Court dismissed the appeal for failure to give notice within ten days of the oral judgment. *Id.* at 277, 401 S.E.2d at 639. The Supreme Court reversed, stating that:

> Rule 3(a)(1) provides that a party may give *oral notice* of appeal once judgment is *rendered*. *Written notice* is also appropriate once judgment is rendered, N.C.R. App. P. 3(a)(2), but "must be taken within 10 days after its *entry*." N.C.R. App. P. 3(c) (emphasis added). Thus, the *rendering* of judgment establishes the point from which a party *may* appeal under Rule 3, and the *entry* of judgment marks the beginning of the period during which a party *must* file written notice of appeal.

Id. at 278-79, 401 S.E.2d at 640 (emphasis in original and emphasis added).

Here, respondent-mother gave oral notice of appeal on 3 August 2005, the day the trial court announced its denial of her motion in court, and written notice on 16 August 2005. The trial court entered its written order on 12 September 2005. As such, respondent-mother's notice of appeal was timely under Rule 3.

II.

In its cross-assignments of error, Cumberland County Department of Social Services ("DSS") and the guardian ad litem ("appellees") in fact admit that dismissing the appeal on the above basis was error, but argue that because the court could have properly based its order to dismiss on other grounds, the error was harmless and the order should be affirmed. *See* N.C. Gen. Stat. 1A-1, Rule 61 ("no error or defect in any ruling or order . . . is ground for . . . vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action amounts to the denial of a substantial right"). Specifically, appellees argue that the trial court could have based its grant of the motion to dismiss on respondent-mother's failure to issue proper notice of her appeal to the guardian ad litem attorney advocate. We agree.

Per Rule 25(a) of the North Carolina Rules of Appellate Procedure, "[i]f after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed." N.C.R. App. P. 25(a). Respondent-mother

does not dispute appellees' assertion that she failed not only to give them timely notice, but indeed to give them no notice at all, up to the date of this appeal. The trial court dismissed the action on the motion of appellees. Thus, Rule 25(a) provides the authority for the trial court's actions.

Although the trial court used invalid grounds as basis for its order, because valid grounds exist on which the trial court could have based its order, the error was harmless and we affirm the trial court's dismissal of the appeal.

Affirmed.

Judges TYSON and JACKSON concur.

THOMAS G. INGERSOLL, AND WIFE BARBARA D. INGERSOLL, PLAINTIFFS v. GLENN D. SMITH, AND WIFE MAUREEN T. SMITH, DEFENDANTS

No. COA06-1113

(Filed 17 July 2007)

Real Property— escrow agreement at closing—terms clear—extrinsic evidence of intent not admitted

Contractual provisions in an escrow agreement concerning a swimming pool in real estate closing did not need clarification, and the trial court properly held that both the parol evidence rule and the statute of frauds foreclosed the admission of any extrinsic evidence as to the agreement between the parties.

Appeal by plaintiffs from an order entered 13 June 2006 by Judge C. Christopher Bean in Currituck County District Court. Heard in the Court of Appeals 11 April 2007.

Vincent Law Firm, P.C., by Branch W. Vincent, III, for plaintiff-appellants.

Dan L. Merrell & Associates, P.C., by James A. Clark, for defendant-appellees.

HUNTER, Judge.

Husband and wife Thomas G. Ingersoll and Barbara D. Ingersoll ("plaintiffs") appeal from an order granting a motion on the pleadings by husband and wife Glenn D. Smith and Maureen T. Smith ("defendants"). After careful review, we affirm.

