NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 185

7 AUGUST 2007

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4 SEPTEMBER 2007

RALEIGH
2009

CITE THIS VOLUME
185 N.C. APP.

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CASES

ARGUED AND DETERMINED IN THE

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OF

NORTH CAROLINA

AT

RALEIGH

HOSPICE AT GREENSBORO, INC. D/B/A HOSPICE AND PALLIATIVE CARE OF GREENSBORO AND HOSPICE OF THE PIEDMONT, INC., PETITIONER v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES DIVISION OF FACILITY SERVICES, LICENSURE AND CERTIFICATION SECTION AND NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENTS, AND LIBERTY HOME CARE, LLC, RESPONDENT-INTERVENOR

No. COA06-1204

(Filed 7 August 2007)

1. **Hospitals and Other Medical Facilities— hospice—no review letter—exemption—appeal to Court of Appeals**

   The issuance of a "no review" letter by the N.C. Department of Health and Human Services Certificate of Need section is the issuance of an "exemption" for purposes of N.C.G.S. § 131E-188(a), so that there may be an immediate appeal to the Court of Appeals rather than to superior court.

2. **Hospitals and Other Medical Facilities— certificate of need—hospice—branch office**

   The opening of a branch office by an established hospice within its current service area is not the construction of a new institutional health service for which a certificate of need (CON) is required (as Chapter 131E existed in July 2005). However, Liberty was required to obtain a CON for its proposed Greensboro hospice office because that office is not located within the current service area of its Fayetteville office and is a new institutional health service.

3. Hospitals and Other Medical Facilities— hospice—no review letter for expansion—prejudice to existing competing provider

The issuance of a "no review" letter, which results in the establishment of a new institutional health service (in this case a hospice) without a prior determination of need, substantially prejudiced a licensed, pre-existing competing health service provider as a matter of law.

Appeal by respondent-intervenor from final agency decision entered on or about 12 June 2006 by North Carolina Department of Health and Human Services, Division of Facility Services Director Robert J. Fitzgerald. Heard in the Court of Appeals 11 April 2007.

Wyrick Robbins Yates & Ponton, LLP by K. Edward Greene for Respondent-Intervenor Liberty Home Care, LLC.

Smith Moore, LLP by Maureen Demarest Murray and Susan M. Fradenburg for Petitioner Hospice at Greensboro, Inc. d/b/a Hospice and Palliative Care of Greensboro's and Hospice of the Piedmont, Inc.

Attorney General Roy A. Cooper, III by Assistant Attorney General June S. Ferrell for Respondent-Appellee N.C. Dept. of Health and Human Services.

Bode Call & Stroupe, L.L.P. by Matthew A. Fisher for Amicus Community CarePartners, Inc.

Maupin Taylor, P.A. by Marcus C. Hewitt for Amicus Community Home Care of Johnston County, Inc., Carrolton Home Care, Inc., and Community Home Care of Vance County, Inc.

Parker Poe Adams & Bernstein by Renee J. Montgomery, Susan L. Dunathan, and Robert A. Leandro for Amicus Hospice & Palliative Care Charlotte Region d/b/a Hospice at Charlotte.

Johnston, Allison & Hord, P.A. by Patrick E. Kelly for Amicus The Carolinas Center for Hospice and End of Life Care.

STROUD, Judge.

Respondent-intervenor Liberty Home Care, L.L.C. appeals from the final agency decision entered by the North Carolina Department

of Health and Human Services [DHHS], Division of Facility Services [DFS] in a contested case. Petitioner Hospice at Greensboro, Inc. [HGI] contested the DHHS, DFS Certificate of Need Section's [CON Section] issuance of a "No Review" letter to Liberty, which authorized Liberty to open a hospice office in Greensboro, North Carolina without first obtaining a Certificate of Need [CON] from the department. The final DHHS agency decision granted summary judgment in favor of HGI based upon the agency's conclusions that Liberty's Greensboro hospice office was a "new institutional health service" for which Liberty was required to obtain a CON and that HGI was "substantially prejudiced" by the CON Section's actions.

This Court must resolve three issues on appeal: (1) whether N.C. Gen. Stat. § 131E-188 (2005) authorizes Liberty to appeal the final DHHS agency decision directly to this Court, (2) whether Liberty established a "new institutional health service" in Guilford County for which it was required to obtain a CON, and (3) whether HGI has shown "substantial prejudice" resulting from the CON Section's actions. We affirm.

I. Factual Background

On 21 February 2005, Liberty's Executive Director Anthony Zizzamia, Jr. sent a letter of intent to CON Section Chief Lee Hoffman, requesting permission to open "branch locations" to its "existing licensed and certified hospices" without first obtaining CONs. In the letter, Zizzamia expressed Liberty's "understanding that the branch extension of existing hospice offices is exempt from [CON] review"; thus, Zizzamia sought a "No Review" letter from the CON section. Liberty proposed "branch office locations" in four additional counties based on its "existing licensed and certified" Fayetteville hospice and in nine additional counties based on its "existing licensed and certified" Raeford hospice.

On 7 March 2005, the CON Section responded to Liberty's letter of intent and informed Liberty that "[e]stablishment of each branch office is a separate determination that requires a separate request." The CON section further explained that Liberty "must demonstrate the need for each branch office based on the provision of hospice services to patients who reside in that county from the home office that will support the branch office."

On 30 March 2005, Hoffman sent a letter to Zizzamia requesting additional information and responding to his inquiries "as to whether a certificate of need is required prior to opening the branch offices"

that Liberty proposed. Hoffman stated that Liberty must document that the proposed offices would be "located in" Liberty's " 'current service area,' " explaining "documentation must be submitted to show that the proposed branch offices will be located in a county in which at least one patient is currently served by one of your existing licensed hospice agencies." (Emphasis added.) According to Hoffman, Liberty's "current service area" included any county in which Liberty served at least one patient from its existing, licensed hospices. [hereinafter one patient rule]. An attachment to Hoffman's letter set forth a sample format for providing the requested information. The attachment was titled "RE: Exempt from review/<Proposed County Location> branch office of <name of existing licensed hospice> Medicare Provider."

Thereafter, Liberty made a separate request for each proposed hospice office and submitted documentation to show the proposed hospice offices complied with the one patient rule. In particular, on 30 June 2005, Liberty informed the CON section that it had "recently admitted a hospice patient in Guilford County, North Carolina," who was "being served by [Liberty's] Hospice providing services from our Fayetteville location." Liberty requested that the CON section "provide [it] with a letter of '[N]o [R]eview' with respect to this [Greensboro] branch office."

As documentation, Liberty attached a Home Health Certification and Plan of Care[1] identifying one patient, S.H., in Greensboro, North Carolina. The form listed S.H.'s "start of care date" as 21 June 2005. It also listed authorized prescription medications for S.H. and set forth a plan for S.H's care, which included the use of oxygen, wound care, pain management, and "short term therapy management of terminal illness." Liberty received the Plan of Care on 27 June 2005 and the form was signed by S.H.'s attending physician on 28 June 2005; however, S.H. died on 24 June 2005. Notwithstanding S.H.'s death, Liberty attached the Plan of Care to its 30 June 2005 request for a "No Review" letter as documentation of its "current service area." The Plan of Care for S.H. is the only documentation of current service area that Liberty provided to the CON section.

On 7 July 2005, the CON Section responded to Liberty's 30 June 2005 request for "No Review." The response provided, in part:

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1. Although the letter from Liberty stated that a "signed Hospice Plan of Care identifying the location of this patient is attached," the form actually attached was a Home Health Certification and Plan of Care, which is DHHS Health Care Financing Administration Form 4-485, not a hospice care plan.

> Based on the CON law in effect on the date of this letter, the proposal described in your correspondence is not governed by, and therefore, does not currently require a certificate of need. . . . Further, it should be noted that this determination is binding only for the facts represented by you. Consequently, if changes are made in the project or in the facts provided in the correspondence referenced above, a new determination as to whether a certificate of need is required would need to be made by the Certificate of Need Section.
>
> [Hereinafter "No Review" letter.]

The CON Section relied entirely upon Liberty's 30 June 2005 representations and made no further inquiry before issuing this "No Review" letter to Liberty.

On 15 July 2005, based upon the "No Review" letter, Liberty applied for a license from DHHS DFS License and Certification Section to operate a "branch office" in Guilford County, which the Section granted. The license, which became effective 19 July 2005 and expired "[m]idnight, December 31, 2005," authorized Liberty to "operate a hospice known as Liberty Home Care and Hospice located at 2307 West Cone Blvd., Suite 150, City of Greensboro, North Carolina Guilford County."

On 5 August 2005, HGI filed a petition for a contested case hearing, requesting review of the CON Section's decision to approve Liberty's request for a "No Review" letter and the decision of the License and Certification Section, to issue a license to Liberty for the Greensboro hospice office. Liberty intervened in the contested case on 18 August 2005.

On 2 December 2005, HGI filed motions for summary judgment, entry of a stay of the CON Section's 7 July 2005 "No Review" letter to Liberty, and entry of a stay of the hospice license issued to Liberty on 19 July 2005 for the Greensboro hospice office. HGI argued that Liberty's Greensboro hospice office is a "new institutional health service" for which Liberty was required to obtain a CON. On 9 December 2005, Liberty filed a motion for summary judgment arguing that HGI was not an "aggrieved party" because the issuance of a "No Review" letter to Liberty did not "substantially prejudice[]" HGI's rights.

Depositions and affidavits submitted for the purpose of summary judgment established that Liberty first hired employees for its

Greensboro hospice office in April or May of 2005. Thereafter, Liberty provided hospice services to one patient named S.H. for four days, from 21 to 24 June 2005. Before coming into Liberty's care, S.H. was a resident in Oakhurst nursing facility. A representative of Oakhurst contacted Liberty to inform Liberty that Oakhurst had a patient who needed hospice services. At that time, Liberty was "actively looking for hospice patients to serve" so that it could "establish [its] hospice unit" in Greensboro. As of 26 September 2005, Liberty had not provided hospice services to any patient in Greensboro other than S.H. Liberty did not obtain a CON for its Greensboro hospice office, but received a license for this office based upon the CON Section's issuance of a "No Review" letter.

The "No Review" process is not set forth in statute or rule, but is a practice DHHS developed over time based on its understanding of this Court's decision in *In re Total Care*. In *In re Total Care*, this Court held that "the opening of branch offices by an established home health agency within its current service area is not the construction, development, or other establishment of a new health service facility" for which a CON was required. *In re Total Care*, 99 N.C. App. 517, 522, 393 S.E.2d 338, 342 (1990). When determining whether a proposed branch office is within a health service provider's current service area the CON section considered only whether the applicant hospice had recently "provided hospice services in the county in which they want to open a branch." Here, the CON Section relied entirely upon Liberty's representations to make this determination.

Administrative Law Judge Agustus B. Elkins, II entered a recommended decision granting HGI's motion for summary judgment on 25 January 2006. DFS Director Robert J. Fitzgerald reviewed the recommended decision, considered written exceptions, and heard oral argument on 21 April 2006. Fitzgerald entered a final agency decision on 12 June 2006, adopting most of Judge Elkin's findings and granting HGI's motion for summary judgment. Liberty appealed the final agency decision to this Court.

II. Jurisdiction

[1] HGI asks this Court to dismiss Liberty's appeal, arguing that appeal from a final DHHS agency decision concerning a "No Review" letter must be filed in Superior Court, Wake County pursuant to section 150B-45 of the North Carolina Administrative Procedure Act. N.C. Gen. Stat. § 150B-45 (2005). Liberty agrees with HGI that section 150B-45 controls but asks this Court to grant certiorari review pur-

suant to Rule 21 of the North Carolina Rules of Appellate Procedure. N.C. R. App. P. 21 (2005). In their briefs, both parties acknowledge that N.C. Gen. Stat. § 131E-188(a) (2005) permits "any affected person" to contest the CON Section's decision to "issue, deny, or withdraw a certificate of need or exemption" and that N.C. Gen. Stat. § 131E-188(b) (2005) provides a direct appeal to this Court from "all or any portion" of any final DHHS agency decision resolving a contested case filed under this section. However, the parties conclude that section 131E-188 does not authorize immediate appeal to this Court from the final DHHS agency decision resolving petitioner's challenge to the CON section's issuance of a "No Review" letter because a "No Review" letter is not an "exemption."

We disagree with both parties and hold that the CON section's issuance of a "No Review" letter is the issuance of an "exemption" for purposes of section 131E-188(a). Accordingly, we conclude that section 131E-188(b) confers jurisdiction on this Court to hear Liberty's appeal.[2]

"Any person affected,"[3] by the CON Section's "decision to issue . . . a certificate of need or exemption" is "entitled to a contested case hearing under Article 3 of Chapter 150B of the General Statutes." N.C. Gen. Stat. § 131E-188 (2005). Chapter 150B of the North Carolina General Statutes is commonly known as the Administrative Procedure Act and Article 3 of that Chapter sets forth the procedures governing administrative hearings in contested cases. A "contested case" is "an administrative proceeding . . . to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges." N.C. Gen. Stat. § 150B-2(2) (2005). Generally, "to obtain judicial review of a final decision" entered pursuant to Article 3 of Chapter 150B, "the person seeking review must file a petition in the Superior Court of Wake County or in the superior court of the county where the person

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2. Additionally, we note that Rule 21 of the North Carolina Rules of Appellate Procedure authorizes this Court to grant certiorari review only "when the right to prosecute an appeal has been lost by failure to take timely action, or when no right to appeal from an interlocutory order exists, or for review pursuant to N.C. Gen. Stat. § 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief." N.C. R. App. P. 21(a)(1) (2005). None of these circumstances are present in the case *sub judice*.

3. N.C. Gen. Stat. § 131E-188(c) (2005) defines an "affected person" as "the applicant . . . [and] any person who provides services, similar to the services under review, to individuals residing within the service area or the geographic area proposed to be served by the applicant."

resides." N.C. Gen. Stat. § 150B-45 (2005). However, when the final agency decision resolves a contested case filed pursuant to section 131E-188, appeal may be taken to this Court as of right. N.C. Gen. Stat. § 131E-188(b); N.C. Gen. Stat. § 7A-29(a) (2005).

HGI contests the CON Section's issuance of a "No Review" letter to Liberty. If the "No Review" letter represents an "exemption," then section 131E-188(b) confers jurisdiction on this Court to consider Liberty's appeal from the final DHHS decision resolving the contested case. If not, then appellate jurisdiction lies in Superior Court, Wake County or in the superior court of the county where Liberty resides.

The term "exemption" is not defined by N.C. Gen. Stat. § 131E-176 (2005), which provides definitions for many terms of art used throughout Chapter 131E. Although N.C. Gen. Stat. § 131E-184 (2005) lists circumstances in which DHHS "shall exempt . . . a new institutional health service" from certificate of need review, that section does not define the term "exemption." Finding no express definition of the term "exemption" in Chapter 131E, we "presume[] the General Assembly intended the word[] it used to have the meaning [it has] in ordinary speech." *Nelson v. Battle Forest Friends Meeting*, 335 N.C. 133, 136, 436 S.E.2d 122, 124 (1993); *see also Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) (stating that "[s]tatutory interpretation properly begins with an examination of the plain words of the statute.").

To be "exempt" ordinarily means to be "free from an obligation or liability to which others are subject" or to be "released from or not subject to, an obligation, liability, etc." Random House Webster's College Dictionary, 467 (1st ed. 1991); Black's Law Dictionary 612 (8th ed. 2004) (defining "exempt" as "free or released from a duty or liability to which others are held"); Ballentine's Law Dictionary, 435 (3rd ed. 1969) (defining "exempt" as "free of an obligation which is binding on others").

With respect to health service providers, N.C. Gen. Stat. § 131E-178(a) (2005) states, "No person shall offer or develop a new institutional health service without first obtaining a certificate of need" from DHHS. The plain language of section 131E-178(a) places an affirmative duty on any person seeking to "offer or develop a new institutional health service" to apply for and receive a CON first. Here, the CON Section released Liberty from the obligation to obtain a CON for its Greensboro hospice office by issuing the "No

Review" letter. Thus, the CON section's issuance of a "No Review" letter is an "exemption" which HGI was entitled to contest pursuant to section 131E-188(a).[4] *See also In re Wilkesboro, Ltd.*, 55 N.C. App. 313, 317, 285 S.E.2d 626, 628 (1982) (similarly concluding under prior law that the CON Section's issuance of a "letter relieving Wilkesboro, Limited of the requirement to apply for a certificate of need" was "[an] approval, an approval with conditions, or [a] denial of an application for a certificate of need" which the petitioner was entitled to contest).

For the reasons stated above, we hold that the CON Section's issuance of a "No Review" letter is the issuance of an "exemption" for purposes of section 131E-188(a). Accordingly, we conclude that section 131E-188(b) confers jurisdiction on this Court to hear the incident direct appeal.

III. Summary Judgment

[2] Liberty argues that DHHS erred by granting petitioner's motion for summary judgment. In particular, Liberty assigns error to the agency's conclusions that (1) "Liberty's proposal to open a new hospice office in Guilford County constitutes the establishment of a new hospice agency which required a Certificate of Need" and (2) "[HGI is] substantially prejudiced as a matter of law by [the CON Section's] actions." Citing *In re Total Care*, 99 N.C. App. 517, 393 S.E.2d 338 (1990), Liberty concludes that it was not required to obtain a CON before opening the Greensboro office because the office (1) is located within the "service area" of its existing Fayetteville hospice and (2) is a "branch office" of the Fayetteville hospice. Citing N.C. Gen. Stat. § 150B-23 (2005) and *Bio-Medical Applications of N.C., Inc. v. N.C. Dep't of Health and Human Servs.*, No. COA04-1644, slip op. (N.C. App. Oct. 4, 2005) (unpublished), Liberty concludes HGI failed to show that the CON Section's issuance of the "No Review" letter substantially prejudiced its rights because HGI's claims of prejudice are speculative and because HGI does not

4. This interpretation of section 131E-188 is consistent with the CON section's own understanding of "No Review" letters. The CON section itself described the "No Review" process as an "exemption" in the attachment to its 30 March 2005 letter to Liberty. In that letter, the CON section explained what information it needed to consider Liberty's request for "No Review." The attachment contained the following template for the title of Liberty's "No Review" request: "RE: <u>Exempt from review</u>/<Proposed County Location>branch office of <name of existing licensed hospice>Medicare Provider." (Emphasis added.) The final DHHS agency decision also states that appeal lies to this Court pursuant to section 131E-188.

have a right to be free from competition. These are questions of law which this Court reviews *de novo*. *Craven Reg'l Medical Authority v. N.C. Dep't of Health and Human Servs.*, 176 N.C. App. 46, 51, 625 S.E.2d 837, 840 (2006). We disagree with Liberty and affirm the final DHHS agency decision.

A. New Institutional Health Service

N.C. Gen. Stat. § 131E-178 provides that "No person shall offer or develop a new institutional health service without first obtaining a certificate of need" from DHHS. (Emphasis added.) " 'New institutional health service' means," in part, "[t]he construction, development, or other establishment of a hospice." N.C. Gen. Stat. § 131E-176(16)(n) (2005). Therefore, any person seeking to construct, develop, or otherwise establish a hospice must first obtain a CON from DHHS.

In 1990, this Court considered whether an existing home health agency must obtain a CON before opening a branch office within its service area. *See In re Total Care*, 99 N.C. App. 517, 393 S.E.2d 338. At that time, section 131E-176 defined "new institutional health service" to mean, in part, "[t]he construction, development, or other establishment of a new health service facility." N.C. Gen. Stat. § 131E-176(16) (1989). New "health service facility" was defined, in part, as a "home health agency." *Id.* Considering these statutory definitions, together with the statutory definition of home health agency,[5] this Court held that "the opening of branch offices by an established home health agency within its current service area is not the construction, development, or other establishment of a new health service facility" for which a CON was required. *In re Total Care*, 99 N.C. App. at 522, 393 S.E.2d at 342. In so doing, the Court reasoned that a home health agency's opening of a second office inside its current service area did not "transform" it into two separate agencies. *Id.* at 520, 393 S.E.2d at 340. The Court noted that "if the legislature had intended to require a CON for each office used by the home health agency in providing home health services it could have specified this in the statute," and specifically in the statutory definition of "new health service facility."[6]

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5. At that time, section 131E-176(12) defined a "home health agency" as "a private organization or public agency, whether owned or operated by one or more persons or legal entities, which furnishes or offers to furnish home health services." N.C. Gen. Stat. § 131E-176(12) (1989).

6. Thereafter, the North Carolina General Assembly amended the statutory definition of "new institutional health service" to include "[t]he opening of an additional

We conclude that the reasoning and rule of *In re Total Care* govern the case *sub judice*. An existing hospice's opening of a second office within its current service area does not transform it into two separate hospices. Correspondingly, if the legislature had intended to require a CON for each office used by a hospice then it could have specified this in the statutory definition of "new institutional health service."[7] Therefore, the opening of branch offices by an established hospice within its current service area is not the construction, development, or other establishment of a new institutional health service for which a CON is required.[8] Our conclusion applies only to the statutory definition of "new institutional health service" in effect in July 2005, at the time the CON Section issued the "No Review" letter for Liberty's proposed Greensboro hospice office.

Having concluded that the rule of *In re Total Care* is applicable to hospice branch offices opened within an existing hospice's service area, this Court must consider whether Greensboro is within the "service area" of Liberty's Fayetteville hospice. In so doing, we emphasize that this Court's decision in *In re Total Care* was "premised on [the] undisputed fact" that the plaintiff "inten[ded] to open additional offices only in its existing geographical service area." *In re Total Care*, 99 N.C. App. at 522, 393 S.E.2d at 342. Thus, whether the home health care office proposed by the plaintiff home health care agency in *In re Total Care* was actually located within the plaintiff's "service area" was not an issue on appeal and was not addressed in the Court's opinion.

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office by an existing home health agency within its service area as defined by rules adopted by the Department; or the opening of any office by an existing home health agency outside its service area as defined by rules adopted by the Department." 1991 N.C. Sess. Laws 2222.

7. Recently, the General Assembly further amended the statutory definition of "new institutional health service" to include "the opening of an additional office by an existing . . . hospice within its service area . . . or outside its service area." 2005 N.C. Sess. Laws 1179. Although this session law was ratified by the General Assembly on 16 August 2005 and signed by the Governor on 26 August 2005, it did not "become[] effective for hospices and hospice offices" until 31 December 2005. 2005 N.C. Sess. Laws 1184. Liberty requested a "No Review" letter for its proposed Greensboro office in March 2005, shortly before the original Bill was filed in the Senate. S. 740, 2005 Gen. Assem., Reg. Sess. (N.C. 2005).

8. Our holding is consistent with a 15 February 2004 declaratory ruling entered by DFS Director John M Syria, who determined that an existing, licensed hospice did not need to obtain a CON to open a "branch office" within its "existing service area."

1. Service Area

A "service area" is "the area of the State, as defined in the State Medical Facilities Plan or in the rules adopted by [DHHS] which receives services from a health services facility." N.C. Gen. Stat. § 131E-176(24a) (2005). The 2005 State Medical Facilities Plan [SMFP] defines a "hospice's service area" as "the hospice planning area in which the hospice is located." N.C. Dep't of Health and Human Servs., 2005 State Medical Facilities Plan 252 (2005). "Each of the 100 counties in the State is a separate hospice planning area." *Id.* Thus, the North Carolina General Statutes define a hospice's "service area" as the county in which it is located.

As explained above, this Court did not consider whether the home health care office proposed by the plaintiff home health care agency in *In re Total Care* was actually located within the plaintiff's service area. In fact, the plaintiff in *In re Total Care* established its home health agency in 1978, which is before the effective date of the CON act. Because the plaintiff "was granted a license under the grandfather provisions of the CON law when the law was enacted," it operated without a CON in approximately fourteen counties, including four in which it had offices. For purposes of that appeal, the Court treated the fourteen counties in which the plaintiff operated as "equivalent to a geographic service area under a CON," citing the SMFP in effect at that time.[9] Thus, when stating its holding, this Court used the term "service area" as the term was defined in the SMFP. The Court did not create a new definition for this term or consider whether the plaintiff's "service area" actually complied with the SMFP definition. The definition of "service area" was not at issue in that case.

Applying *In Re Total Care* to the case *sub judice*, we hold that the opening of branch offices by an established hospice within its current service area is not the construction, development, or other establishment of a new institutional health service for which a CON is required. Service area means "the hospice planning area in which the hospice is located." Liberty holds a CON for its hospice located in Fayetteville, North Carolina. The planning area and, therefore, the service area for this hospice is Cumberland County. Because Liberty seeks to open a hospice office in Greensboro, North Carolina, which

9. At that time, the SMFP stated that "[a] proposed service area (for home health services) may also consist of a grouping of contiguous counties." N.C. Dep't of Health and Human Servs., 1989 State Medical Facilities Plan 27 (1989).

is located in a county outside the service area of its existing hospice, Liberty has not met the requirements set forth in *In re Total Care*.

Liberty urges this Court to ignore the statutory definition of "service area," arguing that the home health care office proposed by the plaintiff home health care agency in *In re Total Care* did not meet the statutory definition of "service area"; the CON Section has interpreted *In re Total Care* to create a new definition of service area, such that a health service provider's service area is any area in which it has recently served at least one patient; and the statutory definition of "service area" is used only to determine whether there is a need for a "new institutional health service." We are not persuaded.

First, this Court's opinion in *In re Total Care* was "premised on [the] undisputed fact" that the plaintiff "inten[ded] to open additional offices only in its existing geographical service area." *In re Total Care*, 99 N.C. App. at 522, 393 S.E.2d at 342. Again, whether the proposed home health care offices were actually located within the plaintiff home health care agency's existing service area was "undisputed" and not at issue on appeal.

Second, we agree with Liberty that an agency's interpretation of a statutory term is entitled to deference when the term is ambiguous and the agency's interpretation is based on a "permissible construction of the statute." *County of Durham v. N.C. Dep't of Env't and Natural Res.*, 131 N.C. App. 395, 396-97, 507 S.E.2d 310, 311 (1998). However, we conclude that the statutory term "service area" is not ambiguous and that the CON Section's interpretation of this term is not based on "construction of the statute"; rather, it is based on an erroneous reading of this Court's decision in *In re Total Care*.

CON Section Chief Lee Hoffman testified at a deposition taken in preparation for the hearing in this contested case. When asked how the CON Section defined the term "current service area," Hoffman explained that the Section considered a "current service area" to be any county where "there was a patient being served at about that time" or "there had been a pattern and practice of services provided to that county, even if there wasn't a patient currently being served in the most recent past." Hoffman also repeatedly testified that the CON Section gleaned this definition from this Court's decision in *In re Total Care* and nowhere else.

DHHS is not entitled to judicial deference to its misinterpretation of *In re Total Care*. In fact, by implementing a one patient rule, DHHS

has encouraged a practice that this Court disavowed in that case: "[the] offering . . . and opening [of] offices in leapfrog fashion across the State without obtaining a CON for such services and offices." *In re Total Care*, 99 N.C. App. at 522, 393 S.E.2d at 342. This Court expressly "premised" its ruling "on [the] undisputed fact" that the plaintiff home health agency intended "to open additional offices only in its existing geographical service area" and explained that its decision in *In re Total Care* was "limited to the facts of [that] particular appeal" to prevent such an interpretation. *Id.*

Moreover, DHHS is not entitled to deference for a policy that is contrary to the plain language of section 131E-176(24a), which defines a hospice's service area as the county in which the hospice is located by statutorily adopting the definition of service area set forth in the SMFP. The one patient rule further frustrates the General Assembly's express purpose to prevent "[t]he proliferation of unnecessary health service facilities" by permitting hospice providers to open facilities in "leapfrog fashion" without a determination that such facilities are needed. N.C. Gen. Stat. § 131E-175(4) (2005). The General Assembly has determined that "unnecessary health service facilities result[] in costly duplication and underuse of facilities," as well as "unnecessary use of expensive resources" and "an enormous economic burden on the public who pay for the construction and operation of these facilities as patients, health insurance subscribers, health plan contributors, and taxpayers," which the CON process is designed to prevent. N.C. Gen. Stat. § 131E-175(4), (6) (2005).

Third, Liberty argues that the statutory definition of "service area" is used only to determine the need for a "new institutional health service," and should not be used to determine whether its proposed Greensboro hospice office meets the definition of "new institutional health service." In essence, Liberty asks this Court to determine that its proposed Greensboro office is not subject to the requirements of the CON law because the proposed office is inside Liberty's service area and that the proposed office is inside Liberty's service area because the CON law (specifically the statutory definition of service area) does not apply. We reject this circular argument.

2. Extension of *In re Total Care*

This Court limited its holding in *In re Total Care* as follows:

> [T]his opinion is limited to the facts of this particular appeal and <u>does not determine the question whether</u> extension of

> home health services to patients in counties outside an agency's current service area, or the expansion of branch offices of an established home health agency outside the agency's current service area would trigger the CON requirement under N.C. Gen. Stat. § 131E-176.

In re Total Care, 99 N.C. App. at 522-23, 393 S.E.2d at 342 (emphasis added). Having concluded that Liberty's Greensboro hospice office is located outside the service area of its Fayetteville hospice, we must answer the question left unresolved by *In re Total Care*: whether an existing hospice care provider must obtain a CON before opening an office outside its service area. We conclude that it must.

Because a branch hospice office is necessarily supported by an existing certified "parent" hospice, it is also necessarily subject to the limitations imposed on the "parent" hospice by the CON law. *See In re Total Care*, 99 N.C. App. at 520, 393 S.E.2d at 340. (reasoning that a branch home health office and parent home health agency comprise a single agency). Every CON is issued for a finite "service area." *See* N.C. Gen. Stat. § 131E-181(a) (entitled "Nature of a Certificate of Need") (stating "[a] certificate of need shall be valid only for the defined scope, physical location, and person named in the application). It is well established that an existing institutional health service must obtain a new CON to relocate outside this service area. N.C. Gen. Stat. § 131E-176(16)(q). This is because "the relocation of a health service facility from one service area to another" establishes a "new institutional health service." *Id.*; *But see Christenbury Surgery Center v. N.C. Dep't of Health*, 138 N.C. App. 309, 531 S.E.2d 219 (2000). Similarly, we hold that an existing institutional health service must obtain a new CON to open a "branch office" outside its service area.[10] Such an office, regardless of the label affixed by its developer, is a "new institutional health service" for which a CON is required.

3. Conclusion

For the reasons stated above, we hold that the opening of a branch office by an established hospice within its current service area is not the construction, development, or other establishment of a new institutional health service for which a CON is required. This

10. We note that Total Care did not define "branch office" as it was undisputed in that case that the new home health office was a "branch office. The CON law contains no formal definition of a "branch office." For purposes of this opinion reviewing summary judgment, we assume that Liberty's Greensboro office is a "branch office." However, this opinion also does not define "branch office" as such a holding is not necessary.

holding is applicable only to Chapter 131E as it existed in July 2005. We further hold that the Greensboro hospice office proposed by Liberty is not located within its current service area; therefore, the proposed office is a "new institutional health service" for which Liberty was required to obtain a CON. Accordingly, this assignment of error is overruled.

B. Substantial Prejudice

[3] Liberty assigns error to DHHS's denial of its motion for summary judgment. In support of its argument, Liberty contends that HGI failed to allege in its petition for a contested case hearing that the CON Section "substantially prejudiced" its rights and failed to forecast evidence of "substantial prejudice" as required by N.C. Gen. Stat. § 150B-23(a) (2005). We disagree and hold that the issuance of a "No Review" letter, which results in the establishment of "a new institutional health service" without a prior determination of need, substantially prejudices a licensed, pre-existing competing health service provider as a matter of law.

N.C. Gen. Stat. § 150B-23(a) provides, in part, that a petition for a contested case hearing "shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights." Here, HGI alleges only that the CON Section's issuance of a "No Review" letter to Liberty has "substantially prejudiced" its rights. In support of this allegation, HGI forecast evidence regarding the potential for loss of patients, patient confusion, and impairment of fund-raising for non-profit hospices. Because we resolve this issue as a matter of law, we do not consider the sufficiency of the evidence forecast by HGI.

HGI is a hospice care provider that has been operating licensed hospices in Guilford County since 1978 and has a significant interest in ensuring that unnecessary and duplicative hospice services are not opened in its service area. Because an applicant for a CON must "demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities," this interest (which the General Assembly has also determined to be a public interest) is vetted during the CON application process. Competing hospice providers, like HGI, may participate in the CON application process by filing "written comments and exhibits concerning a proposal [for a new institutional health service]

under review with the Department." N.C. Gen. Stat. § 131E-185(a1) (2005). Such comments may include

> a. Facts relating to the service area proposed in the application;
>
> b. Facts relating to the representations made by the applicant in its application, and its ability to perform or fulfill the representations made;
>
> c. Discussion and argument regarding whether, in light of the material contained in the application and other relevant factual material, the application complies with relevant review criteria, plans, and standards.

Id.

Here, HGI was denied any opportunity to comment on the CON application, because there was no CON process. In fact, the CON Section's issuance of a "No Review" letter to Liberty effectively prevented any existing health service provider or other prospective applicant from challenging Liberty's proposal at the agency level, except by filing a petition for a contested case. We hold that the issuance of a "No Review" letter, which resulted in the establishment of a "new institutional health service" in HGI's service area without a prior determination of need was prejudicial as a matter of law. *Cf. In re Wilkesboro, Ltd.*, 55 N.C. App. 313, 285 S.E.2d 626 (decided under prior law, holding that the petitioner was entitled to a contested case hearing, and concluding that the petitioner, who was a competitor of the respondent, had "a substantial stake in the outcome of the controversy, such that the Court could, "in fact, think of no better person to assure complete review of this issue").

IV. Conclusion

For the reasons stated above, we hold that the CON Section's issuance of a "No Review" letter is the issuance of an "exemption" for purposes of section 131E-188(a). Accordingly, we conclude that section 131E-188(b) confers jurisdiction on this Court to hear the incident appeal.

Additionally, we hold that the opening of a branch office by an established hospice within its current service area is not the construction, development, or other establishment of a new institutional health service for which a CON is required. As explained above, this holding is applicable only to Chapter 131E as it existed in July 2005. We further hold that the Greensboro hospice office proposed

by Liberty is not located within the current service area of its Fayetteville hospice; therefore, the proposed office is a "new institutional health service" for which Liberty must obtain a CON.

Finally, we hold that the issuance of a "No Review" letter, which results in the establishment of "a new institutional health service" without a prior determination of need, substantially prejudices a licensed, pre-existing competing health service provider as a matter of law.

Accordingly we affirm the final agency decision entered on or about 12 June 2006 by DHHS, DFS Director Robert J. Fitzgerald awarding summary judgment to HGI.

AFFIRMED.

Judges McCULLOUGH and CALABRIA concur.

STATE OF NORTH CAROLINA v. JACOBIE QUONZEL BROCKETT

No. COA06-1005

(Filed 7 August 2007)

1. Evidence— prior crimes or bad acts—use of same firearm—relevant to identity

Evidence of prior bad acts (robberies) was relevant to identity and was properly admitted in a prosecution for gang-related first-degree murder and related crimes. There was expert testimony that the TEC-9 firearm used in the killing was the weapon used in the robberies.

2. Evidence— prior crimes or bad acts—decision to admit—not an abuse of discretion

The trial judge did not abuse his discretion by admitting evidence of prior bad acts in a gang-related murder prosecution where he held a voir dire hearing, considered the arguments of counsel, and then determined that the probative value of the evidence outweighed any prejudicial effect it may have had. His decision was not arbitrary or unsupported by reason.

3. Evidence— transcript of prior plea—admissibility

The trial court did not err in a prosecution for a gang-related murder by admitting the transcript of defendant's plea to three prior armed robberies. The transcript established defendant's admission to having previously used the murder weapon, a limiting instruction was given, the actual judgment or conviction record was not admitted, and the State was required to sanitize the plea to remove references to any charge or crime other than that to which he was pleading guilty.

4. Evidence— defendant's telephone conversation—discussion of witnesses—profanity—not prejudicial

The trial court did not err in a first-degree murder prosecution by admitting into evidence a taped telephone conversation between defendant and his brother in which defendant used profanity, discussed witnesses who would testify against him, and discussed his brother's sexual encounters. Defendant's statements about witnesses showed awareness of guilt, and he did not specifically object at trial to other portions of the testimony. The trial court held a voir dire, listened to the recording, heard arguments from counsel, and made a reasoned decision.

5. Evidence— meaning of gang terms—detective's lay expertise

The trial court did not err in a gang-related first-degree murder prosecution by allowing a detective to testify about the meaning of slang terms used by defendant and his brother during a taped telephone conversation after refusing to qualify him as an expert. The judge stated that he believed the detective had the training and skills to aid the jury in interpreting the language.

6. Evidence— gang terminology—meaning of specific terms—variable context

The trial court did not err by allowing a detective to testify about the meaning of certain gang terminology where defendant asserted that the terms have various meanings depending on the context. It is clear that the testimony was necessary for an understanding of the conversation in issue, defendant did not object to the specific testimony offered, and he cross-examined the detective on his interpretation of only one word. Moreover, the judge instructed the jury that it was the sole judge of credibility.

7. Appeal and Error— preservation of issues—challenge at trial on different basis

A contention about a detective's testimony was not preserved for appeal where the testimony was not challenged at trial on this basis.

8. Appeal and Error— preservation of issues—not the basis for objection at trial

A contention regarding alteration or supplementation of the transcript of a taped conversation was not the basis for the objection at trial and was not preserved for appeal. A general objection to the witness's testimony did not include these changes or additions.

Appeal by Defendant from judgments entered 17 February 2006 by Judge Quentin T. Sumner in Pitt County Superior Court. Heard in the Court of Appeals 22 February 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Norma S. Harrell, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliot Walker, for Defendant.

STEPHENS, Judge.

On 6 March 2005, O'Joshua Roberts ("Roberts") saw Defendant, a member of a street gang in Greenville called the "Fifth Street Boys," at a convenience store in their neighborhood. Defendant told Roberts he was afraid that the "New York Boys," another street gang in Greenville, were "going to kill somebody" because of "some earlier shootings." Defendant then told Roberts that "he was going to get them before they get somebody in our neighborhood." Later that evening, Defendant and Roberts rode bicycles toward a house where they believed certain "New York Boys" were gathered. Roberts knew Defendant had a gun and that Defendant intended to commit a shooting. However, he did not continue to ride with Defendant because he "didn't want to have nothing to do with it." Defendant rode on and Roberts heard "four or five gunshots" and soon saw Defendant "running around the corner." Defendant was running toward his apartment and carrying a gun in his hand. Roberts followed Defendant to his apartment where Defendant gave him the firearm he had been carrying and told him to hide the gun. As a result of the shooting, Jahmel

Little, thirteen years old, was killed and Donique Rich, twenty or twenty-one years old, was seriously injured.

On 28 March 2005, Defendant was indicted on charges of first-degree murder of Jahmel Little and assault with a deadly weapon with intent to kill inflicting serious injury and attempted first-degree murder of Donique Rich. A jury trial was held before the Honorable Quentin T. Sumner in Pitt County Superior Court between 13 and 17 February 2006. At the close of the evidence, the jury returned verdicts finding Defendant guilty on all charges. After the jury returned its verdicts, Defendant admitted to the existence of two aggravating factors involving the attempted murder charge. Specifically, Defendant admitted that he "committed the offense while on pretrial release on another charge" and that the "victim of this offense suffered serious injury that is permanent and debilitating."

Based on the jury's verdicts, Defendant's prior record level of IV, and the admitted aggravating factors, Judge Sumner sentenced Defendant to "life imprisonment without parole" for his conviction of first-degree murder. Judge Sumner imposed a consecutive sentence of 313 months minimum and 385 months maximum imprisonment for Defendant's conviction of attempted first-degree murder. Judge Sumner arrested judgment on Defendant's conviction of assault with a deadly weapon with intent to kill inflicting serious injury.[1] From the judgments entered upon his convictions, Defendant appeals. For the reasons which follow, we hold that Defendant received a fair trial, free of error.

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[1] By his first argument, Defendant contends Judge Sumner committed prejudicial error in admitting, over Defendant's objection, evidence regarding Defendant's participation in three armed robberies that occurred approximately two months before the events which are the subject of this case. Defendant argues this evidence violated Rule 404(b) of the North Carolina Evidence Code. This argument is without merit.

We review a trial court's admission of evidence under Rule 404 of the North Carolina Rules of Evidence for an abuse of discretion. *State v. Summers*, 177 N.C. App. 691, 629 S.E.2d 902, *appeal dismissed and disc. review denied*, 360 N.C. 653, 637 S.E.2d 192 (2006). "A trial

1. It is unclear from the transcript and record why judgment was arrested on this charge. However, in the briefs submitted, both the State and Defendant allege that this charge was the underlying felony for Defendant's felony murder conviction.

court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986).

Rule 404(b) provides that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005). The admission of evidence under Rule 404(b) is constrained by how similar in manner and how close in time the prior acts were to the crimes with which the defendant is currently charged. *State v. Abraham*, 338 N.C. 315, 451 S.E.2d 131 (1994).

> [E]vidence is admissible under Rule 404(b) of the North Carolina Rules of Evidence if it is substantial evidence tending to support a reasonable finding *by the jury* that the defendant committed a similar act or crime and its probative value is not limited *solely* to tending to establish the defendant's propensity to commit a crime such as the crime charged.

State v. Stager, 329 N.C. 278, 303-04, 406 S.E.2d 876, 890 (1991) (citations omitted). Prior crimes or acts by the defendant are deemed similar when there are "some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both[.]" *State v. Moore*, 309 N.C. 102, 106, 305 S.E.2d 542, 545 (1983) (citations omitted). "However, it is not necessary that the similarities between the two situations rise to the level of the unique and bizarre. Rather, the similarities simply must tend to support a *reasonable* inference that the same person committed both the earlier and later acts." *Stager*, 329 N.C. at 304, 406 S.E.2d at 891 (internal quotations and citation omitted).

In the case at bar, Defendant argues the murder and assault charges are not sufficiently similar to the robberies because (1) the robberies occurred inside a residence and the shooting occurred outside in the street, (2) Defendant allegedly shot at a dog during the robberies, but shot people in this case, (3) Defendant walked to commit the robberies, but rode a bicycle to commit the shootings, (4) Defendant attempted to conceal his identity during the shootings, but

made no such effort during the robberies, and (5) "the *only* similar fact between the charged offenses and the robberies was that defendant allegedly used the same TEC 9 weapon each time." Defendant further asserts that "[b]ecause firearms *always* are used in shootings and *commonly* are used in robberies, this fact, though similar, is not unusual." We are not persuaded.

During the trial, Neal Morin, a special agent with the North Carolina State Bureau of Investigation and an expert in the field of firearm identification, testified that the TEC 9 firearm used to kill Jahmel Little was the same weapon used to commit the robberies to which Defendant pled guilty. From this testimony, it is clear that the evidence regarding Defendant's participation in the armed robberies established more than that Defendant had the propensity to break the law. This evidence established not only that Defendant had used a firearm to commit a crime in the recent past; significantly, it also demonstrated that Defendant had used or had access to the *same* firearm within two months of the shootings. At a minimum, this evidence was relevant to prove identity and plainly supports "a *reasonable* inference that the same person committed both the earlier and later acts." *Id.* Judge Sumner properly ruled that the evidence was admissible under Rule 404(b).

[2] However, in framing his "Question[] Presented" on this issue, Defendant further asserts that the admission of evidence of the three prior armed robberies under Rule 404(b) was prejudicial error. While Defendant does not clearly argue that the admission of this evidence violated Rule 403 of the North Carolina Evidence Code, we believe it is imperative to address this issue.

Pursuant to Rule 403 of the North Carolina Rules of Evidence, "[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). The exclusion of evidence under Rule 403 is a matter left to the sound discretion of the trial judge, and we will reverse a Rule 403 decision of the trial court only when the decision is arbitrary or unsupported by reason. *State v. Hyatt*, 355 N.C. 642, 566 S.E.2d 61 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003).

Here, before permitting the jury to hear evidence regarding the prior armed robberies, Judge Sumner conducted a *voir dire* hearing to take Roberts's testimony, considered arguments of counsel, and

then determined that "the probative value offered by the State's proffered . . . evidence in this matter outweighs any prejudicial effect it may have." Judge Sumner properly balanced the potential prejudicial effect of the 404(b) evidence against its probative value. His decision to admit the evidence was not arbitrary or unsupported by reason. We disagree with Defendant that admission of this evidence constituted prejudicial error. Accordingly, this assignment of error is overruled.