On 16 January 2004, plaintiffs purchased a house from defendants located on lot 24 of Magnolia Bay in Corolla, North Carolina. The house property included a swimming pool which, because of winter weather, plaintiffs were unable to have inspected prior to closing. As a result, the parties entered into an escrow agreement that contained the following clauses:

> WHEREAS, [plaintiffs] ha[ve] been unable to obtain a pool inspection of the swimming pool located on the property prior to closing due to the winter weather and desires to insure that, if problems are revealed [by such an inspection], funds will be available to pay for correction of deficiencies, [defendants] ha[ve] agreed to provide funds for such purpose and this agreement documents the terms of such deposit.
>
> . . .
>
> 1. Amount of Deposit. Seller and Buyer hereby deposit with the Depositary the sum of $500 in cash (the "fund"), the receipt of which is hereby acknowledged by Depositary for deposit to Depositary's regular trust checking account.
>
> 2. Terms of Deposit. Depositary shall hold the fund until Buyer, acting in good faith and within reasonable time not to exceed May 15, 2004, causes the pool to be prepared for use in the 2004 season and inspects the pool for damage. In the event that damages are revealed, the fund will be used to pay for such damages.

When plaintiffs had the inspection done (within the time limit specified by the escrow agreement), they found that the pool needed repairs that would cost $8,600.00. They notified defendants, who refused to pay anything over the $500.00 in the escrow account. Plaintiffs brought suit, arguing that the escrow agreement was not intended to be the total commitment and liability of defendants; defendants' subsequent answer and motion for judgment on the pleadings refuted this claim. The motion for judgment on the plead-

ings was granted by the trial court on 13 June 2006. Plaintiffs appeal from that order.

Plaintiffs argue that the trial court erred in holding that the statute of frauds and parol evidence rule foreclosed the admission of extrinsic evidence. This argument is without merit.

Courts may properly grant a motion for judgment on the pleadings made pursuant to N.C.R. Civ. P. 12(c) "when all the material allegations of fact are admitted on the pleadings and only questions of law remain." *DeTorre v. Shell Oil Co.*, 84 N.C. App. 501, 504, 353 S.E.2d 269, 271 (1987). The court must "view[] the facts and permissible inferences in the light most favorable to the nonmoving party" and determine that the movant "is clearly entitled to judgment as a matter of law." *Id.*

In its order granting defendants' motion, the trial court made a conclusion of law that "[t]he terms of the Escrow Agreement are not ambiguous and the application of the Statute of Frauds and/or the Parol Evidence Rule forecloses admission of prior or contemporaneous promises, conversations or agreements between the parties which would give rise to other inferences favorable to the Plaintiffs." The court also concluded that "[t]he Escrow Agreement sets forth in plain language the limit of the Defendants' obligation at $500.00."

The statute of frauds and parol evidence rule operate similarly in this case in that both prevent the consideration of extrinsic evidence as to the meaning of the escrow agreement. "The parol evidence rule prohibits the admission of parol evidence to vary, add to, or contradict" the terms of an integrated written agreement, *Hall v. Hotel L'Europe, Inc.*, 69 N.C. App. 664, 666, 318 S.E.2d 99, 101 (1984), though "an ambiguous term may be explained or construed with the aid of parol evidence." *Vestal v. Vestal*, 49 N.C. App. 263, 266-67, 271 S.E.2d 306, 309 (1980). Similarly, the statute of frauds requires that "[a]ll contracts to sell or convey any lands . . . or any interest in or concerning them . . . be put in writing and signed by the party to be charged therewith[.]" N.C. Gen. Stat. § 22-2 (2005).

Here, we agree with the trial court that the relevant contractual provisions need no clarification. It states: "In the event that damages are revealed, the fund will be used to pay for such damages." The amount of that fund was also clearly delineated by its description as "the sum of $500 in cash (the 'fund')." Holding that this agreement created an unlimited obligation on the part of defendants to pay for

repairs to the pool regardless of their cost would twist the clear meaning of the agreement and commit defendants to a monetary obligation they did not agree to undertake. Further, because the agreement concerns the parties' interests in the pool and thus in the house and land being conveyed, any terms of the parties' agreement must have been set down in writing to be valid. Looking at the facts in the light most favorable to plaintiffs does not change the fact that the escrow agreement is clear on its face.

Thus, the trial court properly held that both the parol evidence rule and the statute of frauds foreclosed the admission of any extrinsic evidence as to the agreement between the parties. As such, we affirm the trial court's ruling.

Affirmed.