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[3] Defendant next asserts the trial court committed prejudicial error in admitting over his objection the transcript of his guilty plea to the three armed robberies. Defendant's argument lacks merit.

As discussed *supra*,

> [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). Relying on Judge Wynn's dissenting opinion in *State v. Wilkerson*, 148 N.C. App. 310, 319, 559 S.E.2d 5, 11 (Wynn, J., dissenting), *rev'd per curiam for reasons stated in dissenting opinion*, 356 N.C. 418, 571 S.E.2d 583 (2002), and *State v. McCoy*, 174 N.C. App. 105, 620 S.E.2d 863 (2005), *disc. review denied*, ––– N.C. –––, 628 S.E.2d 8 (2006), Defendant contends the admission in evidence of his "Transcript of Plea" for the three armed robberies was improper evidence of a "bare conviction" and was unduly prejudicial. However, these cases are distinguishable from the case at bar, and thus, do not control.

In *Wilkerson*, after testimony from two law enforcement officers regarding the defendant's

> prior crimes on 15 June and 11 and 12 October 1994, . . . the Deputy Clerk of the Superior Court, Rockingham County, testified that defendant had prior convictions on file in Rockingham County for (1) possession of cocaine on 15 June 1994, (2) possession with intent to sell or deliver cocaine on 11 October 1994, and (3) sale or delivery of cocaine on 11 October 1994.

Wilkerson, 148 N.C. App. at 320, 559 S.E.2d at 11. Similarly, in *McCoy*, "the State elicited . . . testimony . . . describ[ing] the underlying facts of an assault committed by the defendant . . . . Following [this] testi-

mony, the State introduced a certified copy of defendant's criminal conviction . . . resulting from the events described[,]" and the trial court admitted both the testimony and the evidence of the defendant's prior conviction. *McCoy*, 174 N.C. App. at 111, 620 S.E.2d at 868. In each case, although the testimony describing the underlying facts of the prior crimes was admissible, the defendant was awarded a new trial due in part to the admission of the "bare fact" of each defendant's prior *conviction*, evidence that would "permit the jury to surmise that the defendant, having once formed the necessary intent or developed the requisite *mens rea*, undoubtedly did so again; after all, another jury ha[d] already conclusively branded the defendant a criminal." *Wilkerson*, 148 N.C. App. at 328, 559 S.E.2d at 16.

In the case at bar, the State first elicited testimony from Roberts, a friend of Defendant who was with him on the night of the shooting and who participated with him in the armed robberies, and from police officer Jason Campbell and Corporal John Jenkins of the Greenville Police Department to establish the underlying facts of the armed robberies. The State then offered in evidence the "Transcript of Plea" by which Defendant, of his "own free will, fully understanding what" he was doing, admitted his guilt to the armed robbery charges. Therefore, the admission of this document constituted more than bare evidence of Defendant's prior conviction. Rather, it was an admission by Defendant that he had participated in the armed robberies. Based on the properly admitted evidence establishing that the same firearm used in the armed robberies was used to murder Jahmel Little, Defendant's guilty plea demonstrated that he admitted having access to or using the murder weapon at a previous time. Furthermore, Judge Sumner gave a limiting instruction to the jury in which he stated:

> Evidence has been received tending to show that . . . defendant, Jacobie Brockett, [was] involved in an armed robbery on or about January 11, 2005 at 1305 West Third Street in Greenville. And further that during that armed robbery, the defendant, Jacobie Brockett, used a TEC 9 to shoot at a dog at 1305 West Third Street. This evidence was received solely for the purpose of showing the identity of the person who committed the crime charged in this case, if it was committed. If you believe this evidence you may consider it, but only for the limited purpose for which it was received.

Because the "Transcript of Plea" established Defendant's admission to having previously used the murder weapon and because Judge

Sumner properly limited the jury's consideration of such evidence, *Wilkerson* and *McCoy* are distinguishable. Moreover, we note that Judge Sumner did not admit in evidence the actual judgment or Defendant's conviction record. Additionally, the trial court required the State to "sanitize" the "Transcript of Plea" to eliminate references to any crime or charge "other than the matter he's pleading guilty to at this time." Furthermore, unlike *Wilkerson* and *McCoy*, where the jury learned that a previous jury "branded" the defendant a criminal, in this case Defendant himself, having first-hand knowledge of his participation in the armed robberies, admitted his guilt to those crimes. Under these circumstances, we hold the trial court did not err in admitting Defendant's "Transcript of Plea." Accordingly, this assignment of error is overruled.

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[4] Next, Defendant argues the trial court committed reversible error by admitting in evidence a taped phone conversation between Defendant and his brother because (1) the conversation was not relevant, (2) this evidence constituted impermissible character evidence, and (3) the profane language on the tape was overly prejudicial. We disagree.

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2005). All relevant evidence is admissible at trial unless specifically excluded by rule or law. N.C. Gen. Stat. § 8C-1, Rule 402 (2005). However, when making an evidentiary ruling a trial court should also consider that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403. Generally, an attempt by a defendant to intimidate a witness to affect the witness's testimony is relevant and admissible to show the defendant's awareness of his guilt. *State v. Mason*, 337 N.C. 165, 446 S.E.2d 58 (1994).

At trial, the State offered in evidence the recording and the transcript of a taped phone conversation between Defendant and his brother. Defendant timely objected on grounds that the tape and transcript were not relevant to the case and were overly prejudicial. However, Defendant did not argue to the trial court that this evidence constituted impermissible character evidence. Therefore, we do not

consider this argument on appeal. *See State v. Woodard*, 102 N.C. App. 687, 696, 404 S.E.2d 6, 11 (recognizing that "[t]he defendant may not change his position from that taken at trial to obtain a 'steadier mount' on appeal") (citing *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), *disc. review denied*, 329 N.C. 504, 407 S.E.2d 550 (1991)), *appeal dismissed and disc. review denied*, 329 N.C. 504, 407 S.E.2d 550 (1991).

A review of the transcript of the conversation between Defendant and his brother reveals that Defendant expressed concern about a witness who intended to testify against him. When discussing the witness's potential testimony, Defendant told his brother that some things the witness had written "will almost f*** me . . man[,]" and that his brother should "smack" the potential witness. Defendant's brother warned him not to "talk greasy on the phone" because their conversation was likely "tapped up." Finally, Defendant and his brother also discussed other individuals who were "trying to talk against" Defendant.

Defendant's statements regarding the testimony of potential witnesses and his suggestion that his brother should "smack" a certain witness to deter him from testifying tend to show Defendant's awareness of his guilt and are thus relevant and admissible under *Mason*. Moreover, although some portions of the transcript were irrelevant to the case, including the excessive profanity Defendant used and the references to Defendant's brother's sexual encounters, because Defendant did not specifically object to these portions of the tape and transcript at trial, he did not properly preserve his argument as to these issues on appeal. *See State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721 (1974) (noting that where a general objection is made to testimony that is competent in part and incompetent in part, the appellate court will not assume that the objection was aimed at the incompetent testimony), *vacated in part on other grounds*, 428 U.S. 903, 49 L. Ed. 2d 1206 (1976).

Finally, Defendant has not shown the trial court abused its discretion in determining that the probative value of the statements outweighed any prejudicial effect the profane language included on the tape may have had. In making his decision on the admissibility of this evidence, Judge Sumner heard *voir dire* testimony to establish the authenticity of the recording, listened to the recording, and heard arguments from trial counsel on both the relevance and the prejudicial effect of the recording. Based on the information

that Judge Sumner considered before determining the admissibility of the recording, it is clear that he made a reasoned decision and did not abuse his discretion. Accordingly, Defendant's argument is overruled.

By his fourth and final argument, Defendant contends the trial court committed reversible error by permitting the testimony of James Carlton, a detective with the Greenville Police Department, who interpreted the taped phone conversation between Defendant and his brother. Specifically, Defendant argues that Detective Carlton, while not being admitted as an expert witness, (1) was impermissibly allowed to provide his opinion to the jury regarding the meaning of certain slang terminology used by Defendant and his brother during the phone conversation, (2) was allowed to provide his opinion even though he acknowledged that the same words and phrases have different meanings within different groups, and (3) contradicted or supplemented the transcript of the recording offered by the State.

"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." N.C. Gen. Stat. § 8C-1, Rule 702(a) (2005). "Expert testimony is properly admissible when it can assist the jury in drawing certain inferences from facts and the expert is better qualified than the jury to draw such inferences." *State v. Evangelista*, 319 N.C. 152, 163, 353 S.E.2d 375, 383 (1987). While a trial court should avoid unduly influencing the jury's ability to draw its own inferences, expert testimony is proper in most facets of human knowledge or experience. *State v. Crawford*, 329 N.C. 466, 406 S.E.2d 579 (1991). "In applying the rule, the trial court is afforded wide discretion and will be reversed only for an abuse of that discretion." *State v. Anderson*, 322 N.C. 22, 28, 366 S.E.2d 459, 463, *cert. denied*, 488 U.S. 975, 102 L. Ed. 2d 548 (1988).

When making his objection to Detective Carlton's testimony, Defendant's counsel stated:

> The one thing that concerns me is in his testimony when he says that—that all these words have so many different meanings and it differs from area to area, geography, you know, one gang to another.

> We're going to allow him to testify to meanings of words, and that may not be the meaning that's assigned with the word under the context of the statements made on the recording.
>
> And if that happens and it's incorrect, it could be highly prejudicial to the defendant. So I would just note my objection on that . . .—as much as it's necessary, I just don't think there is a clearly defined dictionary of street gang lingo, and I think that if some of these words are open to interpretation, then the wrong interpretation would be extremely damaging, when, in fact, it's not evidence that should be, under other context.

After hearing Detective Carlton's testimony on *voir dire*, Judge Sumner noted Defendant's objection and allowed Detective Carlton to testify.

[5] On appeal, Defendant first argues that because Judge Sumner told the prosecutor "I'm not going to let you qualify [Carlton] as an expert[,]" the trial court erred by permitting a lay witness to offer expert opinion testimony. We are not persuaded by this argument.

In *State v. Wise*, 326 N.C. 421, 431, 390 S.E.2d 142, 148 (citing *State v. Perry*, 275 N.C. 565, 169 S.E.2d 839 (1969)), *cert. denied*, 498 U.S. 853, 112 L. Ed. 2d 113 (1990), our Supreme Court noted that when a

> defendant interposed only general objections to the testimony which is the subject of this assignment of error . . . [and] never requested a specific finding by the trial court as to the witness' qualifications as an expert . . . a finding that the witness is qualified as an expert is implicit in the trial court's ruling admitting the opinion testimony.

When overruling Defendant's objection to Detective Carlton's testimony, Judge Sumner stated:

> Certainly. Your objection is noted, and let's just say this, that the effort here is to get to the truth. The jury has heard this taped conversation, and unless you are versed in this stuff, it doesn't mean anything.
>
> And I believe that Officer Carlton has the necessary training, experience, and knowledge, based on his exposure as an officer, and training as an officer here in Pitt County and in Nash County, I believe—Rocky Mount—having worked with juveniles who are known to be gang members.

> He's indicated, I think, quite willingly, that some terms have different connotations, and he's indicated that for me, I think, succinctly when that was the case. So, I'm going to—now I'm not going to let you qualify him as an expert, mind you.
>
> . . . .
>
> But I do think that he has some training and skills that will aid the jury in interpreting this stuff . . . .
>
> . . . .
>
> I want you to certainly lay the foundation to indicate that . . . this is not just somebody that you brought off the streets to come in . . . .

Although Judge Sumner ruled that he would not allow the prosecutor to qualify Detective Carlton as an expert before the jury, Judge Sumner's statement that he believed Detective Carlton has "training and skills that will aid the jury in interpreting this stuff[,]" and the fact that he allowed Detective Carlton to offer opinion testimony, demonstrate that Judge Sumner concluded that Detective Carlton was qualified to offer expert opinions on the meaning of slang terms. Judge Sumner's statement that he would not allow the prosecutor to "qualify [Carlton] as an expert" indicates only that, to avoid any improper judicial influence on the weight to be given Detective Carlton's testimony, Judge Sumner did not want the jury to hear that Detective Carlton was testifying as an expert. *See Wise*, *supra* (holding that a trial court's decision to qualify a witness as an expert may be implied from the court's decision to admit testimony that only an expert witness could provide even when the witness has not been qualified as an expert in open court). Accordingly, Defendant's argument challenging the trial court's decision to permit Detective Carlton's testimony is overruled.

[6] Defendant next argues the trial court erred in allowing Detective Carlton to testify regarding the definition of certain slang terminology used by Defendant and his brother in their taped phone conversation. Defendant asserts the terms in question can have various meanings depending on the declarant and the context in which the terms are used. For this reason, Defendant argues that an improper definition could have an overly prejudicial effect on the jury.[2]

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[7] 2. Defendant also argues in his brief to this Court that the trial court erred in allowing Detective Carlton's testimony because it contradicted prior *voir dire* testimony of another "expert witness" that the State initially proffered to define the

At trial, when Detective Carlton was giving his interpretation of the slang terms used by Defendant and his brother, Defendant's counsel did not object to any of the specific testimony offered. Furthermore, when given the opportunity to cross-examine Detective Carlton, Defendant's attorney questioned him only on his interpretation of the word "smack." In the context in which the term was used, Carlton testified the term meant to "pistol whip[.]" After reading the transcript of the taped conversation, it is clear that Detective Carlton's testimony was necessary to effectuate an understanding of the conversation because, as Judge Sumner stated, "unless you are versed in this stuff, it doesn't mean anything." Furthermore, in his jury charge, Judge Sumner instructed the jury that they were "the sole judges of the credibility, that is the believability, of each witness" and "the sole judges of the weight to be given any evidence."

With regard to expert witness testimony, the trial court reminded the jury that:

> As I have instructed you, you are the sole judges of the credibility of each witness and the weight to be given to the testimony of each witness. In making this determination as to testimony of an expert witness, you should consider, in addition to the other tests of credibility and weight, the witness's training, qualifications, and experience or lack thereof, the reasons, if any, given for the opinion; whether the opinion is supported by facts that you find from the evidence; whether the opinion is reasonable; and whether it is consistent with other believable evidence in the case[.]
>
> You should consider the opinion of an expert witness, but you are not bound by it. In other words, you are not required to accept an expert witness's opinion to the exclusion of the facts and circumstances disclosed by other testimony.

From this charge, it is plain that Judge Sumner clearly and repeatedly reminded the jury that they were the sole judges of the credibility of expert and lay witnesses and of the weight to be given their testimony. Therefore, although Detective Carlton admitted that some of the words to which he testified can have different meanings, Judge

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slang terms. Because that witness was the sister of the murder victim, Judge Sumner refused to let her testify to the jury. However, Defendant did not challenge Detective Carlton's testimony before the trial court for this reason. Consequently, the argument has not been properly preserved and we do not consider it on appeal. *See* N.C. R. App. P. 10(b)(1).

Sumner left the ultimate determination to the jury. Accordingly, based on the *voir dire* testimony, the attorneys' arguments heard by Judge Sumner and the instructions he gave to the jury, the trial judge did not err in determining that any prejudicial effect of an allegedly improper definition was outweighed by the probative value of Detective Carlton's testimony. Defendant's argument is without merit.

[8] Finally, Defendant asserts that the trial judge committed prejudicial error by allowing Detective Carlton to alter or supplement the transcript of the taped conversation offered in evidence by the State. At no time, however, did Defendant's trial counsel object to Detective Carlton's testimony in this regard. Furthermore, the general objection that Defendant's trial attorney made before Detective Carlton testified to the jury did not include as grounds for the objection the changes or additions to the transcript that Detective Carlton described during his testimony on *voir dire*. Therefore, any error regarding this alleged improper testimony has not been preserved. *See* N.C. R. App. P. 10(b)(1) (requiring 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 . . . if the specific grounds were not apparent from the context"); *Woodard*, 102 N.C. App. at 696, 404 S.E.2d at 11 (recognizing that "[t]he defendant may not change his position from that taken at trial to obtain a 'steadier mount' on appeal") (citing *Benson*, *supra*). Accordingly, this argument is dismissed.

For the reasons stated, we hold that Defendant received a fair trial, free of error.

NO ERROR.

Judges McGEE and CALABRIA concur.

CITY OF WINSTON-SALEM, PLAINTIFF v. DOUGLAS A. SLATE AND WIFE, SHIRLEY SLATE, DEFENDANTS

CITY OF WINSTON-SALEM, PLAINTIFF v. GARY M. SLATE AND WIFE, DENISE SLATE; DOUGLAS A. SLATE AND WIFE, SHIRLEY SLATE; PAMELA S. KENNEDY AND HUSBAND, RICK KENNEDY; AND R. KENNETH BABB, ADMINISTRATOR, DEFENDANTS

No. COA06-1015

No. COA06-1161

(Filed 7 August 2007)

1. Appeal and Error— appealability—interlocutory orders—condemnation—substantial right

Orders under N.C.G.S. § 40A-47 (condemnation) are immediately appealable as affecting a substantial right even when interlocutory.

2. Pleadings— motion to amend answer—no ruling

There was no error in an eminent domain action where defendants argued that the trial court erred by declining to rule on their motion to amend their answer. The trial court properly concluded that defendants had failed to file their motion in a timely fashion; moreover, the court's orders do not preclude defendants from having their motion heard on another date.

3. Eminent Domain— hearing—matters raised by pleadings only

The plain language of N.C.G.S. § 40A-47 (condemnation) requires that the trial court resolve only issues raised by the pleadings, not all matters at issue between the parties as the defendants here contended.

4. Eminent Domain— refusal to conduct evidentiary hearing—issues

The trial court erred by refusing to conduct an evidentiary hearing in an eminent domain action where defendants' answers were sufficient to raise an issue as to the land affected by the taking.

5. Eminent Domain— refusal to hold evidentiary hearing—prejudice

An error in not holding an evidentiary hearing in an eminent domain action was not harmless where there was a possibility

that defendants could show a unity of ownership and unity of use as to certain tracts.

Appeal by defendants from orders entered 13 March 2006 by Judge Edwin G. Wilson, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 19 March 2007.

Winston-Salem City Attorney Ron Seeber, by Assistant City Attorney Anthony J. Baker, for plaintiff-appellee.

Max D. Ballinger for defendants-appellants.

GEER, Judge.

The City of Winston-Salem, North Carolina filed two eminent domain actions and declarations of taking in which the City sought to take a permanent sewer easement and a temporary construction easement running across real property owned by defendants in COA06-1015 and COA06-1161. As the issues presented in the appeals from the trial court's order in each eminent domain action involve common questions of law, we have consolidated the appeals for purposes of decision.

Following the filing of the City's complaints, defendants were entitled to an evidentiary hearing pursuant to N.C. Gen. Stat. § 40A-47 (2005) on all issues placed in controversy by the pleadings other than the amount of just compensation. Because the pleadings in this case presented a dispute as to the identity of the property affected by the City's taking, defendants were entitled to an evidentiary hearing on that issue. We, therefore, hold that the trial court erred by declining to conduct an evidentiary hearing and reverse and remand for further proceedings in accordance with this opinion.

Facts

These actions primarily revolve around an approximately 75 acre parcel of farmland inherited by all of the Slate children, as well as a smaller adjoining parcel solely owned by defendants Douglas and Shirley Slate. The City, intending to construct a sewer line, filed two complaints in Forsyth County Superior Court on 2 March 2004, declaring eminent domain takings of a temporary construction easement and a permanent sewer line easement across both a portion of the inherited farmland and the parcel solely owned by Douglas and Shirley Slate.

The first complaint (04 CVS 1426 in the trial court and COA06-1161 on appeal) was directed at the solely-owned parcel and named only Douglas and Shirley Slate as defendants (the "Douglas Slate action"). The second complaint (04 CVS 1430 in the trial court and COA06-1015 on appeal) related to the farmland and named as defendants Douglas and Shirley Slate, Gary and Denice Slate, Rick and Pamela Slate Kennedy, Vicky and Wilson Newsome, Beverly and Phil Shelnut, Andrew and Louise Slate, Jeffery and Becky Slate, John and Tammy Slate, Rex and Gayle Slate, and Administrator R. Kenneth Babb (the "Slate Family action"). Defendants filed answers to the City's complaints on 13 July 2004.

On 22 September 2005, defendants' counsel, Max D. Ballinger, moved to withdraw as counsel for certain defendants in the Slate Family action. The motion claimed that, prior to the filing of the City's complaints, defendants "had reached an agreement" as to how they would divide the approximately 75 acres they had inherited from their parents' estate. The motion explained that, under this agreement (the "Family Settlement"), only the property allocated to Gary and Denise Slate, Douglas and Shirley Slate, and Rick and Pamela Slate Kennedy would be affected by the City's taking. Mr. Ballinger asserted that he needed to withdraw as attorney for the remaining defendants in the Slate Family action because they no longer had any interest in the action, and continued representation of both the interested defendants and the purportedly disinterested defendants created a conflict of interest. At this point, no deeds had yet been recorded reflecting the purported property distribution resulting from the Family Settlement.

The following day, defendants filed a second motion in the Slate Family action, requesting three separate jury determinations as to the damages caused by the City's taking with respect to Gary and Denise Slate, Douglas and Shirley Slate, and Rick and Pamela Slate Kennedy. According to the motion, because Gary and Denise Slate and Douglas and Shirley Slate already owned property adjoining the property distributed to them in the Family Settlement, the City's taking should be valued for each of them separately based upon the effect of the taking on the total property owned by each of them—i.e., their portion of the farmland plus any adjoining property.

On 10 October 2005, in response to a motion by defendants Vicki and Wilson Newsome, Jill and Phil Shelnut, Andrew and Louise Slate, John and Tammy Slate, and Rex and Gayle Slate, Judge Ben F. Tennille entered an order dismissing those defendants from the Slate

Family action on the grounds that each of those defendants had, under the Family Settlement, "released and waived any and all rights to any sums received" in the eminent domain proceedings. As a result of that order, only Gary and Denise Slate, Douglas and Shirley Slate, and Rick and Pamela Slate Kennedy remained as defendants in the Slate Family action.

In a subsequent order filed on 9 November 2005, Judge Tennille concluded that Mr. Ballinger's continuing representation of the remaining Slate family defendants did not pose a conflict of interest. With respect to defendants' motion to submit three issues to the jury, Judge Tennille "defer[red] that issue to the trial Court."

The City, pursuant to N.C. Gen. Stat. § 40A-47, timely calendared a 27 February 2006 hearing to determine all issues other than damages in both the Slate Family action and the Douglas Slate action. Four days before the scheduled hearing date, on 23 February 2006, defendants in the Slate Family action filed a motion to amend their answer, as well as a notice of hearing asking that the motion to amend be heard on 27 February 2006.

At the opening of the hearing, which in fact began on 28 February 2006, the trial court inquired of counsel whether "this hearing [is] one to be determined on the pleadings[.]" The City argued that the present case should be resolved on the pleadings because the admissions and denials in defendants' answers failed to give rise to any disputed issues. The trial court then declined to conduct an evidentiary hearing and sustained the City's objections to defendants' attempted submission of various exhibits, affidavits, and testimony. In addition, after concluding that the motion to amend had not been filed the required number of days before the hearing, the trial court declined to rule on the motion at that hearing.

On 13 March 2006, the trial court entered orders in both actions, concluding, among other things, that the City had accurately described the property to be taken in its complaints, that the City and defendants were the only parties with any interest in the land taken, and that the only remaining issue to be determined was that of just compensation. With respect to the Slate Family action, the trial court also concluded that the property at issue had not been subdivided among defendants before the date of the taking and that Judge Tennille's order dismissing the other Slate Family action defendants had not affected their ownership of the property, but, rather, had merely released them from receiving any portion of the just compen-

sation. Finally, the trial court denied defendants' motion in the Slate Family action to submit separate issues to the jury. Defendants have appealed to this Court.

Discussion

[1] We first address the interlocutory nature of defendants' appeals. Because the trial court's order left the issue of just compensation still to be resolved, it is an interlocutory order. *See Concrete Mach. Co. v. City of Hickory*, 134 N.C. App. 91, 96, 517 S.E.2d 155, 158 (1999). Generally, there is no right to appeal from an interlocutory order. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). Nevertheless, this Court has held on multiple occasions that orders under N.C. Gen. Stat. § 40A-47 are immediately appealable as affecting a substantial right. *See*, *e.g.*, *Piedmont Triad Reg'l Water Auth. v. Unger*, 154 N.C. App. 589, 591, 572 S.E.2d 832, 834 (2002) (trial court's determination under N.C. Gen. Stat. § 40A-47 "affect[ed] a substantial right"), *disc. review denied*, 357 N.C. 165, 580 S.E.2d 695 (2003). Defendants' appeals are, therefore, properly before the Court.

I

[2] We turn first to defendants' argument in the Slate Family action that the trial court erred in declining to rule on their motion to amend their answer. The trial court concluded that the motion had not been filed a sufficient number of days prior to the 28 February 2006 hearing to provide the required notice to the City.

Rule 6(d) of the Rules of Civil Procedure specifies: "A written motion . . . and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing . . . ." In computing any period of time under the Rules of Civil Procedure, "[w]hen the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation." N.C.R. Civ. P. 6(a). On Thursday, 23 February 2006, defense counsel served defendants' motion to amend their answer on the City and noticed a hearing for the 27 February 2006 court session. Under Rule 6(a), the City had only three days notice of the motion to amend as of Tuesday, 28 February 2006, the actual day of the hearing. The trial court thus properly concluded that defendants had failed to file their motion in a timely fashion prior to the hearing at which they wished to be heard and did not err in declining to consider their motion. *See FNB Southeast v. Lane,* 160 N.C. App. 535, 537-38, 586 S.E.2d 530, 532 (2003) (trial court did not abuse its discretion in refus-

ing to hear defendants' motion to amend answer when motion was filed only two days prior to hearing), *disc. review denied*, 358 N.C. 153, 592 S.E.2d 558 (2004).

Defendants nevertheless argue that the trial court in fact surreptitiously denied their motion by stating in its written orders that "[o]ther than those issues ruled on [in the order], all issues or claims alleged by the parties in their respective pleadings, or otherwise, have been resolved or are deemed to have been waived by the parties." We do not agree with defendants' interpretation of the trial court's order. At the hearing, the trial court specifically stated that it was "not allowing or denying the amendment," that the motion to amend was simply "not before the Court," and that the trial court's decision not to rule on the motion did not "mean that some judge isn't going to hear the motion to amend at a later date once it is filed and properly calendared."

Consequently, the appealed orders do not preclude defendants in the Slate Family action from having their motion to amend heard on another hearing date. We express no opinion on the merits of the motion, including the City's contention that defendants delayed too long in filing the motion to amend.

II

[3] We turn next to defendants' argument that N.C. Gen. Stat. § 40A-47 required the trial court to resolve not merely any matters raised by the pleadings, but, rather, "all matters at issue" between the parties. (Emphasis omitted.) Notably, as defendants admit in their brief, "they have no case to support [their] contention." *See* N.C.R. App. P. 28(b)(6) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated *or authority cited*, will be taken as abandoned." (emphasis added)).

N.C. Gen. Stat. § 40A-47 provides:

> The judge, upon motion and 10 days' notice by either the condemnor or the owner, shall, either in or out of session, hear and determine any and all issues *raised by the pleadings other than the issue of compensation*, including, but not limited to, the condemnor's authority to take, questions of necessary and proper parties, title to the land, interest taken, and area taken.

(Emphasis added.) It is well settled that the meaning of any statute is controlled by the intent of the legislature and that this intent is

first ascertained from the plain language of the statute. *Elec. Supply Co. of Durham, Inc. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). We conclude that the plain language of N.C. Gen. Stat. § 40A-47 requires the trial court to resolve only issues raised by the pleadings, and, as a result, we reject this argument.

[4] We turn now to defendants' argument that the trial court erred by refusing to conduct an evidentiary hearing. This Court has previously characterized hearings under N.C. Gen. Stat. § 40A-47 as "evidentiary," *Bd. of Educ. of Hickory Admin. Sch. Unit v. Seagle*, 120 N.C. App. 566, 568, 463 S.E.2d 277, 279 (1995), *disc. review improvidently allowed*, 343 N.C. 509, 471 S.E.2d 63 (1996), and has routinely upheld decisions under N.C. Gen. Stat. § 40A-47 in which the trial court admitted evidence during the hearing, *see*, *e.g.*, *Frances L. Austin Family Ltd. P'ship v. City of High Point*, 177 N.C. App. 753, 755, 630 S.E.2d 37, 39 (trial court "reviewed depositions, pleadings, exhibits, and other materials"), *disc. review denied*, 360 N.C. 575, 635 S.E.2d 594 (2006); *Unger*, 154 N.C. App. at 591, 572 S.E.2d at 834 (trial court accepted expert testimony).

In the present case, the trial court refused to admit any of defendants' evidence on the ground that, under N.C. Gen. Stat. § 40A-47, no issues were "raised by the pleadings." In challenging this decision, defendants must demonstrate both that there were issues raised by the pleadings and that the failure to admit their evidence to resolve those issues was prejudicial. *Blankenship v. Town & Country Ford, Inc.*, 174 N.C. App. 764, 769, 622 S.E.2d 638, 642 (2005). *See also* N.C.R. Civ. P. 61 ("No error in either the admission or exclusion of evidence . . . is ground for . . . disturbing a judgment or order, unless refusal to take such action amounts to the denial of a substantial right.").

On appeal, defendants point to three issues that they claim were raised by the pleadings. First, defendants in the Slate Family action argue that the pleadings created a dispute over the ownership of the areas being taken by the City. A complaint exercising eminent domain by taking property must include "[t]he names and addresses of those persons who the condemnor is informed and believes may be or, claim to be, owners of the property . . . ." N.C. Gen. Stat. § 40A-41(4) (2005). Additionally, N.C. Gen. Stat. § 40A-47 specifically provides that, if raised by the pleadings, the "title to the land" is among the issues the trial court is to determine at the hearing. *See also State v. Forehand*, 67 N.C. App. 148, 153, 312 S.E.2d 247, 250 ("A determination of *ownership of the area affected* is a prerequisite to a determi-

nation of just compensation for the area taken." (emphasis added)), *disc. review denied*, 311 N.C. 307, 317 S.E.2d 904 (1984).

The pleadings in the Slate Family action, however, fail to give rise to a dispute as to the ownership of the property. The City's complaint in the Slate Family action states: "The names and addresses of those persons whom the Plaintiff is informed and believes may be or claim to be the owners of the property, so far as the same can be ascertained, are set forth in Exhibit B. Said persons are under no legal disability except as stated in Exhibit B, attached hereto and made a part hereof." Defendants' answer to that allegation states simply: "Admitted." Defendants then further state that "[t]heir interests in the property at issue are that they are heirs of the Ralph and Dora Slate estate, and are the beneficiaries of interests in the property at issue." Accordingly, based on the pleadings, no issue exists as to the ownership of the property being taken by the City.

Second, defendants in both actions argue that the pleadings create a dispute as to the "area taken." The City's complaints in the Slate Family action and the Douglas Slate action both state that "the area taken" is "described in said Exhibit A, attached hereto and made a part hereof." Defendants' answer in each case states in response: "It is admitted that Exhibit A accurately describes the area taken and the alleged interest taken." Again, based on the pleadings, no dispute exists as to the "area taken."

Defendants nonetheless argue that the plats filed by the City—long after the filing of the pleadings—contain errors and that those errors create a dispute as to the areas taken. According to defendants, the trial court, therefore, erred by excluding the testimony of their land surveyor, who would testify as to the errors on the City's plats. N.C. Gen. Stat. § 40A-45(c) (2005) governs the filing of plats:

> The condemnor, within 90 days from the receipt of the answer shall file in the cause a plat of the property taken and such additional area as may be necessary to properly determine the compensation, and a copy thereof shall be mailed to the parties or their attorney; provided, however, the condemnor shall not be required to file a map or plat in less than six months from the date of the filing of the complaint.

As plats are not to be filed until after the pleadings are closed and, in any event, no earlier than six months after the initiation of the action,

any dispute pertaining to them was not properly before the trial court in a hearing under N.C. Gen. Stat. § 40A-47.

Finally, defendants in both actions contend that the pleadings created a dispute as to whether the City's complaints accurately described the land "affected" by the taking. A complaint exercising eminent domain by taking property must describe any "land affected by the taking." N.C. Gen. Stat. § 40A-41(2). Defendants' answers both denied that the City had accurately described the lands affected, and, accordingly, this issue was raised by the pleadings. *See also Forehand*, 67 N.C. App. at 153, 312 S.E.2d at 250 (noting, in statutorily similar context of condemnation by Department of Transportation, that "[o]ne issue raised by the pleadings is the area affected by the taking").

The City, however, contends that the bare denial in defendants' answer was not enough to give rise to a dispute. They argue that defendants were required to set forth their contentions as to the identity of the property affected in order to preserve the issue for hearing. The City has, however, cited no authority for this proposition. Moreover, under N.C. Gen. Stat. § 40A-41(2), it is the public condemnor—not the landowner—that must carry the burden of producing a "description of the entire tract or tracts of land affected by the taking sufficient for the identification thereof[.]" *See also Redevelopment Comm'n of City of Washington, N.C. v. Grimes*, 277 N.C. 634, 643, 178 S.E.2d 345, 350 (1971) ("[I]n order to invoke [the power of eminent domain] the [petitioner] must affirmatively allege compliance with the statutory requirements."); *City of Charlotte v. McNeely*, 8 N.C. App. 649, 653, 175 S.E.2d 348, 351 (1970) ("[W]hen the City undertook to exercise the power of eminent domain . . ., it was necessary that it both allege and prove compliance with statutory procedural requirements."). We, therefore, hold that defendants' denial was sufficient to raise the issue in the pleadings. Accordingly, defendants were entitled to present evidence on the issue of the affected property.

[5] With respect to whether defendants were harmed by this error, defendants argue that they would have offered evidence indicating that other tracts were used in "unity" with the properties over which the City's easements crossed and that those tracts will, as a result, also be "affected" by the City's takings. We note as a preliminary matter that the City, in support of its contention that defendants were not harmed by the trial court's error, has attached various documents

from outside the record as appendices to its briefs before this Court. We cannot, however, consider any of those items as they are not part of the record on appeal and, therefore, may not be included in an appendix under N.C.R. App. P. 28(d). *See also Woodburn v. N.C. State Univ.*, 156 N.C. App. 549, 551, 577 S.E.2d 154, 156 (striking appendix under N.C.R. App. P. 28 because it was not part of record), *disc. review denied*, 357 N.C. 470, 584 S.E.2d 296 (2003).

N.C. Gen. Stat. § 40A-67 (2005) specifies that "[f]or the purpose of determining compensation under this Article, all contiguous tracts of land that are in the same ownership and are being used as an integrated economic unit shall be treated as if the combined tracts constitute a single tract." This Court has explained: "The distinction between whether the condemned lots are part of a unified parcel of land or instead independent parcels is significant because, if treated as a unified parcel, the damages from the condemnation are calculated by the effect on the property as a whole and not based solely on the value of the condemned lots." *Dep't of Transp. v. Roymac P'ship*, 158 N.C. App. 403, 407, 581 S.E.2d 770, 773 (2003), *appeal dismissed*, 358 N.C. 153, 592 S.E.2d 555 (2004).

In determining whether condemned land is part of a unified tract, North Carolina courts consider three factors: (1) physical unity, (2) unity of ownership, and (3) unity of use. *Barnes v. N.C. State Highway Comm'n*, 250 N.C. 378, 384, 109 S.E.2d 219, 224-25 (1959). Although all three factors need not be present, some unity of ownership must be established when separate parcels of land are involved. *Bd. of Transp. v. Martin*, 296 N.C. 20, 26, 249 S.E.2d 390, 395 (1978).

In the present case, there is no dispute that the parcels involved all adjoin and, therefore, satisfy the physical unity requirement. *See Roymac P'ship*, 158 N.C. App. at 407, 581 S.E.2d at 773 ("Physical unity generally requires that 'parcels of land must be contiguous to constitute a single tract of land.' " (quoting *Dep't of Transp. v. Rowe*, 138 N.C. App. 329, 333, 531 S.E.2d 836, 839 (2000), *rev'd on other grounds*, 353 N.C. 671, 549 S.E.2d 203 (2001), *cert. denied*, 534 U.S. 1130, 151 L. Ed. 2d 972, 122 S. Ct. 1070 (2002))). The City does not dispute this factor.

As to the next factor, the City contends there is no unity of ownership because: "Though, as of the date of taking, they each owned a co-tenants [sic] share in the Slate Heirs Property, they did not each own an interest in the homes of their respective co-Appellants." The

City's argument is, however, contrary to *Barnes*, which specifically addressed tenants in common. In *Barnes*, the Supreme Court held:

> The parcels claimed as a single tract must be owned by the same party or parties. It is not a requisite for unity of ownership that a party have the same quantity or quality of interest or estate in all parts of the tract. *But where there are tenants in common, one or more of the tenants must own some interest and estate in the entire tract.*

250 N.C. at 384, 109 S.E.2d at 225 (emphasis added). *See also City of Winston-Salem v. Tickle*, 53 N.C. App. 516, 528, 281 S.E.2d 667, 674 (1981) ("The test of substantial unity of ownership appears, then, to be whether some one of the tenants in the land taken owns some quantity and quality of interest and estate in all of the land sought to be treated as a unified tract."), *disc. review denied*, 304 N.C. 724, 288 S.E.2d 808 (1982).

Douglas and Shirley Slate seek to have the property involved in the Douglas Slate action treated as a single tract with the farmland that is the subject of the Slate Family action. Since they are tenants in common as to the farmland, they can thus present evidence of unity of ownership with respect to their tract and the farmland. Likewise, Gary and Denise Slate are sole owners of property that similarly adjoins the farm and have an ownership interest with respect to the farmland as tenants in common. *See id.* ("[T]he significant factor is that the party who owns an interest and estate in the parcel he seeks to include in the whole for purposes of computing damages must also own an interest and estate in the tract taken, although the two interests and estates need not be of the same quality or quantity.").

The question before this Court is not whether defendants will in fact be able to prove unity of ownership or which tracts, if any, should be treated as an integrated economic unit. The question is whether the trial court's failure to conduct an evidentiary hearing was harmless. Based on the possibility that defendants may be able to show a unity of ownership as to some of the additional tracts, we cannot determine that the trial court's error was harmless. *See Roymac P'ship*, 158 N.C. App. at 406-07, 581 S.E.2d at 773 (addressing whether the condemned lots should be considered in unity with three other parcels with varying ownership).

Finally, "[u]nity of use is determined by whether the various tracts of land are being used as an integrated economic unit." *Id.* at

408, 581 S.E.2d at 773. Defendants' offer of proof—included in the record—indicates that defendants would have offered evidence that they used their property "as a single economic unit" in conjunction with one another. Depending on the evidence actually adduced at the hearing, this may be sufficient to establish unity of use.

The City nevertheless argues, citing *Wachovia Bank of N.C. v. Weeks*, 2002 N.C. App. LEXIS 170, 2002 WL 372516, 149 N.C. App. 234, 562 S.E.2d 304 (Mar. 5) (unpublished), *cert. denied*, 356 N.C. 176, 569 S.E.2d 282 (2002), that there can be no unity of use unless the owner has exclusive use of the entire tract alleged to be affected by the taking. As an initial matter, we note that, in violation of N.C.R. App. P. 30(e)(3), the City has failed to acknowledge that *Weeks* is unpublished and failed to attach a copy of the opinion to either of its briefs. In any event, *Weeks* does not address "unity of use" for condemnation purposes, but, rather, considers exclusivity of use only in the context of adverse possession. *Weeks* is inapposite.

As the City has not made any other argument regarding unity of use, we hold that defendants have made a sufficient showing to warrant an evidentiary hearing on the issue of the property affected. We express no opinions, however, on whether defendants' evidence is sufficient under N.C. Gen. Stat. § 40A-67 or what tracts of land, if any, should be treated as an integrated economic unit.

Accordingly, we reverse and remand for an evidentiary hearing limited to the issue of the property affected by the taking. Given our resolution of this appeal, we need not address defendants' remaining arguments. *Swilling v. Swilling*, 99 N.C. App. 551, 554-55, 393 S.E.2d 303, 305 (1990), *aff'd in part and rev'd in part on other grounds*, 329 N.C. 219, 404 S.E.2d 837 (1991).

Reversed and remanded.

Chief Judge MARTIN and Judge WYNN concur.

TERRES BEND HOMEOWNERS ASSOCIATION AND DAVID O'NEAL, PLAINTIFFS v. RONALD G. OVERCASH, BRUCE H. SALZMAN AND WIFE, KATHRYN K. SALZMAN; AND STEVEN WAYNE LONDON AND WIFE, PHYLLIS C. LONDON, DEFENDANTS

No. COA06-846

(Filed 7 August 2007)

1. Deeds— restrictive covenants—exception

Unambiguous language in restrictive covenants provided that an exception for a particular lot ran with the land rather than being personal to the developer.

2. Deeds— restrictive covenants—successor in title and successor developer

Defendant Overcash was a successor of the developer of a lot despite the interjection of another owner in the chain of title.

3. Deeds— restrictive covenants—read together—exception

An exception in restrictive covenants allowing access across a lot to extend the subdivision despite the general prohibition on using lots for streets was also an exception to another covenant that lots could be used only for residential purposes.

4. Deeds— restrictive covenants—easements—access to extend subdivision

Easements included in a plat and easements which were not included were both permitted by a restrictive covenant which allowed access to a particular lot for the extension of a subdivision.

5. Deeds— restrictive covenants—development of lot in flood plain—soccer field

A soccer field was the "extension" of a subdivision within the meaning of restrictive covenants where the lot in question was in a flood plain and was not suitable for the development of homes.

Appeal by plaintiffs and cross-appeal by defendant Ronald G. Overcash from judgment entered 28 November 2005 by Judge W. Erwin Spainhour in Superior Court, Cabarrus County. Heard in the Court of Appeals 19 February 2007.

Rallings & Tissue, PLLC, by Christopher J. Culp for plaintiff-appellants.

Ferguson, Scarbrough & Hayes, PA, by James E. Scarbrough for defendant-appellant Overcash.

STROUD, Judge.

This is an action for injunctive and declaratory relief concerning the interpretation and enforcement of a Declaration of Restrictive Covenants [Declaration] on residential real property, filed in Superior Court, Cabarrus County. Defendants Ronald G. Overcash and FC Carolina Alliance [FCCA] have constructed three soccer fields on a retained landlocked lot adjacent to the Terres Bend subdivision [Terres Bend]. Plaintiff Terres Bend Homeowners Association [HOA] and plaintiff lot owner David O'Neal, who is also the HOA president, sought a permanent injunction of defendant Overcash's construction of an access road to the soccer fields over an easement from Highway 73 [Highway 73 Easement], arguing that the Declaration does not permit the easement to be used for nonresidential purposes. Defendant Overcash denied the material allegations of plaintiffs' complaint and filed a counterclaim seeking a declaratory judgment granting access to the soccer fields over a separate driveway easement from Banyon Court cul de sac in Terres Bend [Banyon Court Easement] as well as the Highway 73 Easement.

Plaintiffs and defendant Overcash both moved for summary judgment, and Superior Court Judge W. Erwin Spainhour granted and denied each motion in part. In so doing, Judge Spainhour ordered that the Banyon Court Easement may be used "to gain access to a residence or dwelling house, and for no other purpose" but that the "private driveway constructed by the defendant Overcash" from Highway 73 may be used "for the purpose of using the soccer fields . . . for soccer games or practice, whether organized or unorganized, or soccer tournaments." Plaintiffs appeal. Defendant Overcash cross-appeals.

I. Background

In 1984, John F. Swinson acquired sixty-nine acres of real property in Cabarrus County for the development of Terres Bend. On 21 February 1984, Swinson prepared plats depicting Phases I and II of Terres Bend. Phase I included lots numbered one through six and twenty-three through forty-two. Phase II included lots numbered seven through twenty-two. Phase II was located behind Phase I.