Judges TYSON and JACKSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 17 JULY 2007

CHARLOTTE OBSERVER PUBL'G CO. v. ALVIS COATINGS, INC. No. 06-1175	Mecklenburg (05CVD6320)	Dismissed
GOLDS v. RYDER INTEGRATED LOGISTICS, INC. No. 06-1385	Ind. Comm. (I.C. 950746)	Affirmed
HALLOWAY v. CMS HOLDINGS CO. No. 06-1277	Ind. Comm. (I.C. 221263)	Affirmed
IN RE B.D.H., J.L.S. & R.L.S. No. 07-161	Wilkes (04J105-07)	Affirmed
IN RE C.B., N.B. No. 06-591	Buncombe (05J79-80)	Affirmed
IN RE C.J.F. No. 06-1294	Wake (05JB413)	Affirmed
IN RE D.J.R. No. 07-117	Stanly (05JA68)	Affirmed
IN RE S.T.K. & N.S.K. No. 06-1361	Davidson (04J265) (05J120)	Affirmed
MODULAR TECHS., INC. v. MODULAR SOLUTIONS, INC. No. 06-813	Lenoir (04CVS549)	Affirmed
OLDE POINT PROP. OWNERS ASS'N v. OLDE POINT ASSOCS. LTD. P'SHIP No. 06-1639	Pender (06CVS525)	Dismissed
PARKER v. TOWN OF FOUR OAKS No. 06-1370	Johnston (06CVS1696)	Dismissed
PINEVILLE FOREST HOMEOWNERS ASS'N v. PORTRAIT HOMES CONSTR. CO. No. 06-790	Mecklenburg (04CVS14862)	Affirmed
SANDER v. O'DWYER No. 06-631	Orange (04CVS907)	Reversed and remanded
STATE v. BALLARD No. 06-1439	Madison (05CRS50277-78) (06CRS1334)	No error

STATE v. BROWN No. 06-1194	Robeson (04CRS56238)	No error
STATE v. CHRISTOPHER No. 06-1480	Haywood (05CRS51978-79)	No error
STATE v. DAYE No. 06-1378	Iredell (04CRS57839-41)	No prejudicial error
STATE v. DOUGLAS No. 06-1396	Wake (04CRS89804)	Reversed
STATE v. DUBOSE No. 06-1376	Johnston (04CRS56690) (05CRS13408-09)	No error
STATE v. HANDY No. 06-1337	Onslow (04CRS61104)	No error
STATE v. JONES-WHITE No. 06-1402	Onslow (05CRS58847)	No prejudicial error in part and remanded for resentencing in part
STATE v. STATON No. 06-1009	Forsyth (02CRS58925)	No error
TILLEY v. DIAMOND No. 06-500	Watauga (02CVD14)	Vacated and reversed
UNIVERSITY HEIGHTS CMTY. ASS'N v. PORTRAIT HOMES CONSTR. CO. No. 06-746	Mecklenburg (05CVS5035)	Affirmed
WHITNEY v. BLUE CROSS & BLUE SHIELD OF N.C. No. 06-1172	Buncombe (04CVS2218)	Affirmed
WHITT v. TARGET STORES, INC. No. 06-1178	Guilford (05CVS6435)	Affirmed

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WORD AND PHRASE INDEX

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CHILD ABUSE AND NEGLECT—Continued

CHILD ABUSE AND NEGLECT—Continued

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Permanency planning order—failure to comply with Family Service Case Plan—supporting evidence—Competent evidence supported the trial court's findings in a permanency planning order that respondent father failed to comply with the Family Service Case Plan, even though the Plan was not introduced into evidence, where the DSS court report outlined requirements from the Family Service Case Plan, and there was evidence that respondent father failed to meet the two major requirements of attending parenting classes and attending mental health appointments. **In re S.J.M., 42.**