The plat illustrating Phase II also shows a 14.7 acre parcel of land adjoining Terres Bend. This parcel is designated on the plat as land "retained by owner," and has become known as Lot 43. Lot 43 is bordered on the east by Irish Buffalo Creek, the north by the Interstate 85 right-of-way, and the south and west by Terres Bend. It has no direct access to a roadway; however, the plat shows a thirty-foot driveway easement crossing Lot 21 and Lot 22, providing access to Lot 43 off of the Banyon Court cul de sac in Phase II of Terres Bend. A subsequently created, unplatted easement crosses Lot 30 and Lot 33 in Phase I of Terres Bend, providing access to Lot 43 from Highway 73.

On 25 May 1984, Swinson filed the Declaration with the Cabarrus County Register of Deeds. The Declaration specifically referred to lots numbered one through forty-two as shown on the previously prepared plats. Covenant 1 provided, in part, "All lots shall be used as residential lots and for no other purpose than residential purposes." Covenant 12 provided:

> No lots shall be used for the purpose of constructing a public street or to provide access to and from property located within Terres Bend Subdivision, or to provide access to and from properties located in Terres Bend Subdivision to properties surrounding same <u>with the exception of John F. Swinson, his heirs, successors and assigns who reserve the right to utilize any lots within said subdivision for the extension of the subdivision to adjoining property.</u>

(Emphasis added.)

Swinson filed plats for Phases I and II of Terres Bend with the Cabarrus County Register of Deeds on 26 February 1985.

On 21 January 1986, Swinson conveyed twenty-four of the platted Terres Bend lots to John F. Swinson General Contractors, Inc. [Swinson, Inc.]. The deed from Swinson to Swinson, Inc. provided that the conveyance was "made and accepted subject to Protective Covenants for Terres Bend Subdivision dated 25 May 1984," noting the Deed Book and page of recordation. On 12 December 1994, Swinson conveyed Lot 14C, Lot 39, and Lot 43 to Swinson, Inc., subject to "subdivision restrictions and covenants" for Terres Bend as well as "easements shown in the recorded plat."[1] Finally on 3 March

1. On 6 April 1989, Swinson filed a plat of Terres Bend Phase III with the Cabarrus County Register of Deeds. Phase III included lots 14A, 14B, and 14C, and also described lot 43 as "retained land."

1999, Swinson Inc. conveyed Lot 14C, Lot 7, Lot 26, Lot 31, Lot 33, Lot 41, Lot 42 and Lot 43 to defendant Overcash. The deed from Swinson, Inc. to defendant Overcash conveyed "all of the Seller's easements and rights appurtenant to the foregoing property." The deeds described above were General Warranty Deeds conveying each group of lots in its entirety and without reservation except as noted herein.

Thereafter, defendant Overcash obtained approval from the City of Concord to build soccer fields on Lot 43, which were completed in 2004. In so doing, defendant Overcash submitted to the city a boundary survey plat depicting Phase IIA of Terres Bend. Phase IIA consisted solely of the development of soccer fields on Lot 43. The City of Concord's Unified Development Ordinance permits soccer fields in areas zoned Compact Residential, subject to city approval of a site plan.

Defendant Overcash also constructed a private road to access the soccer fields located on Lot 43. The private road crosses Lot 33, which defendant Overcash owns, and Lot 30, which is owned by defendants London who have granted defendant Overcash an easement for the access road. Defendant Overcash leases the soccer fields to FCCA, which is a non-profit youth soccer organization, for $1.00 per year.

On 6 January 2005, plaintiffs filed a complaint against defendant Overcash, seeking a temporary restraining order, preliminary injunction, and permanent injunction. In their complaint, plaintiffs alleged that construction of the access road to Lot 43 over the Highway 73 Easement violated Declaration Covenants 1 and 12 because Lot 43 was not being used for a residential purpose. Defendant answered and counterclaimed, seeking declaratory judgment that the Banyon Court Easement could be used to access Lot 43.

Plaintiffs later amended their complaint to add additional defendants: Bruce and Kathryn Salzman,[2] Steve and Phyllis London, and FCCA. Defendants Salzman are the owners of Lot 21 and defendants London are the owners of Lot 30.

Judge Spainhour granted and denied each party's motion for summary judgment in part, permitting the Highway 73 Easement to be

2. On 2 June 2005, defendants Salzman filed a *pro se* answer to plaintiffs' amended complaint in the form of a letter. In the letter, defendants Salzman objected to defendant Overcash's use of the Banyon Court Easement, which crosses their lot, but supported use of the Highway 73 Easement and use of the soccer fields in general. The record does not contain answers filed by defendant FCCA or defendants London.

used to access the soccer fields but limiting the Banyon Court Easement to use as an access only to a residence. Plaintiffs appealed and defendant Overcash cross-appealed.

This Court must now determine whether defendant Overcash possesses the right retained by Swinson in Covenant 12 "to utilize any lots within said subdivision for the extension of the subdivision to adjoining property" and, if so, whether defendant Overcash may use either the Highway 73 Easement or Banyon Court Easement to access Lot 43 and the soccer fields constructed thereon.[3] The parties agree that Lot 43 itself is not subject to the Declaration and may be used for non-residential purposes.

This Court reviews the trial court's award of summary judgment *de novo*. *Falk Integrated Techs, Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999).

II. Rights held by Defendant Overcash

Plaintiffs argue that defendant Overcash "did not succeed to the rights of [Swinson] as Declarant under the Declaration," and therefore, defendant Overcash does not possess the right retained by Swinson in Declaration Covenant 12 "to utilize any lots within said subdivision for the extension of the subdivision to adjoining property." Although plaintiffs do not cite legal authority in support of this position, plaintiffs appear to argue that Covenant 12 is personal to Swinson and does not "run with the land." Alternatively, plaintiff appears to argue that defendant Overcash is not a "successor" or "assign" of Swinson. We disagree.

A. Personal Covenant v. Covenant "Running with the Land"

[1] "Covenants accompanying the purchase of real property are contracts which create private incorporeal rights, meaning non-possessory rights held by the seller, a third-party, or a group of people, to use or limit the use of the purchased property." *Armstrong v. The Ledges Homeowners Ass'n, Inc.*, 360 N.C. 547, 554, 633 S.E.2d 78, 85 (2006). "Real Covenants 'run with the land' creating a servitude on the land subject to the covenant." *Id.* A covenant is a real covenant if "(1) the subject of the covenant touches and concerns the land, (2) there

3. In their brief, plaintiffs also argue that the trial court should have enjoined the posting of a sign on Lot 33 that advertises the soccer fields. Plaintiffs did not advance this argument during the summary judgment hearing and did not assign error in the record. Accordingly, we do not consider this argument on appeal. N.C. R. App. P., Rule 10(a), (b)(1) (2005).

is privity of estate between the party enforcing the covenant and the party against whom the covenant is being enforced, and (3) the original covenanting parties intended the benefits and burdens of the covenant to run with the land." *Runyon v. Paley*, 331 N.C. 293, 299-300, 416 S.E.2d 177, 182-83 (1992). A covenant that "runs with the land" is "enforceable at law or in equity by the owner of the dominant estate against the owner of the servient estate, whether the owners are the original covenanting parties or successors in interest." *Id.* at 299, 416 S.E.2d at 182-83. However, "a personal covenant creates an obligation or right enforceable at law only between the original covenanting parties." *Id.*

Here, plaintiffs seek the equitable relief of an injunction. *See Wise v. Harrington Grove Cmty Ass'n*, 357 N.C. 396, 407, 584 S.E.2d 731, 739 (2003) ("Prior to the enactment of the [Planned Communities Act], restrictive covenants were generally enforceable only by an action at law for damages or by a suit in equity for an injunction.).[4] Plaintiffs urge the Court to enforce Declaration Covenants 1 and 12 against defendant Overcash to restrict his use of lots 20, 21, 30 and 33 to residential purposes, but also to conclude that the exception contained in Covenant 12 permitting construction of a street or access is personal to Swinson, meaning that defendant Overcash cannot enforce the exception against plaintiffs. By seeking to enforce the Declaration against defendant Overcash, plaintiffs effectively concede that the Declaration "touches and concerns" the land and that there is privity of estate between the defendant Overcash and themselves.

The sole remaining question is whether Swinson and his grantees intended the exception in Covenant 12 to be enforceable by Swinson's successors in interest. "Ordinarily, the parties' intent must be ascertained from the deed or other instrument creating the restriction." *Runyon*, 331 N.C. at 305, 416 S.E.2d at 186. Where the "language contained in a written instrument" is "unambiguous," the question of the parties' intent is a matter of law. *Id.*

Here, Declaration Covenant 18 provides that "[t]hese protective covenants and restrictions are to run with the land and shall be binding on all parties and all persons claiming under them" for a period of

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4. The Planned Community Act [PCA] became effective 1 January 1999 and "applies in its entirety to all planned communities created on or after that date." *See Wise*, 357 N.C. at 400, 584 S.E.2d at 735. However, some provisions of the PCA, which are not at issue in the case *sub judice*, "also apply to planned communities created prior to 1 January 1999." *Id.*

thirty years. (Emphasis added.) Moreover, Covenant 12 provides that "John F. Swinson, his heirs, successors and assigns . . . reserve the right to utilize any lots within said subdivision for the extension of the subdivision to adjoining property." (Emphasis added.) This is unambiguous language from which the Court concludes that the parties intended the exception contained in Covenant 12 to "run with the land" and to be enforceable by Swinson, his heirs, his successors, and his assigns.

B. "Successor" or "Assign"

[2] As stated above, Covenant 12 pertains to "John F. Swinson, his heirs, successors and assigns." Plaintiffs argue that defendant Overcash is not a successor of Swinson because "the interjection of [Swinson, Inc.] in the chain of title . . . cuts off any possible argument that [d]efendant Overcash is an 'heir, successor, or assign' of Swinson individually." We disagree.

In *Runyon v. Paley*, the North Carolina Supreme Court explained that a final grantee, who purchases real estate from a grantor who obtained the real estate by mesne conveyance, is a "successor[] in interest" of the original property owner. 331 N.C. at 303, 416 S.E.2d at 185. The Court emphasized that "[t]he mere fact" that the final grantee "did not acquire the property directly from the original covenanting parties is of no moment." *Id.*

Similarly, defendant Overcash obtained Lot 14C, Lot 7, Lot 26, Lot 31, Lot 33, Lot 41, Lot 42 and Lot 43 by conveyance from Swinson, Inc. Swinson, Inc. obtained Lot 43 by mesne conveyance from Swinson. The deeds described above were General Warranty Deeds conveying the lots in their entirety and without reservation, except reference to the Declaration and platted easements. Therefore, defendant Overcash is Swinson's successor in interest and "the mere fact" that defendant Overcash "did not acquire the property directly from" Swinson "is of no moment."

Moreover, defendant Overcash is Swinson's successor in the sense that he is a successive developer of Terres Bend. Citing Black's Law Dictionary 1283 (1979), the North Carolina Supreme Court has defined the term "successor" to mean "[o]ne that succeeds or follows; one who takes the place that another has left, and sustains the like part or character; one who takes the place of another by succession." *Rosi v. McCoy*, 319 N.C. 589, 356 S.E.2d 568 (1987). Thus, the Court concluded, " 'successor' does not invariably refer to a suc-

cessor in title; rather, the reader must consider the nature of the 'part or character' to be taken." *Id.* In *Rosi v. McCoy*, the Court determined that the "natural meaning of the term 'successors' " as used in the restrictive covenant at issue was "[s]uccessor-developers," because the " 'part or character" in question was that of the developers as developers rather than as mere lot owners." *Id.*

Here, defendant Overcash's relationship to Swinson is that of both successor in title and successor-developer. Defendant Overcash, who "engages in the business of developing real estate," purchased Swinson's remaining lots in Terres Bend, as well as the land retained by Swinson when he began developing Terres Bend. The deed from Swinson, Inc. to defendant Overcash conveyed "all of the Seller's easements and rights appurtenant to the foregoing property."

For these reasons, we conclude that defendant Overcash is Swinson's successor for purposes of Declaration Covenant 12.

C. Conclusion

The Declaration, including Covenant 12, "runs with the land" and the exception contained therein, permitting utilization of "any lots within said subdivision for the extension of the subdivision to adjoining property," is exercisable by defendant Overcash, who is Swinson's successor.

III. Easements

[3] Plaintiffs argue that Covenant 1 prohibits use of the Highway 73 Easement and the Banyon Court Easement for non-residential purposes; therefore, the easements may not be used to access the soccer fields defendants Overcash and FCCA have built on Lot 43. Alternatively, plaintiffs argue that the soccer fields are not an "extension of the subdivision"; therefore, the exception contained in Declaration Covenant 12 does not control. Plaintiffs "do not challenge defendant Overcash's right to build and maintain soccer fields" on Lot 43.

In considering plaintiffs argument, we refer to Declaration Covenants 1 and 12, construing them together. *See J.T. Hobby & Son, Inc. v. Family Homes, Inc.*, 302 N.C. 64, 71, 274 S.E.2d 174, 179 (1981) (explaining that each part of a declaration of restrictive covenants must be given effect); *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 238 (1967) (When construing restrictive covenants,

the parties intention "must be gathered from study and consideration of all the covenants contained in the instrument . . . creating the restrictions."). Covenant 1 provided, in part, "[a]ll lots shall be used as residential lots and for no other purpose than residential purposes," describing a residential building as a "detached single family dwelling." Covenant 12 provided:

> No lots shall be used for the purpose of constructing a public street or to provide access to and from property located within Terres Bend Subdivision, or to provide access to and from properties located in Terres Bend Subdivision to properties surrounding same with the exception of John F. Swinson, his heirs, successors and assigns who reserve the right to utilize any lots within said subdivision for the extension of the subdivision to adjoining property.

(Emphasis added.) Construing Covenant 1 and Covenant 12 together, we conclude that the exception contained in Covenant 12 is also an exception to the general rule contained in Covenant 1 that Terres Bend lots may be used only for residential purposes: the construction of a public street or access roads is not a residential purpose.

A. Banyon Court Easement

[4] The original plat of Terres Bend registered by Swinson in the Cabarrus County Register of Deeds shows a thirty-foot driveway easement crossing Lot 21 and Lot 22, providing access to Lot 43 off of a cul de sac named Banyon Court. The sole and obvious purpose of the Banyon Court Easement is to provide access to Lot 43 from Terres Bends' existing platted roads. More importantly, the plain language of Covenant 12 permits defendant Overcash to use the Banyon Court Easement to access an extension to Terres Bend. Accordingly, we conclude that defendant Overcash may use the Banyon Court Easement to provide access to an extension of Terres Bend.

B. Highway 73 Easement

The Highway 73 Easement crosses Lot 30 and Lot 33. Defendants London own Lot 30 and have granted permission for defendant Overcash to construct an access road over part of their lot. Defendant Overcash owns Lot 33. Although this easement is not platted, we conclude that it is permitted by the plain language of Covenant 12, which permits defendant Overcash to use "any lot" to access an extension of Terres Bend.

C. "Extension" of Terres Bend

[5] Plaintiffs argue that the soccer fields are not an "extension" of the Terres Bend residential neighborhood. The Declaration does not define the term "extension"; rather "[s]ound judicial construction" of the covenant requires the Court to give effect to this clause "according to the natural meaning of the words." J.T. Hobby & Son, Inc., 302 N.C. at 71, 274 S.E.2d at 179. The ordinary meaning of the term "extension" is "an act or instance of extending," "the state of being extended," "that by which something is extended," or "an enlargment in scope or degree." Random House Webster's College Dictionary, 472 (1st ed. 1991). To the extent the term is ambiguous, we construe it "in favor of the unrestrained use of land." *J.T. Hobby & Son, Inc.*, 302 N.C. at 70, 178 S.E.2d at 178. "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." *Id.*

Lot 43, which is located in the 100-year flood plain, is not suitable for the development of single family homes. This land was retained by Swinson at the time he developed Terres Bend. At that time, Swinson also expressly retained the Banyon Court Easement to provide access to the otherwise landlocked lot. In light of these circumstances, we think it clear that Swinson intended that Lot 43 would be developed in the future, but that the development would not include residences.

Defendant Overcash submitted to the City of Concord a boundary survey plat depicting Phase IIA of Terres Bend, which consisted solely of the development of soccer fields on Lot 43. The City of Concord's Unified Development Ordinance permits soccer fields in areas zoned Compact Residential, subject to city approval of a site plan. Plaintiffs do not dispute that the City of Concord approved the construction of soccer fields on Lot 43 as the development of an extension to Terres Bend.

The soccer fields constructed on Lot 43 replace an overgrown and poorly drained field, which was described in an affidavit submitted for purposes of summary judgment as "infested with mosquitos, rodents, and snakes." At least one resident of Terres Bend has commented that "construction of the soccer field has eliminated the rodent and snake problem and nearly eliminated the mosquito problem." The fields are accessible to residents of Terres Bend and members of the local community, including several local youth soccer

teams. Such recreational space is generally a desirable and appropriate extension of a residential subdivision.

We conclude that Lot 43 and the recreational soccer fields constructed thereon may properly be classified as an "extension" of the Terres Bend residential community.

D. Conclusion

Defendant Overcash may use either the Banyon Court Easement or the Highway 73 Easement or both easements to access an "extension" of Terres Bend. The recreational soccer fields built on Lot 43 are an "extension" of Terres Bend.

IV. Conclusion

For the reasons stated above, we hold that Declaration Covenant 12 "runs with the land" and that defendant Overcash is a "successor" of Swinson for purposes of the exception contained therein. We further hold that defendant Overcash may use either the Banyon Court Easement or the Highway 73 Easement or both easements to access an "extension" of Terres Bend. The recreational soccer fields built on Lot 43 are an "extension" of Terres Bend. In so holding, we note that plaintiffs' alternative interpretation of the Declaration would render Lot 43 landlocked and unuseable. Finally, we hold that the defendant Overcash's right to use either easement is limited to use for access to Lot 43 as an extension of Terres Bend but is not limited to "using the soccer fields . . . for soccer games or practice . . . or soccer tournaments."[5]

The order entered 28 November 2005 by Judge W. Erwin Spainhour in Superior Court, Cabarrus County is affirmed in part and reversed in part. We remand this case to that court for further proceedings not inconsistent with this opinion.

Affirmed in part; Reversed in part; Remanded.

Chief Judge MARTIN and Judge BRYANT concur.

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5. We do not mean to imply that defendant Overcash or his successors could in the future use either easement for any purpose whatsoever. We need not and do not rule upon any other potential use for the easements accessing Lot 43 other than the existing use as soccer fields which is at issue, which is a proper extension of the subdivision. However, we also recognize that it is possible that some use other than soccer fields could also be in compliance with the applicable zoning and land use ordinances and could be considered as an "extension of the subdivision" in the future.

KEITH JOSEPH STOCUM, JR. AND CYNTHIA IVEY STOCUM, PLAINTIFFS v. WARD SAYRE OAKLEY, JR., M.D., AND PINEHURST SURGICAL CLINIC, P.A., DEFENDANTS

No. COA06-957

(Filed 7 August 2007)

1. Evidence— judicial notice—records of prior case

The trial court did not err by considering unverified documents in the court file from a prior action between these two parties in support of a motion to dismiss. Trial courts may take judicial notice of their own records.

2. Appeal and Error— multiple grounds for dismissal by trial court—one not challenged—all considered

Dismissals for violations of N.C.G.S. § 1A-1, Rule 4(a) are entered pursuant to Rule 41(b); because plaintiffs challenged the dismissal of their case pursuant to Rules 11 and 41, the merits of their case were heard even though they made no argument regarding their dismissal under Rule 4, which the trial judge had stated was a sufficient and independent ground to dismiss.

3. Pleadings— Rule 11 sanctions—action refiled after voluntary dismissal consideration of prior action

A voluntary dismissal may not be taken in bad faith, and will not deprive the trial court of jurisdiction to consider collateral issues such as sanctions under Rule 11. However, a motion for Rule 11 sanctions must be filed within a reasonable time, and defendants' motion to dismiss as a Rule 11 sanction was filed within a reasonable time where defendants filed one motion before plaintiffs took a voluntary dismissal of their action, and defendants filed a second motion upon plaintiffs' refiling of their complaint.

4. Pleadings— Rule 11 sanctions—prejudice not required

In a case in involving Rule 11 sanctions, plaintiffs cited no authority requiring prejudice before sanctions could be granted; in fact, some degree of sanction is mandatory upon finding a Rule 11 violation. Moreover, the trial court in this case had competent evidence from which it made its finding.

5. Pleadings— Rule 11 sanctions—estoppel

Plaintiffs did not cite authority discussing the use of estoppel in a Rule 11 motion; in fact, Rule 11 sanctions must be imposed when a trial court finds grounds for sanctions.

6. Pleadings— Rule 11 sanctions—effect of voluntary dismissal

Plaintiffs' arguments that a Rule 41(a) voluntary dismissal wipes the slate clean of sanctionable conduct was rejected where the trial court found that the Rules of Civil Procedure were violated for the purpose of delay and to gain an unfair advantage.

7. Pleadings— Rule 11 sanctions—dismissal

In light of the trial court's findings, it could not be said that the trial court abused its discretion in determining that dismissal was appropriate as a Rule 11 sanction where the court considered less severe sanctions and there was competent evidence to support the court's findings.

Appeal by plaintiffs from an order entered 6 February 2006 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 28 March 2007.

Troutman Sanders LLP, by Gary S. Parsons and Gavin B. Parsons; Crisp, Page & Currin, L.L.P., by Cynthia M. Currin, for plaintiff-appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Deanna Davis Anderson, for defendant-appellees.

HUNTER, Judge.

This cause of action arose after Dr. Ward Sayre Oakley, Jr., who was employed by Pinehurst Surgical Clinic, P.A., performed surgery on Keith Stocum, Jr. Keith Stocum, Jr. and Cynthia Stocum ("plaintiffs") sued Pinehurst and Dr. Oakley ("defendants") for bodily injuries and loss of consortium. Plaintiffs also asserted claims for *res ipsa loquitur*, a claim for foreign object left in a body, and constructive fraud. Plaintiffs appeal from an order dismissing their complaint. After careful consideration, we affirm.

Plaintiffs filed their first complaint against defendants on 1 October 2002. Summonses were issued to defendants on 1 October 2002 but were never served upon any defendant. Alias and pluries

summons were also issued to all defendants on 20 December 2002, 17 March 2003, 5 June 2003, and 22 July 2003. No attempt, however, was ever made to serve any of the summonses or the complaint upon any defendant.

One year after filing the original complaint, plaintiffs filed an amended complaint pursuant to North Carolina Rule of Civil Procedure (hereafter "Rule") 15(a). The amended complaint made substantive changes in the allegations and added claims for breach of fiduciary duty, constructive fraud, and punitive damages. No attempt was made to serve the amended complaint.

Plaintiffs issued more alias and pluries summonses on 6 October 2003, 31 December 2003, and 24 March 2004. Again, there was no attempt to serve any of the summonses or the amended complaint on any defendant. On 21 June 2004, a ninth set of alias and pluries summonses were issued.

On 22 July 2004, Pinehurst Surgical, one of the defendants, received an order for mediated settlement conference directly from Moore County Superior Court, dated 12 July 2004. This was the first notice that any defendant had received that a lawsuit had been filed against them.

Although no discovery had occurred, plaintiffs' trial counsel, Cynthia M. Currin, signed a letter to the trial court coordinator stating that "[w]e are still in the discovery stages of this case[,]" and asked to have the case removed from the calendar. Plaintiffs' counsel sent a different letter three days later stating that "[p]arties are still involved in discovery" and asked for "additional time to complete discovery prior to mediation and trial." Between 9 August 2004 and 23 August 2004 all defendants were served. All of the prior summonses issued to the various defendants listed each of their correct address.

After defendants received notice of the lawsuit pending against them, they filed a motion to dismiss. Both parties acknowledge that the motion to dismiss was based on alleged violations of Rules 4 and 41 for failure to timely serve notice of the lawsuit and for failure to prosecute the action. Defendants also asserted that plaintiffs' cause of action should be dismissed because of a purported violation of Rule 11 after plaintiffs' counsel represented to the trial court that discovery was ongoing. The hearing on the motion was scheduled for 18 October 2004. Plaintiffs' counsel, however, filed a notice of voluntary

dismissal without prejudice pursuant to Rule 41(a) on 14 October 2004. Thus, the motion to dismiss was never heard.

Plaintiffs then filed the present action on 11 October 2005, within one year of taking the voluntary dismissal. Defendants served a joint motion to dismiss and a motion for a protective order based on the same grounds as their first motion to dismiss. On 6 February 2006, the trial court entered an order granting the motion to dismiss with prejudice.

The motion to dismiss was granted based on violations of Rules 4, 11, and 41. Specifically, the trial court made the following conclusions of law:

> 6. Plaintiffs' counsel . . . violated Rule 11 of the North Carolina Rules of Civil Procedure when she signed the July 26, 2004 letter . . . and the July 29, 2004 Motion and Order Extending Completion Date for Mediation. At the time these documents were signed, Plaintiffs had made no attempt to serve process on any Defendant, despite the issuance [of] nine Summonses to each Defendant. In this context, Plaintiffs' counsel could not reasonably have believed that her representations to this Court ("We are still in the discovery stages of this case." "Parties still involved in discovery. Need additional time to complete discovery prior to mediation and trial.") were well grounded in fact. Instead, the July 26 2004 letter and the July 29, 2004 Motion were interposed for the improper purposes of causing further unnecessary delay and misleading the Court as to the status of the case. This Court has considered less drastic sanctions, but finds in its discretion that, under the circumstances set forth herein, no lesser sanction, other than dismissal with prejudice, would better serve the interests of justice in this case. For this reason, independent of other violations set forth herein, Defendants' Motions to Dismiss are granted.
>
> 7. Plaintiffs violated Rule 4 of the North Carolina Rules of Civil Procedure when Plaintiffs failed to deliver any Complaint or Summons to some proper person for service from October of 2002 until August of 2004. Plaintiffs' violation of Rule 4 in the manner set forth herein was willful and intentional and was, on its face, bad faith, with the intent and purpose to delay and in order to gain an unfair advantage over the Defendants. There is no good faith reason or excuse for the delay in obtaining service of process for 22 months or for why service was not attempted

prior to August of 2004. Each time Plaintiffs had a Summons issued, Plaintiffs failed to effectuate service. Plaintiffs were in possession of the correct addresses for Defendants. Defendants were readily available to be served and could have been easily served, had Plaintiffs made an attempt to do so. This Court has considered less drastic sanctions, but finds in its discretion that, under the circumstances set forth herein, no lesser sanction, other than dismissal with prejudice, would better serve the interests of justice in this case. For this reason, independent of other violations set forth herein, Defendants' Motions to Dismiss are granted.

8. Plaintiffs violated Rule 41 when Plaintiffs failed to prosecute their action by failing to deliver any Complaint or Summons to a proper person for service from October of 2002 until August of 2004 and when Plaintiffs caused further unnecessary delay by misleading the Court as to the status of the case in the July 26, 2004 letter and the July 29, 2004 Motion. This failure manifested an intention to thwart the progress of Plaintiffs' action to its conclusion by engaging in a delaying tactic. This Court has considered less drastic sanctions, but finds in its discretion that, under the circumstances set forth herein, no lesser sanction, other than dismissal with prejudice, would better serve the interests of justice in this case. For this reason, independent of other violations set forth herein, Defendants' Motions to Dismiss are granted.

There are two issues in this case: (1) whether the trial court considered incompetent evidence in determining to dismiss plaintiffs' claim; and (2) whether the trial court properly dismissed plaintiffs' claim pursuant to Rules 4, 11, and 41 of the North Carolina Rules of Civil Procedure.

I.

[1] Plaintiffs argue that the trial court considered incompetent evidence when ruling on defendants' motion to dismiss. We disagree. Errors assigned pursuant to Rule 6 are reviewed for abuse of discretion. *Lane v. Winn-Dixie Charlotte, Inc.*, 169 N.C. App. 180, 184, 609 S.E.2d 456, 459 (2005). In relevant part, Rule 6(d) provides: "When a motion is supported by affidavit, the affidavit shall be served with the motion; and except as otherwise provided in Rule 59(c), opposing affidavits shall be served at least two days before the hearing." N.C. Gen. Stat. § 1A-1, Rule 6(d) (2005). Under this Rule, the trial court has discretion as to "whether to allow affidavits to be filed subsequent to

the filing of a motion." *Lane*, 169 N.C. App. at 184, 609 S.E.2d at 458 (citing *Rockingham Square Shopping Center, Inc. v. Integon Life Ins. Corp.*, 52 N.C. App. 633, 641, 279 S.E2d 918, 924 (1981)).

Here, defendants filed one affidavit and unverified documents in support of their motion to dismiss two days before the scheduled hearing. The affidavit was not considered by the trial court in support of its motion to dismiss. The remaining documents consisted of the court file from the prior action between the two parties before plaintiffs took the voluntary dismissal. Included in the file were the nine alias and pluries summonses, the complaint, the amended complaint, and the letters drafted from plaintiffs' counsel to the trial court. Consequently, we limit our discussion, as do the parties, to the issue of whether the trial court could take judicial notice of unverified documents in ruling on a motion to dismiss. Plaintiffs contend that even unverified documents must comply with Rule 6(d). We disagree.

Facts essential to a judgment are not limited to testimony of witnesses, exhibits introduced into evidence, or by stipulation of parties. *Mason v. Town of Fletcher*, 149 N.C. App. 636, 640, 561 S.E.2d 524, 527, *disc. review denied*, 355 N.C. 492, 563 S.E.2d 570 (2002). Trial courts may properly take judicial notice of "its own records in any prior or contemporary case when the matter noticed has relevance." Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 26 (5th ed. 1998) (footnote omitted) (cited with approval by *Mason*, 149 N.C. App. at 640, 561 S.E.2d at 527).

In *Mason*, this Court held that the trial court properly took judicial notice of another case between the parties in the same court. *Mason*, 149 N.C. App. at 640, 561 S.E.2d at 527. This Court noted that the appellant made no request for an opportunity to be heard regarding the taking of judicial notice, nor did they argue on appeal that the trial court could not properly take judicial notice of its own records. *Id.*

As in *Mason*, the trial court in this case took judicial notice of a prior case between the parties that had occurred in the same court. Plaintiffs in this case, like defendant's in *Mason*, made no request to be heard as to the propriety of taking judicial notice. Plaintiffs in the instant case also fail to argue that the trial court erred in taking judicial notice of the prior action. Finally, we note that plaintiffs' contention that these documents were " 'spr[u]ng' " upon them is without merit as they were in possession of and had drafted them. Therefore,

we hold that the trial court did not consider incompetent evidence when ruling on defendant's motion to dismiss.

II.

[2] Plaintiffs next argue that the trial court erred in granting defendants' motion to dismiss. We disagree. The trial court dismissed plaintiffs claim pursuant to Rules 4, 11, and 41 of the North Carolina Rules of Civil Procedure. We review the imposition of sanctions *de novo*, "but the choice of sanction is reviewable under an abuse of discretion standard." *Crutchfield v. Crutchfield*, 132 N.C. App. 193, 195, 511 S.E.2d 31, 33 (1999). Plaintiffs argue that any alleged errors by plaintiffs in the prior action cannot be considered in the present case. We disagree.

In dismissing plaintiffs' cause of action under Rule 4, the trial court stated that plaintiffs' violation of Rule 4 was a sufficient and independent ground to dismiss. Plaintiffs, however, only argue in their brief that the trial court erred in dismissing the case pursuant to Rules 11 and 41. They make no argument with regards to the dismissal pursuant to Rule 4. Normally, when there is no argument or supporting authority in a brief, the assignment of error is taken as abandoned and dismissed. *See State v. Elliott*, 360 N.C. 400, 427, 628 S.E.2d 735, 753 (2006); N.C.R. App. P. 28(b)(6). Dismissals for violations of Rule 4(a), however, are entered pursuant to Rule 41(b). *Smith v. Quinn*, 324 N.C. 316, 318, 378 S.E.2d 28, 30 (1989). Because plaintiffs challenge Rule 41(b) in this appeal we address the merits of this issue.

A.

[3] As to the dismissal based on alleged Rule 11 violations, plaintiffs argue that any of the purported violations occurred before plaintiffs moved for voluntary dismissal under Rule 41(a), and as such, those violations are wholly irrelevant to the current action. We disagree. Plaintiffs correctly state the general rule that when a party has earlier taken a voluntary dismissal, refiling the action begins the case anew. *Tompkins v. Log Systems, Inc.*, 96 N.C. App. 333, 335, 385 S.E.2d 545, 547 (1989), *disc. review denied*, 326 N.C. 366, 389 S.E.2d 819 (1990). It is "as if the suit had never been filed." *Id.*

The rule, however, is not as absolute as plaintiffs contend. A voluntary dismissal may not be taken in bad faith, *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 597, 528 S.E.2d 568, 573 (2000), nor will "[d]ismissal . . . deprive the [trial] court of jurisdiction to con-

sider collateral issues such as sanctions that require consideration after the action has been terminated." *Bryson v. Sullivan*, 330 N.C. 644, 653, 412 S.E.2d 327, 331 (1992); *see also Renner v. Hawk*, 125 N.C. App. 483, 481 S.E.2d 370, *disc. review denied*, 346 N.C. 283, 487 S.E.2d 553 (1997).

In both *Renner* and *Bryson*, however, neither this Court nor the Supreme Court were considering sanctions imposed in a refiled action. Rather, the sanctions were brought after the voluntary dismissal and each court held that a motion for sanctions need not be brought before the action is dismissed. *See Renner*, 125 N.C. App. at 488, 481 S.E.2d at 373. Plaintiffs argue this distinction demands a different result. For the following reasons, we find this distinction unimportant, and plaintiffs' argument to the contrary unpersuasive.

"Neither Rule 11 nor Rule 41 of the North Carolina Rules of Civil Procedure contains explicit time limits for filing Rule 11 sanctions motions." *Id.* at 491, 481 S.E.2d at 374. That said, " 'a party should make a Rule 11 motion within a reasonable time' after he discovers an alleged impropriety." *Id.* (citation omitted); *see also Griffin v. Sweet*, 136 N.C. App. 762, 765, 525 S.E.2d 504, 506 (2000). Whether a Rule 11 motion is filed within a reasonable time is reviewed *de novo*, under an objective standard. *Static Control Components*, *Inc. v. Vogler*, 152 N.C. App. 599, 607, 568 S.E.2d 305, 311 (2002).

Plaintiffs argue that defendants did not make their Rule 11 motion until fourteen months after defendants received notice of suit and should be barred, as a matter of law, from seeking sanctions. Defendants counter that they filed their first Rule 11 motion just over a month after becoming aware of the alleged violations, and as such, should not be barred from seeking the sanctions in a later proceeding.

Plaintiffs rely on *Griffin* in support of their argument. In *Griffin*, this Court held that a Rule 11 motion was untimely where the movant delayed filing for thirteen months after the Supreme Court of North Carolina had denied defendant's petition for discretionary review, and there was no activity in the case in the interim. *Griffin*, 136 N.C. App. at 765-66, 525 S.E.2d at 506-07. *Griffin*, however, is distinguishable from the instant case.

Here, there have been two motions for sanctions. The first came before plaintiffs took a voluntary motion to dismiss and the second upon plaintiffs' refiling the claim. Under these circumstances, plaintiffs' attorney was aware that sanctions could be imposed long before

the attorneys in *Griffin*. Also unlike *Griffin*, plaintiffs in this case refiled their complaint which led to defendants' filing their motion for dismissal. This is not a case where defendants sought to impose sanctions long after the litigation between the parties had been conclusively resolved. Instead, when plaintiffs dismissed their case they effectuated the relief defendants were seeking, giving defendants little or no reason to pursue a motion to dismiss. *See Dickerson Carolina, Inc. v. Harrelson*, 114 N.C. App. 693, 697, 443 S.E.2d 127, 131, *appeal dismissed and disc. review denied*, 337 N.C. 691, 448 S.E.2d 520 (1994) (holding that when it develops that the relief sought has been granted the case should not be pursued). Under these circumstances, we conclude that defendants' motion to dismiss was filed within a reasonable time.

[4] Plaintiffs' next argument is that there was no competent evidence from which the trial court could have concluded that there was prejudice. Plaintiffs cite no authority in which a finding of prejudice is required before granting sanctions under Rule 11. Instead, plaintiffs argue that this Court's decision in *O'Neal Construction, Inc. v. Leonard S. Gibbs Grading*, 121 N.C. App. 577, 468 S.E.2d 248 (1996), is controlling. In *Gibbs Grading*, this Court reversed a trial court's denial of a motion to compel arbitration and did not address the trial court's denial of sanctions because no findings of fact or conclusions of law were made by the trial court. *Id.* This Court only addressed prejudice in that portion of *Gibbs Grading* relating to the arbitration, and not the denial of sanctions. *Id.* We also note that upon a finding of a violation of Rule 11(a), some degree of sanction is mandatory. *Melton v. Stamm*, 138 N.C. App. 314, 315-16, 530 S.E.2d 622, 624 (2000), *disc. review denied*, 353 N.C. 377, 547 S.E.2d 12 (2001). Moreover, given the delay between the filing of the original action and the second action, the trial court had competent evidence from which it made its finding of prejudice. Plaintiffs' argument on this issue is without merit.

[5] Plaintiffs' final argument relating to Rule 11 is that defendants' conduct estops them from seeking sanctions. We disagree. Plaintiffs have again failed to cite authority in which any court in this state or another jurisdiction has even discussed the use of estoppel in relation to a Rule 11 motion. The purpose of Rule 11 is to reduce the reluctance of courts to impose sanctions. *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). Accordingly, where a trial court finds "grounds for imposing sanctions exist, Rule 11 requires the court to impose sanctions." *Overcash v. Blue Cross and Blue*

Shield, 94 N.C. App. 602, 617, 381 S.E.2d 330, 340 (1989). Thus, in the instant case, where the trial court found grounds to sanction plaintiffs it was required to do so. Plaintiffs' argument on this point is without merit. Thus, we affirm the trial court's ruling to dismiss plaintiffs' claims pursuant to Rule 11.

B.

[6] Plaintiffs argue the taking of a voluntary dismissal in the first action bars defendants from moving to impose sanctions in the refiled action under Rule 41(b). We disagree. Under Rule 41(b) a case may be involuntarily dismissed "[f]or failure of the plaintiff to prosecute or to comply with" the Rules of Civil Procedure "or any order of court[.]" N.C. Gen. Stat. § 1A-1, Rule 41(b) (2005). As stated above, voluntary dismissal does not deprive a trial court from imposing sanctions. *Renner*, 125 N.C. App. at 489, 481 S.E.2d at 373. Additionally, voluntary dismissals must be taken in good faith and with the intent to pursue the action. *Estrada v. Burnham*, 316 N.C. 318, 323, 341 S.E.2d 538, 542 (1986). Here, the trial court made a conclusion of law that plaintiffs' initial complaint was not filed in good faith and was not filed with the intent to prosecute under Rule 41(b). Further, when "the Rules of Civil Procedure are violated for the purpose of delay or gaining an unfair advantage, dismissal of the action is an appropriate remedy." *Smith v. Quinn*, 324 N.C. at 318-19, 378 S.E.2d at 30. Here, the trial court found that the rules violation was for the purpose of delay and to gain an unfair advantage. Consequently, we reject plaintiffs' arguments that a Rule 41(a) voluntary dismissal wipes the slate clean of any passed sanctionable conduct.

Plaintiffs next argue that the motion to dismiss pursuant to Rule 41(b) was not filed within a reasonable time. We disagree for the reasons set out above with regards to our discussion of Rule 11, and hold that defendants filed their motion to dismiss pursuant to Rule 41(b) within a reasonable time. Plaintiffs also argue that the trial court did not find, nor was there any evidence that defendants were prejudiced. As stated above, there is no such requirement before sanctions may be imposed. This argument is similarly rejected. Also rejected for the reasons discussed in the section above is plaintiffs' contention that defendants are estopped from seeking sanctions against them.

[7] Plaintiffs' final argument is that the trial court did not find any facts, nor did defendants offer facts, to support its conclusion that no sanction short of dismissal would suffice. We disagree and review this assignment of error for an abuse of discretion. *Page v. Mandel*,

154 N.C. App. 94, 99, 571 S.E.2d 635, 638 (2002). Under Rule 41(b), " 'dismissal is the most severe sanction available' and should only be imposed 'when lesser sanctions are not appropriate to remedy' the situation." *Id.* (quoting *Wilder v. Wilder*, 146 N.C. App. 574, 575-76, 553 S.E.2d 425, 426-27 (2001)).

In support of its conclusion that dismissal was appropriate, the trial court made findings of fact that: (1) plaintiffs made no effort to notify defendants about the complaint as late as twenty months after it was filed; (2) the trial court actually notified the defendants; (3) plaintiffs' trial counsel signed a letter to the trial court stating that the parties were "still in the discovery stages of this case" when in fact there had been no attempt to serve any defendant; (4) plaintiffs' counsel sent a second letter to the trial court that the parties were still in discovery, when in fact there had been no attempt to serve any defendant; (5) plaintiffs failed to show any reason or excuse for the delay in obtaining service of process and offered no good faith reason why service was not attempted sooner; and (6) of the twenty-eight summonses issued to the three defendants in this case, none were delivered until nearly two years after the complaint was filed, yet all twenty-eight summonses listed the correct address for each defendant. In light of these findings, we cannot say that the trial court abused its discretion in determining that dismissal was appropriate. This is especially true where the trial court considered less severe sanctions.

Plaintiffs' argument that these findings are not supported by evidence presented by defendants is similarly without merit. Defendants presented, *inter alia*, the following to the trial court when moving for the motion to dismiss: (1) the complaint and all summonses issued in the prior action; (2) the trial court's correspondence with defendants alerting them that an action had been filed against them; and (3) plaintiffs' counsel's letters to the trial court stating that the trial was still in discovery stages. This is competent evidence to support the trial court's findings of fact and we cannot say that the trial court abused its discretion in dismissing plaintiffs' complaint.

III.

In summary, we hold that the trial court did not rely on incompetent evidence in dismissing plaintiffs' claim and that defendants' motion for sanctions was filed within a reasonable time. We also reject plaintiffs' remaining arguments as it relates to Rule 41. Accordingly, the ruling of the trial court is affirmed.

Affirmed.

Judges TYSON and JACKSON concur.

STATE OF NORTH CAROLINA v. MARK N. PATTERSON

No. COA06-1347

(Filed 7 August 2007)

1. Evidence— other break-ins—chain of events

Evidence about other reported break-ins was properly admitted in a prosecution for possession of stolen property. The evidence explained the chain of events in the police investigation and was not hearsay.

2. Evidence— possession of stolen property—other break-ins—not prejudicial

The probative value of testimony about other break-ins in a prosecution for possession of stolen property was not outweighed by the prejudicial value. There was no testimony directly accusing defendant of the other crimes, and the court gave an instruction limiting the testimony to what the detective did, not what he heard.

3. Evidence— identification of stolen property—properly admitted

Testimony identifying a recovered camera as one that had been stolen was properly admitted in a prosecution for possession of stolen property. The testimony was relevant, the witness stated that she was personally familiar with the camera, and she testified that she recognized it as the one stolen.

4. Evidence— possession of stolen property—relevancy—proper foundation

Testimony identifying a recovered camcorder as having been stolen was properly admitted in a prosecution for possession of stolen property. The witness's testimony was relevant and was preceded by a proper foundation.

5. Appeal and Error— assignment of error—no supporting legal basis—dismissal

An assignment of error was dismissed where it included no legal basis opposing the admission of certain evidence. There was no manifest injustice to support invocation of Rule 2 because the result would not change if the rule was applied.

6. Possession of Stolen Property— sufficiency of evidence—property claimed by defendant

There was sufficient evidence to support charges of possessing stolen property and possessing housebreaking tools where there was evidence that stolen items were recovered which defendant claimed were his, and tools found with the stolen items were consistent with tools typically used to break and enter locked properties.

Judge WYNN concurring in the result.

Appeal by defendant from judgments entered 16 March 2006 by Judge Zoro J. Guice, Jr., in Graham County Superior Court. Heard in the Court of Appeals 22 May 2007.

Attorney General Roy Cooper, by Assistant Attorney General Scott A. Conklin, for the State.

Daniel F. Read, for defendant-appellant.

CALABRIA, Judge.

Mark N. Patterson ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of possession of stolen property pursuant to a breaking or entering and possession of implements of house breaking. We find no error.