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Hearsay—AOC preclearance documents—public record not excluded—The trial court erred in a judicial districting case by admitting an exhibit from the AOC Director only on a limited basis. Public records and reports are not excluded by the hearsay rule; this document was prepared pursuant to the AOC Director's statutory duty to obtain preclearance of districts from the United States Department of Justice under the Voting Rights Act and was admissible under N.C.G.S. § 8C-1, Rule 803(8). **Blankenship v. Bartlett, 327.**

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Stroke during surgery—res ipsa loquitur—12(b)(6) dismissal—The trial court did not err by granting defendants' motions to dismiss a medical malpractice action under N.C.G.S. § 1A-1, Rule 12(b)(6) because plaintiff relied on res ipsa loquitur to support his claim that his stroke during a procedure was the result of negligence. The average juror would not be able to infer negligence based on common knowledge or experience, and air emboli are not a foreign object or injury outside the scope of the surgical field. **Hayes v. Peters, 285.**

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Automobile accident—expert testimony—speed—stopping distance—The trial court did not err in a negligence case arising out of an automobile accident by admitting the testimony of the defendants' accident reconstruction expert even though plaintiff contends it constituted improper expert testimony regarding the speed third-party defendant driver was traveling, because: (1) although our legislature has recently amended N.C.G.S. § 8C-1, Rule 702 to overturn the doctrine that an expert witness may not testify regarding the speed of a vehicle unless he personally observed the vehicle, the amendment applies only to offenses committed on or after 1 December 2006, and the automobile collision in this case occurred on 13 March 2003; and (2) the expert's testimony did not amount to an opinion on third-party defendant's speed, but rather was the type of testimony admissible even under the previously existing law when he used his scientific expertise to perform an experiment that demonstrated stopping distances at various speeds. **Hoffman v. Oakley, 677.**

Contributory negligence—speeding—sufficiency of evidence—The trial court did not err by denying motions by plaintiff and third-party defendant for a directed verdict on the issue of contributory negligence in a case arising out of an automobile accident, because: (1) evidence that a party was exceeding the posted speed limit is sufficient to send the issue of contributory negligence to the jury, and the jury could have drawn this inference based on an accident reconstruction expert's testimony as to stopping distances at various speeds; and (2) the evidence was sufficient to allow a jury to find that had third-party defendant not been speeding, she would have been able to stop in less than 54 feet which would have brought her vehicle to a halt prior to any impact, thus demonstrating a causal connection between her excessive speed and the resulting accident. **Hoffman v. Oakley, 677.**

Driving while license suspended—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss a driving while license suspended charge even though defendant concedes the State proved each of the elements except for knowledge of the suspension, because: (1) the State raised prima facie presumption of receipt of notice of suspension through the signed certificate of an employee of the Division of Motor Vehicles that constituted proof of the giving of notice under N.C.G.S. § 20-48(a), and defendant was obligated to rebut the presumption; and (2) defendant chose

TERMINATION OF PARENTAL RIGHTS—Continued

deemed to be supported by sufficient evidence and were binding on appeal. **In re H.L.A.D., 381.**

Decision by same judge who had previously terminated other parent's rights—no error—There was no error where a judge who had previously terminated a mother's parental rights concluded that it was in the best interest of the child to terminate the father's rights. Nothing suggests reliance by the court upon evidence other than that presented at the father's hearing, and the court was entitled to take judicial notice that the mother's rights had been terminated. Moreover, this district has a Family Court, one of the primary characteristics of which is the assignment of one judge to one family. **In re M.A.I.B.K., 218.**

Failure to hold initial hearing within statutory time—prejudicial error—Respondent mother was prejudiced by the trial court's failure to conduct the initial termination of parental rights hearing within the 90-day period prescribed by N.C.G.S. § 7B-1109(a) where respondent's three children were under five years old when removed from respondent's care; respondent was initially granted visitation, but when the permanent plan was changed from reunification to adoption, petitioner ceased visitation between respondent and her children; and respondent was denied the company and familial relationship with her children for the fourteen months between the filing of the termination petition and the initial hearing. **In re J.Z.M., R.O.M., R.D.M., & D.T.F., 474.**