On 2 November 2005, Tonya Sellers ("Sellers") reported for work at Four-Square Community Action Head Start ("Head Start") and noticed that someone had broken into a room in the Head Start office. "One of the file cabinets was messed up, some money was missing from the extended day room, and we had a camera that was missing," Sellers testified. Sellers identified the missing camera as a silver colored Kodak Easy-Show digital camera that was kept in a white pack with a USB cord. Sellers reported the break-in and theft to the police, speaking with James Jones ("Detective James Jones"), a detective with the Graham County Sheriff's Department.

Three weeks later, on 22 November 2005, Detective James Jones received a call from Kyle Boring ("Boring"), a Graham County resident. Boring informed Detective James Jones that he allowed defendant to store property inside a camper trailer on Boring's premises and that he believed some of the property inside the trailer may be items the police were seeking. Following Boring's tip, Detective James Jones sent Brian Jones ("Detective Brian Jones"), also with the Graham County Sheriff's Department, to search for the stolen property.

With Boring's consent, Detective Brian Jones searched the trailer and found several black bags containing items including papers with defendant's name on them. He also found a camera matching the description of the digital camera Sellers reported stolen. At trial, Sellers testified that the camera found in the trailer was the same as the one taken from Head Start.

Detective Brian Jones also found a set of bolt cutters and other tools, which he characterized as a "homemade lock-picking kit." Detective Brian Jones testified that such items were typically used for breaking and entering buildings. In addition to the camera found in the trailer, Detective Brian Jones found a camcorder. Noah Crowe ("Pastor Crowe"), pastor of the First Baptist Church in Robbinsville, testified that the camcorder found in the trailer was one that had been stolen from his church.

Defendant testified that the camera, camcorder, and alleged burglary tools belonged to him. He stated the tools were not burglary tools, but were used for other purposes such as his job as a plumber. Following his trial in Graham County Superior Court, the jury returned guilty verdicts. Judge Zoro J. Guice, Jr. sentenced defendant to a minimum of 10 months and a maximum of 12 months in the North Carolina Department of Correction for possession of property stolen pursuant to a breaking or entering and a minimum of 6 months and a maximum of 8 months for possession of implements of house breaking. Judge Guice suspended the sentence for possession of implements of house breaking and placed defendant on supervised probation for a period of five years. From those judgments, defendant appeals.

[1] Defendant initially argues the trial court erred by admitting Detective Brian Jones' statements regarding other businesses that had reported break-ins. Defendant contends that the admission of

such statements over his objection was improper in that the statements were hearsay, speculative, irrelevant, and unduly prejudicial. We disagree.

We first note that relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2005). Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801 (2005).

The relevant exchange in the record was as follows:

> [Detective Brian Jones]: With the items I then—after finding what was missing, first of all I put them in a safe place in our evidence room. Then we started going through reports. Then I loaded several items on the back of a pickup truck, which belongs to the sheriff's department. I then went to local businesses that had reported break-ins and stolen merchandise[.]
>
> [Defense counsel]: Objection, Your Honor, to what somebody might have said.
>
> The Court: Overruled, just to what he did.
>
> [Prosecutor]: Did you do anything else with regard to investigating the incident at Head Start—breaking and entering at Head Start?
>
> [Detective Brian Jones]: Not that I'm aware of, no.

This exchange clarifies that the trial court overruled the defendant's objection only to the extent it sought to preclude statements about what Detective Brian Jones did, not what he had heard regarding the break-ins, by stating, "Overruled, just to what he did." As such, the evidence offered was both relevant, in that it explained the chain of events in the police investigation, and was non-hearsay, because it precluded the further admission of statements regarding the reported break-ins. The statements were offered to explain the chain of events and were not offered for the truth of the matter asserted.

[2] Further, it is clear that the probative value of the statements was not substantially outweighed by their prejudicial effect.

Therefore, their admission did not violate N.C. Gen. Stat. § 8C-1, Rule 403 (2005) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

Defendant relies upon *State v. Al-Bayyinah*, 356 N.C. 150, 567 S.E.2d 120 (2002), in which our Supreme Court granted a new trial to a defendant after the trial court allowed testimony accusing the defendant of two previous crimes for which he had been neither indicted nor convicted. This case is distinguishable from *Al-Bayyinah* in that here there was no testimony directly accusing defendant of other crimes. Implicit in Detective Brian Jones' testimony is that the police may have *suspected* defendant of committing other break-ins, but defendant was not in fact *accused* of any other break-ins. Here, the trial court cured any defect by stating that Detective Brian Jones' testimony should be limited to what he did, not what he had heard. As such, the undue prejudice resulting from the admission of the statements in *Al-Bayyinah* was much greater than any slight prejudice which may have occurred here and which did not substantially outweigh the probative effect of the statements.

Further, *Al-Bayyinah* dealt with the issue of N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005), which states that

> evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

Id. The exchange quoted above makes clear that Detective Brian Jones' statement was not offered to prove defendant's conformity with character to commit wrongs, but was offered to explain the sequence of events. This assignment of error is overruled.

[3] Defendant next argues the trial court erred in allowing Sellers to testify that the camera produced at trial was the same one taken from the Head Start office. Defendant contends there was no foundation for Sellers' statement and that the statement was not credible and therefore irrelevant. We disagree.

Sellers testified that she was familiar with the camera stolen from Head Start, and stated that she had used it on a number of occasions. When asked to identify the camera in court, she stated, "[I]t looks like the camera that we had at Head Start." When defense counsel objected, Sellers stated, "[I]t's the same one we had down there that we always used." The trial court then overruled defense counsel's objection.

As previously noted, relevant evidence is evidence showing any fact of consequence to be more or less probable. Here, the witness' identification of the camera was clearly relevant. She stated that she was personally familiar with the camera and testified that she recognized the camera found in Boring's trailer as the camera that was taken from Head Start. Defendant's arguments go to the weight of the evidence and not to its admissibility. "Any contradictions or discrepancies in the evidence are for resolution by the jury." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

[4] Defendant further argues the trial court erred by allowing testimony regarding the camcorder on the ground that no foundation was laid, and further objects to the admission of the camcorder itself. Like Sellers, Pastor Crowe testified that he was familiar with the camcorder and that he recognized it as the one taken from Boring's trailer. As such, his identification of the camcorder was relevant and was preceded by a proper foundation. Defendant's characterization of Pastor Crowe's identification of the camcorder as "weak" goes to the weight and not the admissibility of the evidence. This assignment of error is without merit.

[5] Defendant next argues the trial court erred by allowing testimony concerning his reasons for being in jail in Swain County when the sheriff's deputies searched Boring's trailer. Defendant argues the evidence was irrelevant and unduly prejudicial, while the State contends defendant opened the door allowing the prosecutor to elicit the testimony.

We first note that defendant's assignment of error preserving this issue for appeal fails to state legal grounds for his challenge. The North Carolina Rules of Appellate Procedure state, "Each assignment of error shall, so far as practicable, be confined to a single issue of law; and *shall state plainly, concisely and without argumentation the legal basis upon which error is assigned*." N.C. R. App. 10(c)(1) (2006) (emphasis supplied). Defendant's assignment of er-

ror number 5 states, "The trial court erred by overruling Defendant's objections about details of why he was in jail in Swain County when he was arrested on these charges." This assignment of error, while objecting to the admission of evidence, states no legal basis supporting the objection.

Our Supreme Court, in *State v. Hart*, 361 N.C. 309, ––– S.E.2d ––– (2007) established that this Court may invoke N.C. R. App. P. 2 (2006) to suspend the Rules of Appellate Procedure to prevent "manifest injustice." In the present case, appellate review is frustrated in that the assignment of error in question is overly broad. This assignment, "like a hoopskirt—covers everything and touches nothing. It is based on numerous exceptions and attempts to present several separate questions of law—none of which are set out in the assignment itself—thus leaving it broadside and ineffective." *State v. Kirby*, 276 N.C. 123, 131, 171 S.E.2d 416, 422 (1970). The concurring opinion concedes that the result would be no different if we chose to invoke Rule 2 to suspend the rules. As such, no "manifest injustice" results from our refusal to suspend the rules in this case. Accordingly, this assignment of error is dismissed for failure to comply with the North Carolina Rules of Appellate Procedure.

[6] Defendant lastly argues the trial court erred in denying defendant's motions to dismiss on the ground that there was insufficient evidence to support the charges. Our courts have established the following standard in reviewing motions to dismiss:

> In ruling upon a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences which may be drawn from the evidence. The court must determine whether substantial evidence supports each essential element of the offense and the defendant's perpetration of that offense. If so, the motion must be denied and the case submitted to the jury. " 'Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion."

State v. Hairston, 137 N.C. App. 352, 354, 528 S.E.2d 29, 30 (2000) (internal citations omitted).

Possession of stolen goods is defined as follows:

> If any person shall possess any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof

> amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing or having reasonable grounds to believe the same to have been feloniously stolen or taken, he shall be guilty of a Class H felony, and may be indicted and convicted, whether the felon stealing and taking such chattels, property, money, valuable security or other thing shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and any such possessor may be dealt with, indicted, tried and punished in any county in which he shall have, or shall have had, any such property in his possession or in any county in which the thief may be tried, in the same manner as such possessor may be dealt with, indicted, tried and punished in the county where he actually possessed such chattel, money, security, or other thing; and such possessor shall be punished as one convicted of larceny.

N.C. Gen. Stat. § 14.71.1 (2005).

Possession of burglary tools is defined as such:

> If any person shall be found armed with any dangerous or offensive weapon, with the intent to break or enter a dwelling, or other building whatsoever, and to commit any felony or larceny therein; or shall be found having in his possession, without lawful excuse, any picklock, key, bit, or other implement of housebreaking; or shall be found in any such building, with intent to commit any felony or larceny therein, such person shall be punished as a Class I felon.

N.C. Gen. Stat. § 14-55 (2005).

Here, the State presented evidence that the camera and camcorder were stolen, and Sellers and Pastor Crowe both identified those items at trial. It further presented evidence that the items were seized from Boring's trailer, and defendant claimed the items belonged to him. In addition, the State presented evidence that a break-in had occurred at the Head Start office, and that the tools found with the camera and camcorder in Boring's trailer were consistent with the tools typically used to break and enter locked properties. In light of this, it is clear from the record that there was ample evidence that, when viewed in the light most favorable to the State, could support the jury's finding that defendant possessed stolen goods and burglary tools. Accordingly, this assignment of error is overruled.

No error in part, dismissed in part.

Judge TYSON concurs.

Judge WYNN concurs in the result with a separate opinion.

WYNN, Judge, concurring in the result.

I concur with the majority's holding as to all issues presented by Defendant, save that of the testimony concerning his being in the Swain County jail at the time of the search of the camper. On that question, I would reach the merits of Defendant's argument and find no error in the trial court's allowing the objected-to testimony; thus, I concur in the result only as to that issue.

At trial, Defendant testified on direct examination from his attorney that he was not present for the search of his trailer because he was in jail in Swain County. On cross-examination, the prosecutor asked Defendant why he was in jail; defense counsel objected, but the trial court ruled that Defendant's testimony on direct had "opened the door" and allowed Defendant's answer that he was in jail in Swain County for possession of stolen goods.

The majority is correct in noting that Defendant's assignment of error as to this exchange at trial is overly broad and fails to state the legal basis upon which error is assigned. However, I observe that the majority was also able to ascertain and summarize, from both Defendant's and the State's briefs, their respective arguments on this point. As such, I find that appellate review has not been frustrated, nor has the State been denied notice of Defendant's contentions, as to this issue. Given the liberty interest at stake for a criminal defendant such as in the instant case, I would invoke Rule 2 to suspend the Rules of Appellate Procedure and reach the merits of Defendant's argument.[1]

It is well settled in North Carolina that otherwise inadmissible evidence may be admissible if the door has been opened by the opposing party's examination of the witness. *See, e.g.*, *State v.*

1. Though the majority opinion suggests that "the concurring opinion concedes that the result would be no different if we chose to invoke Rule 2 to suspend the rules," it should be noted that one judge on a three-judge panel cannot "concede" a result. Indeed, the majority's adherence to technical rules of procedure denies this incarcerated defendant an opportunity to determine how the judges in the majority here would decide this issue if they chose to reach the merits of his appeal. That is a manifest injustice.

Baymon, 336 N.C. 748, 752-53, 446 S.E.2d 1, 3 (1994). Here, Defendant opened the door as to his whereabouts when the trailer was searched; I would find no error by the trial court in allowing the prosecutor to ask follow-up questions related to his whereabouts, as such information was certainly relevant. *See State v. Bowman*, 349 N.C. 459, 480, 509 S.E.2d 428, 441 (1998) (finding a defendant opened the door to cross-examination by the State on his prior convictions by testifying about them on direct examination), *cert. denied*, 527 U.S. 1040, 144 L. Ed. 2d 802 (1999); N.C. Gen. Stat. § 8C-1, Rule 401 (2005) (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

JOHN P. REIDY AND WIFE, TERRI L. REIDY, PLAINTIFFS v. WHITEHART ASSOCIATION, INC., DEFENDANT

No. COA06-1310

(Filed 7 August 2007)

1. Estoppel— validity of homeowners association—delay in contesting—earlier recognition

Plaintiffs were estopped from contesting the validity of a homeowners association where they purchased their lot subject to the declaration of covenants; they did not contest the validity of the association for nearly five years, until the architectural committee denied their design approval request; and there was evidence in the record that plaintiffs recognized the validity of the association by paying dues.

2. Associations; Deeds— validity of homeowners association—incorporation after sale of first lot

The Planned Community Act applies to this case despite plaintiff's contention that the homeowners association was incorporated after the conveyance of the first lot in violation of N.C.G.S. § 47F-3-101 (2005). That was not one of the provisions made applicable to communities created before the effective date of the Act.

3. Deeds; Constitutional Law— contract clause—homeowners association—retroactive application of enforcement statute

The Contract Clause of the United States Constitution was not violated by retroactive application of a statute allowing fines and suspension of services for violating the regulations and covenants of a homeowners association. The statute merely provides an additional remedy for the enforcement of the declaration and does not disturb a vested right, impair a binding contract, or create a new obligation.

4. Deeds; Constitutional Law— substantive due process—Planned Community Act

Retroactive application of the Planned Community Act did not violate plaintiffs' substantive due process rights. The individual statutes that form the Act are rationally related to the legitimate purpose of providing a statutory framework for dealing with modern real estate developments, particularly planned communities.

5. Constitutional Law— procedural due process—enforcement of homeowners association covenants

Plaintiffs' procedural due process rights were not violated by the procedure provided by a homeowners association. Even if the creation of the statutory framework by the legislature is sufficient state action, the statutes provided notice and the opportunity to be heard, and the association in this case provided both.

6. Appeal and Error— preservation of issues—absence of legal authority

An argument in plaintiffs' brief with no citation to legal authority was taken as abandoned.

7. Deeds; Constitutional Law— enforcement of homeowners association covenants—no evidence of discrimination

A homeowners association did not discriminate against plaintiffs by refusing to allow a building modification where plaintiffs admitted erecting their staircase and door without the architectural committee's approval, and in fact did so in the face of disapproval. Moreover, there does not appear to be any evidence of discrimination.

8. Appeal and Error— cross-appeal—notice filed with superior court clerk

The homeowners association's cross-appeal was dismissed for lack of jurisdiction where its notice of cross-appeal was filed with the Clerk of the Court of Appeals, not with the Clerk of Superior Court of Wake County.

Appeal by plaintiffs and cross-appeal by defendant from order entered 20 June 2006 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 4 June 2007.

Harris & Hilton, P.A., by Nelson G. Harris, for plaintiff appellants.

Jordan Price Wall Gray Jones & Carlton, by Henry W. Jones, Jr., Brian S. Edlin and Jessica E. Cooley, for defendant appellee, cross-appellant.

McCULLOUGH, Judge.

Plaintiffs appeal from an order granting defendant's motion for summary judgment and mandatory injunction and order denying plaintiffs' motion for summary judgment. Defendant cross-appeals from the same order because the trial court did not award reasonable attorneys' fees to defendant. We affirm.

FACTS

John P. Reidy, and wife, Terri L. Reidy ("plaintiffs") obtained title to Lot 54 in the Whitehart Subdivision ("the Lot") by deed recorded on 16 July 1999. On or about 28 February 2005, plaintiff John Reidy requested design approval from the Whitehart Architectural Committee for a structural addition to his property. Specifically, he wanted to add a door and staircase to the rear exterior of his detached garage in order to provide access to the upstairs storage area above his garage. On 3 March 2005, the Architectural Committee denied Mr. Reidy's request because the addition would not be consistent with the aesthetics of the neighborhood. Despite the Committee's decision, plaintiffs commenced construction of the staircase on the rear of their detached garage in or about August of 2005.

In response to plaintiffs' disregard of the Architectural Committee's decision, Whitehart Association, Inc. ("the Association") sent plaintiffs a letter on 31 August 2005 inviting them to attend a hearing. Plaintiffs appeared on 27 October 2005 before the Board of the

Association. The Board voted to impose a fine in the amount of $25.00 per day commencing on 1 November 2005 for plaintiffs' violation.

On 31 October 2005, plaintiffs filed a complaint against the Association. On 21 December 2005, the Association served its answer, motions to dismiss, motion for judgment on the pleadings, affirmative defenses and counterclaim on plaintiffs. The counterclaim sought, in part, to collect the fines which were secured by a claim of lien. On 3 January 2006, plaintiffs filed their response to the Association's counterclaim and affirmative defenses.

On 12 December 2005, plaintiffs filed a motion for summary judgment as to all but one of the counts included in their complaint. On 27 January 2006, the Association filed its cross motion for summary judgment on all counts contained in defendant's counterclaim and all counts contained in plaintiffs' complaint.

On 24 February 2006, the trial court entered an order granting the Association's cross motion for summary judgment on counts 1, 2, 3, 5, 6, and 7 of plaintiffs' complaint. In addition, the trial court denied plaintiffs' motion for summary judgment as to counts 1, 2, 3, 5, 6, and 7 of plaintiffs' complaint. The trial court continued the hearing on count 4 of plaintiffs' complaint and counts 1 and 2 of the Association's counterclaim.

The plaintiffs filed a motion for summary judgment as to count 4 of their complaint and counts 1 and 2 of defendant's counterclaim. On 20 June 2006, the trial court entered an order granting the Association's cross motion for summary judgment as to count 4 of plaintiffs' complaint. The trial court granted the Association's cross motion for summary judgment as to counts 1 and 2 of its counterclaim requiring removal of the staircase and door and entering judgment for the fines accrued through the date of the hearing.

Plaintiffs appeal the trial court's order entered 20 June 2006. The Association cross appeals the failure of the trial court to award reasonable attorneys' fees.

ANALYSIS

All of plaintiffs' contentions on appeal contest the trial court's granting of summary judgment in favor of the Association; so the following standard of review applies. Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). "There is no genuine issue of material fact where a party demonstrates that the claimant cannot prove the existence of an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Harrison v. City of Sanford*, 177 N.C. App. 116, 118, 627 S.E.2d 672, 675, *disc. review denied*, 361 N.C. 166, 639 S.E.2d 649 (2006). On appeal from a grant of summary judgment, this Court reviews the trial court's decision *de novo*. *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 573-74 (1999).

I—The Association

[1] Plaintiffs contend the trial court erred in granting summary judgment in favor of the Association on the basis that (1) the Association was improperly formed, and (2) the membership of the Association conflicted with the allowed membership as defined in the Declaration of Covenants, Conditions and Restrictions ("the Declaration"). We disagree.

"Under a quasi-estoppel theory, a party who accepts a transaction or instrument and then accepts benefits under it may be estopped to take a later position inconsistent with the prior acceptance of that same transaction or instrument." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 18, 591 S.E.2d 870, 881-82 (2004). Plaintiffs obtained title to the lot on or about 16 July 1999, and they conceded in their response to the counterclaim of the Association that they purchased the lot subject to the Declaration. Nothing in the record illustrates that plaintiffs have contested the validity of the Association between 8 December 2000, the date the Association filed its Articles of Incorporation, and 3 March 2005, the date on which the Architectural Committee denied plaintiffs' request. However, there is some evidence in the record that plaintiffs recognized the validity of the Association. For example, based on the accounting records of the management company for Whitehart, plaintiffs have paid their annual assessments consistently since January 2001. In addition, plaintiffs requested design approval from the Architectural Committee for the structural addition. There is also evidence that plaintiff Terry Reidy called the property manager of Whitehart on or about May of 2005 and complained about a neighbor damaging common property. In response to plaintiff Terry Reidy's complaint, the property manager sent a letter to the neighbor stating that complaints have been

received regarding the damage to common property, and that any damage must be fully restored to the prior condition.

Therefore, plaintiffs are estopped from contesting the validity of the Association.

II—Planned Community Act

[2] Several of plaintiffs' arguments on appeal concern the Planned Community Act ("the Act") which is found in Chapter 47F of the North Carolina General Statutes. The Act is instrumental to the instant case because it provides a basis for the Association to fine plaintiffs. *See* N.C. Gen. Stat. § 47F-3-102(12) (2005). Plaintiffs argue that the Act has no application to this case because the Association is not an association within the meaning of the Act. In addition, plaintiffs argue that applying the Act to the instant case violates the contracts clause, substantive due process, and procedural due process. North Carolina law is clear that there is a presumption in favor of the constitutionality of a legislatively enacted statute. *Vinson v. Chappell*, 3 N.C. App. 348, 350, 164 S.E.2d 631, 632-33 (1968), *aff'd*, 275 N.C. 234, 166 S.E.2d 686 (1969). Unless a statute "clearly, positively and unmistakably appears" to be unconstitutional, then statutes are to be upheld. *Id.* at 350, 164 S.E.2d at 633.

A. The Act's Application To the Instant Case

Plaintiffs contend that the Act has no application to this case because the Association is not a lot owners' association under the Act. We disagree.

Plaintiffs argue the Association was incorporated after the conveyance of the first lot in violation of N.C. Gen. Stat. § 47F-3-101 (2005) which requires a "lot owners' association" to be incorporated no later than the date the first lot in the planned community is conveyed. *Id.* However, the official comment of the original version of the Act provided that the "Act is effective January 1, 1999 and applies in its entirety to all planned communities created on or after that date except as provided . . .," and N.C. Gen. Stat. § 47F-3-101 was not one of the provisions that was noted to be applicable to pre-1 January 1999 communities. N.C. Gen. Stat. § 47F-1-102 (Official Comment) (1999). Subsequently, this portion of the official comment was implemented into the actual language of the statute. N.C. Gen. Stat. § 47F-1-102 (2005). Accordingly, we disagree with plaintiffs.