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Findings of fact—willfully leaving juvenile in foster care without reasonable progress—sufficiency of evidence—Competent evidence supported the trial court's findings of fact in a termination of parental rights case, and the findings supported the termination of respondent's parental rights under N.C.G.S. § 7B1111(a)(2) on the ground that respondent willfully left the juvenile in foster care more than 12 months without showing reasonable progress in correcting the conditions that led to the removal of the child from the home. **In re C.M.S., 488.**

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Grounds—failure to make progress toward correcting conditions—reunification efforts ended—The requirements for terminating parental rights based on leaving the child in placement outside the home without reasonable progress were met even though the court had ceased reunification efforts and the permanent plan had been changed to custody by a guardian. The court's findings were based on clear, cogent, and convincing evidence from the time between the initial removal and entry of the order granting guardianship. **In re H.L.A.D., 381.**

Jurisdiction—continuing—child moving out of state—A North Carolina court did not lack subject matter jurisdiction to enter an order terminating parental rights where the child and the child's guardians had moved from North

WORKERS' COMPENSATION—Continued

Findings of fact—asbestosis as result of employment—unable to perform gainful employment—Competent evidence supported the Industrial Commission's finding of fact that plaintiff had suffered from asbestosis as a result of his employment with defendant employer and the disease had rendered him unable to perform gainful employment since 3 December 1999. The possibility that one doctor's statements could support a contrary finding are of no consequence. **Estate of Gainey v. Southern Flooring & Acoustical Co., 497.**

Findings of fact—credibility of doctor's testimony—The Industrial Commission did not err in a workers' compensation case by finding that a doctor's testimony was credible rather than agreeing with the deputy commissioner that the testimony should not be accepted as credible. **Lathon v. Cumberland Cty., 62.**

Findings of fact—ninety-five percent of job is keyboarding or handwriting affidavits—The Industrial Commission did not err in a workers' compensation case by finding that ninety-five percent of plaintiff employee's job is keyboarding or handwriting affidavits because this finding is supported by plaintiff's own testimony. **Lathon v. Cumberland Cty., 62.**

Findings of fact—occupational disease—carpal tunnel syndrome—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee contracted an occupational disease from her work duties, because: (1) although carpal tunnel syndrome is not specifically listed as an occupational disease in N.C.G.S. § 97-53, it falls within the catchall provision of N.C.G.S. § 97-53(13); (2) the Commission's findings are supported by a doctor's testimony even though defendants have pointed to contrary testimony; and (3) the findings of fact support the Commission's conclusion. **Lathon v. Cumberland Cty., 62.**

Findings of fact—stopped working as result of disease—insufficiency of evidence—The Industrial Commission erred in a workers' compensation case by its finding of fact that plaintiff stopped working in 1995 as a result of his disease and plaintiff's asbestos-related condition continued to deteriorate until his death because plaintiff stated unequivocally in answer to an interrogatory regarding this issue that his retirement was in no way related to any medical problem. Although this finding of fact was erroneous, it was not reversible error since it did not affect the Commission's conclusions of law. **Estate of Gainey v. Southern Flooring & Acoustical Co., 497.**

Opinion filed after term of commissioner expired—validity—holdover—de facto officers—The Industrial Commission's opinion and award in a workers' compensation case was not void even though it was filed after the terms of two of the commissioners on the panel deciding plaintiff's case had expired, because: (1) under N.C. Const. art. VI, § 10, N.C.G.S. § 128-7, and *State ex rel. Martin v. Preston*, 325 N.C. 438 (1989), the two commissioners were still properly serving since they continue to hold their positions upon expiration of their term until other appointments are made; (2) nothing in the record indicated that defendants raised the issue of the validity of the commissioners' ongoing tenures in office before the full Commission as required by N.C. R. App. P. 10(b)(1); and (3) even if under *Estes v. N.C. State Univ.*, 117 N.C. App. 126 (1994), the Commissioners were unable to continue serving after their terms expired, the fact that they continued to publicly discharge their duties as Commissioners rendered them de facto officers. **Lathon v. Cumberland Cty., 62.**

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