B. Contract Clause

[3] Next, plaintiffs contend the trial court erred in granting summary judgment in favor of the Association because retroactive application of N.C. Gen. Stat. § 47F-3-102(12) and N.C. Gen. Stat. § 47F-3-107.1 (2005), as provided for by N.C. Gen. Stat. § 47F-1-102(c), violates the contract clause of the United States Constitution. We disagree.

N.C. Gen. Stat. § 47F-3-102(12) allows a homeowners' association to impose reasonable fines or suspend privileges or services provided by the association for reasonable periods for violations of the declaration, bylaws, and rules and regulations of the association. *Id.* N.C. Gen. Stat. § 47F-3-107.1 concerns, among other things, the procedures a homeowners association must follow when fining a homeowner pursuant to N.C. Gen. Stat. § 47F-3-102(12). N.C. Gen. Stat. § 47F-3-107.1. Further, N.C. Gen. Stat. § 47F-1-102(c) creates a presumption that both N.C. Gen. Stat. § 47F-3-102(12) and N.C. Gen. Stat. § 47F-3-107.1 applies to all planned communities created in North Carolina before 1 January 1999. N.C. Gen. Stat. § 47F-1-102(c). Plaintiffs argue that retroactive application of the above-referenced statutes substantially changes the contract between the parties, in violation of the contract clause.

"Any law which enlarges, abridges or changes the intention of the parties as indicated by the provisions of a contract necessarily impairs the contract whether the law professes to apply to obligations of the contract or to regulate the remedy for enforcement of the contract." *Adair v. Burial Assoc.*, 284 N.C. 534, 538, 201 S.E.2d 905, 908, *appeal dismissed*, 417 U.S. 927, 41 L. Ed. 2d 231 (1974). However, in *Tabor v. Ward*, 83 N.C. 291, 294-95 (1880), the North Carolina Supreme Court stated:

> It is well settled by a long current of judicial decisions, state and federal, that the legislature of a state may at any time modify the remedy, even take away a common law remedy altogether, without substituting any in its place, if another efficient remedy remains, without impairing the obligation of the contract.

Here, the provision of the Act does not disturb a vested right, impair a binding contract or create a new obligation. The provision merely provides an additional remedy for the enforcement of the Declaration. *See Byrd v. Johnson*, 220 N.C. 184, 188, 16 S.E.2d 843, 846 (1941) (" 'Statutes directed to the enforcement of contracts, or merely providing an additional remedy, or enlarging or making more

efficient an existing remedy, for their enforcement, do not impair the obligation of the contracts.' "). In addition, the Act facilitates the intent of the parties by solidifying the importance of the restrictive covenants. *Bateman v. Sterrett*, 201 N.C. 59, 62, 159 S.E. 14, 16 (1931) ("[A] statute which facilitates the intention of the parties neither impairs the obligation of the contract, nor divests vested rights."). Accordingly, we disagree with plaintiffs.

C. Substantive Due Process

[4] Plaintiffs contend the trial court erred in granting summary judgment in favor of the Association because retroactive application of N.C. Gen. Stat. § 47F-3-102(12) and N.C. Gen. Stat. § 47F-3-107.1, as provided for by N.C. Gen. Stat. § 47F-1-102(c), violates plaintiffs' substantive due process rights under the United States Constitution and the North Carolina "law of the land" provision. We disagree.

"When confronted with a challenge to a validly adopted statute, the courts must assume that the General Assembly acted within its constitutional limits unless the contrary clearly appears." *Shipman v. N.C. Private Protective Services Bd.*, 82 N.C. App. 441, 443, 346 S.E.2d 295, 296, *appeal dismissed, disc. review denied*, 318 N.C. 509, 349 S.E.2d 866 (1986). "For a statute to be within the limits set by the federal due process clause and the North Carolina 'law of the land' provision, all that is required is that the statute serve a legitimate purpose of state government and be rationally related to the achievement of that purpose." *Id.*

The Act does not violate plaintiffs' substantive due process rights. A legitimate purpose of the Act is to provide a statutory framework for dealing with modern real estate developments, particularly, planned communities. In addition, the individual statutes that form the Act are rationally related to this purpose. Accordingly, we disagree with plaintiffs.

D. Procedural Due Process

[5] Plaintiffs contend the procedure provided by the Association violated plaintiffs' procedural due process rights under both the Fourteenth Amendment and the North Carolina "law of the land" provision. We disagree.

Our Supreme Court has stated that the "mandate of procedural due process contained in our Constitution and in the Fourteenth Amendment applies only to actions by the government which deprive

individuals of their fundamental rights." *Bank v. Burnette*, 297 N.C. 524, 534, 256 S.E.2d 388, 394 (1979). Procedural due process, as guaranteed by the Fourteenth Amendment " 'restricts governmental actions and decisions which ["]deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the . . . Fourteenth Amendment." ' " *Clayton v. Branson*, 170 N.C. App. 438, 452, 613 S.E.2d 259, 270, *disc. review denied*, 360 N.C. 174, 625 S.E.2d 785 (2005). In addition, the North Carolina Supreme Court has noted that under the Fourteenth Amendment, "[t]he fundamental premise of procedural due process protection is notice and the opportunity to be heard." *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998). "Our state courts generally treat the corresponding section of the N.C. Constitution as the functional equivalent of its federal counterpart." *Clayton*, 170 N.C. App. at 451, 613 S.E.2d at 269.

Here, the procedure provided by the Association did not violate plaintiffs' procedural due process rights. First, we question whether the creation of the statutory framework by the legislature constitutes "state action" for procedural due process purposes. *See Giles v. First Virginia Credit Servs., Inc.*, 149 N.C. App. 89, 104-05, 560 S.E.2d 557, 567 (2002) (determining that the statutory scheme providing for non-judicial repossession of collateral did not constitute state action sufficient to evoke the protection of the due process clause of the Fourteenth Amendment of the United States Constitution). Next, even if the creation of the statutory framework is sufficient state action, the Association did not violate plaintiffs' procedural due process rights. Pursuant to N.C. Gen. Stat. § 47F-3-107.1, "the lot owner charged shall be given notice of the charge, opportunity to be heard and to present evidence, and notice of the decision." *Id.* Thus, the Act comports with procedural due process requirements. Furthermore, the Association provided plaintiffs with notice of the charge, opportunity to be heard at a meeting, opportunity to present evidence and notice of the decision. Accordingly, we disagree with plaintiffs.

III—Conduct of the Association

[6], [7] Plaintiffs' final two contentions concern the conduct of the Association. First, plaintiffs contend the Association's conduct of the hearing violated any contract between the parties. Next, plaintiffs contend that genuine issues of material fact exist as to whether the Association discriminated against plaintiffs in enforcement of the Declaration. We disagree.

Regarding the issue of the conduct of the hearing, plaintiffs' brief contains no citation to any legal authority, and thus will be taken as abandoned. N.C. R. App. P. 28(b)(6). Regarding the contention that genuine issues of material fact exist as to whether the Association discriminated against plaintiffs, plaintiffs have admitted to having erected their staircase and door without the Architectural Committee's approval, and did so in the face of disapproval. Moreover, there does not appear to be any evidence of discrimination on the part of the Association. Accordingly, we disagree with plaintiffs.

IV—Attorney's Fees

[8] The Association contends the trial court erred in failing to award reasonable attorneys' fees pursuant to N.C. Gen. Stat. § 47F-3-116(e) (2005). We disagree.

Rule 3(a) of the North Carolina Rules of Appellate Procedure provides as follows:

> Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

N.C. R. App. P. 3(a). Here, the Association filed its "Cross Notice of Appeal" with the Clerk of the Court of Appeals, not with the Clerk of Superior Court of Wake County. "The requirement of timely filing and service of notice of appeal is jurisdictional, and unless the requirements . . . are met, the appeal must be dismissed." *Smith v. Smith*, 43 N.C. App. 338, 339, 258 S.E.2d 833, 835 (1979), *disc. review denied*, 299 N.C. 122, 262 S.E.2d 6 (1980). Although the Association states in its brief that the "Cross Notice of Appeal is on file with the trial court . . . and was in the file with the trial court when counsel for [the Association] reviewed the court file," no cross notice of appeal is in the record that was filed with the trial court in order to give us jurisdiction. *See Blevins v. Town of West Jefferson*, 182 N.C. App. 675, 676-77, 643 S.E.2d 465, 467 (2007) (" 'Without proper notice of appeal, this Court acquires no jurisdiction.' "). (citation omitted). Accordingly, we dismiss the Association's cross-appeal.

Affirmed.

Chief Judge MARTIN and Judge TYSON concur.

WMS, INC., PLAINTIFF v. ALLTEL CORPORATION AND ALLTEL COMMUNICATIONS, INC., DEFENDANTS

No. COA06-793

(Filed 7 August 2007)

Collateral Estoppel and Res Judicata— arbitration award—preclusive effect to be determined by arbitrator, not court

In the context of the Federal Arbitration Act, the issues of res judicata and collateral estoppel based upon a prior arbitration proceeding must be decided initially by the arbitrator and not the trial court.

Appeal by plaintiff from order entered 20 January 2006 by Judge Richard L. Doughton in Wilkes County Superior Court. Heard in the Court of Appeals 6 March 2007.

Taylor Penry Rash & Reimann, PLLC, by J. Anthony Penry and Cynthia A. O'Neal, for plaintiff-appellant (allowed as substitute counsel by order filed 11 January 2007 and filed Plaintiff-Appellant's Reply Brief on 12 February 2007; Record on Appeal and Plaintiff-Appellant's Brief filed by Herring, McBennett, Mills & Finkelstein, P.L.L.C., by Mark A. Finkelstein and J. Aldean Webster III, allowed to withdraw as attorney of record by order filed 11 January 2007).

Womble Carlyle Sandridge & Rice, P.L.L.C., by Pressly M. Millen, for defendants-appellees.

JACKSON, Judge.

WMS, Inc. ("plaintiff") appeals from an order of the trial court dismissing its complaint "on the basis of res judicata and/or collateral estoppel." For the reasons stated herein, we reverse the ruling of the trial court.

The procedural history of the instant case is complex, stemming from two separate lawsuits filed against Alltel Corporation and Alltel Communications, Inc. (collectively, "defendants").

With respect to the former case, Cellular Plus ("Cellular Plus") and defendants entered into a dealer agreement ("the dealer agreement") on 4 June 1999, which provided that Cellular Plus would market defendants' wireless cellular communication services in ex-

change for payment of commissions. On 19 December 2000, plaintiff, Cellular Plus, and David Kilpatrick ("Kilpatrick") filed suit against defendants and Jerry Weaver ("Weaver") asserting various claims arising out of business dealings between the parties, including a claim for breach of contract for failing to make commission payments as well as a claim for unfair and deceptive trade practices. On 8 January 2001, defendants and Weaver moved to compel arbitration pursuant to the dealer agreement, and on 15 February 2001, the trial court entered an order concluding that all claims alleged were governed by the arbitration clause.

Thereafter, on 23 December 2002, a three-member arbitration panel issued an interim award dismissing all claims asserted by plaintiff and Kilpatrick, as well as all claims asserted against Weaver. The arbitrators concluded that defendants had breached the dealer agreement and had engaged in unfair and deceptive trade practices. On 31 January 2003, the arbitrators issued a final award awarding Cellular Plus treble damages in the amount of $2,887,500.00 and attorneys' fees in the amount of $352,640.00.

On 3 February 2003, defendants filed a motion in Wake County Superior Court requesting that the court (1) vacate the arbitrators' awards on the grounds that the arbitrators exceeded their powers in awarding treble damages and attorneys' fees; or in the alternative, (2) eliminate the treble damages or attorneys' fees. On 13 February 2003, Cellular Plus moved to confirm the interim and final awards. The trial court held that the agreement did not give the arbitration panel the authority to award treble damages and attorneys' fees, but found that defendants had failed to preserve their argument challenging the attorneys' fees. Therefore, by order entered 24 April 2003, the court modified the amount of damages to $962,500.00 and upheld the attorneys' fees as awarded. Thereafter, Cellular Plus filed notice of appeal from the trial court's order to vacate treble damages, and defendants filed notice of cross-appeal from the court's order confirming attorneys' fees and actual damages.

On 5 October 2004, this Court held that the Federal Arbitration Act ("FAA") governed the issues on appeal because the contract involved or affected commerce. *See WMS, Inc. v. Weaver (Weaver I)*, 166 N.C. App. 352, 358, 602 S.E.2d 706, 710, *disc. rev. denied*, 359 N.C. 197, 608 S.E.2d 330 (2004). Although this Court noted that the FAA allows a court to vacate an award "where the arbitrators exceeded their powers," *id.* (quoting 9 U.S.C. § 10(a)(4) (2000)), we held that the parties' arbitration agreement was ambiguous and that the arbi-

trators had the authority to construe the remedial provision of the agreement. *Id.* at 366, 602 S.E.2d at 715. Accordingly, this Court held that the trial court erred in modifying the arbitrators' award. *Id.*[1]

With respect to the instant case, plaintiff incorporated in early 2000 for the purpose of taking over Cellular Plus' sub-dealer network. Cellular Plus assigned its sub-dealer contracts to plaintiff, and beginning 1 May 2000, plaintiff entered into a series of agreements with defendants to procure cellular telephone customers for defendants in exchange for the payment of commissions. On 2 July 2001, plaintiff and defendants signed a Communication Services Agent Agreement, which detailed the terms of their business association and included an arbitration clause. The arbitration clause in this agreement was substantially similar to the arbitration provision at issue in the original dispute between Cellular Plus and defendants. *See id.* at 354, 602 S.E.2d at 707-08.

On 29 September 2005, plaintiff filed a complaint against defendants, stating four claims for relief: (1) unfair and deceptive practices; (2) unjust enrichment; (3) unjust impoverishment; and (4) breach of the covenant of good faith and fair dealing. In its complaint, plaintiff alleged that beginning on 1 October 2001, defendants punished plaintiff for plaintiff's role in the arbitration through which Cellular Plus had been awarded damages against defendants. Specifically, plaintiff alleged that defendants refused to provide plaintiff with the same, improved contract terms that defendants granted to all of its other agents in North Carolina. Plaintiff alleged that as a result of defendants' conduct, plaintiff received lower rates of commission than all of defendants' other agents and lost sales because it has less money (1) to subsidize the cost of new cellular phones to encourage customers to activate cellular service through plaintiff; (2) to attract and retain

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1. We note that the litigation in COA03-1063 did not end with this Court's opinion. On 2 December 2005, defendants tendered a check as payment for the judgment in the amount of $3,960,960.19, which represented the original judgment plus eight percent interest. The check was made jointly payable to multiple payees, including plaintiff who refused to endorse the check because of other pending litigation. In addition, the check was $715.00 less than the full payment of the judgment. On 16 December 2005, defendants issued another check, this time payable to the Wake County Clerk of Superior Court, in the amount of $3,961,675.19—the amount owed on 2 December 2005 plus the $715.00 that had not been included in the prior check. On 22 December 2005, defendants filed a motion in the cause, requesting that the trial court declare and mark the judgment satisfied in full. The trial court allowed the motion, and on 15 May 2007, this Court affirmed the trial court's decision to allow defendants' motion in the cause. *See WMS, Inc. v. Weaver (Weaver II)*, No. COA06-723, 2007 N.C. App. LEXIS 1038 (N.C. Ct. App. May 15, 2007).

good cellular phone sales personnel; and (3) to motivate cellular phone service salespeople to close cellular phone transactions. In its complaint, plaintiff also included a motion to compel arbitration, seeking an order from the trial court compelling the dispute to arbitration before the American Arbitration Association ("AAA").

On 2 December 2005, defendants filed a Rule 12(b)(6) motion to dismiss, asserting that the instant action was barred by the doctrines of *res judicata* and collateral estoppel. Specifically, defendants based their *res judicata* argument on the 24 April 2003 judgment entered in the previous case, which confirmed the interim and final arbitration awards, dated 23 December 2002 and 31 January 2003, respectively, in which the arbitrators dismissed all claims asserted by plaintiff against defendants. On 20 January 2006, the trial court granted defendants' motion to dismiss, and thereafter, plaintiff filed timely notice of appeal.

On appeal, plaintiff contends that the trial court erred in determining that the instant case is precluded on the bases of *res judicata* and collateral estoppel. In the alternative, plaintiff contends that the issue of *res judicata* was a matter that should have been determined in arbitration, not by the trial court.

"Under the doctrine of res judicata or 'claim preclusion,' a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004). This Court recently explained that "[f]or defendants to establish that a plaintiff's claim is barred by res judicata, they 'must show (1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits.' " *Gregory v. Penland*, 179 N.C. App. 505, 510, 634 S.E.2d 625, 629 (2006) (quoting *Erler v. Aon Risks Servs., Inc.*, 141 N.C. App. 312, 316, 540 S.E.2d 65, 68 (2000), *disc. rev. denied*, 548 S.E.2d 738 (2001). As this Court has noted, " '[t]he doctrine of res judicata applies to a judgment entered on an arbitration award as it does to any other final judgment.' " *Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 85, 609 S.E.2d 259, 262 (2005) (quoting *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 22, 331 S.E.2d 726, 730 (1985), *disc. rev. denied*, 315 N.C. 590, 341 S.E.2d 29 (1986)). "Under the companion doctrine of collateral estoppel [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." *Whitacre P'ship*, 358 N.C. at 15, 591 S.E.2d at 880. In explaining the relationship between *res judicata* and collateral estoppel, our Supreme Court has noted that

> [w]hereas res judicata estops a party or its privy from bringing a subsequent action based on the "same claim" as that litigated in an earlier action, collateral estoppel precludes the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim. The two doctrines are complementary in that each may apply in situations where the other would not and both 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. (internal quotation marks and citations omitted).

Before determining whether the trial court correctly ruled that the instant case is barred by *res judicata* and/or collateral estoppel, however, we first must evaluate plaintiff's second argument on appeal—namely, whether the issue of preclusion should have been decided by the arbitrator or the trial court. A threshold question for this issue, in turn, is whether the Federal Arbitration Act ("FAA") or the North Carolina Uniform Arbitration Act ("NCUAA") governs the instant case.

As this Court noted in the prior case between Cellular Plus and defendants,

> [t]his question cannot be bypassed as the FAA preempts conflicting state law, including state law addressing the role of courts in reviewing arbitration awards. If the FAA requires that a particular question be determined by the arbitrators, while state law would allow a court to address the issue, the FAA controls. We must, therefore, first determine whether the parties' arbitration agreement falls under the FAA.

Weaver I, 166 N.C. App. at 357-58, 602 S.E.2d at 710 (internal citation omitted). As this Court recognized, "[t]he FAA governs any 'contract evidencing a transaction involving commerce.' " *Id.* at 358, 602 S.E.2d at 710 (quoting 9 U.S.C. § 2). Ultimately, although the parties did not contest the trial court's determination that the FAA governs the con-

tract at issue, this Court saw "no basis in the record for any conclusion other than that the contract at issue evidences a transaction involving commerce." *Id.* Therefore, this Court held that the FAA governed the issues on appeal. *See id.*

In the case *sub judice*, the "Communication Services Agent Agreement" between plaintiff and defendants is substantially the same agreement as the "Non-Exclusive Wireless Communications Services Agent Agreement" between Cellular Plus and defendants in the prior case. Much as the contract between Cellular Plus and defendants, the instant contract between plaintiff and defendants also "evidenc[es] a transaction involving commerce." *See id.* (quoting 9 U.S.C. § 2).[2] Thus, as we stated in *Weaver*, "we see no basis in the record for any conclusion other than that the contract at issue evidences a transaction involving commerce. The FAA, therefore, controls." *Id.*

In arguing that the preclusive effect of the prior arbitration was an issue properly decided by the trial court, defendants cite to *Rodgers Builders, Inc.*, 76 N.C. App. 16, 331 S.E.2d 726. In *Rodgers*, this Court held that "[t]he scope of an arbitration award and its res judicata effect are matters for judicial determination; therefore, whether plaintiff's claims are barred was for the superior court to determine." *Rodgers Builders, Inc.*, 76 N.C. App. at 23, 331 S.E.2d at 730. However, this Court in *Rodgers* was interpreting state law—specifically, the NCUAA—and as the instant case is governed by the FAA, *Rodgers* is inapposite.

Defendants also quote from *Kelly v. Merrill Lynch, Pierce, Fenner & Smith*, 985 F.2d 1067 (11th Cir.), *cert. denied*, 510 U.S. 1011, 126 L. Ed. 2d 565 (1993), in which the Eleventh Circuit rejected the contention that *res judicata* was an issue to be decided by the arbitrators, and instead held that "the better rule is that courts can decide res judicata." *Kelly*, 985 F.2d at 1069. Subsequently, however, the Eleventh Circuit expressly disavowed the holding in *Kelly* to the extent it conflicted with the United States Supreme Court's opinion in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 154 L. Ed. 2d 491 (2002). *See Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1109 (11th Cir. 2004) ("Under the approach taken in the Supreme Court's

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2. As this Court noted, "involving commerce" is synonymous with "affecting commerce" and thus "is broader than the term 'in commerce' and 'signals an intent to exercise Congress' commerce power to the full.' " *Weaver I*, 166 N.C. App. at 358, 602 S.E.2d at 710 (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277, 130 L. Ed. 2d 753, 766 (1995)).

subsequent decision in *Howsam*, . . . the *Kelly* . . . court[] erred in considering the *res judicata* issue.").

In *Howsam*, the Supreme Court held that under the FAA,

> [p]rocedural questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide. So, too, the presumption is that the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability. . . . In the absence of an agreement to the contrary, issues of substantive arbitrability . . . are for a court to decide and issues of procedural arbitrability, *i.e.*, whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.

Howsam, 537 U.S. at 84-85, 154 L. Ed. 2d at 498 (emphasis in original) (internal quotation marks and citation omitted). Therefore, "[g]ateway arbitrability issues . . . are generally for the arbitrators themselves to resolve." *Klay*, 376 F.3d at 1109. Viewing *res judicata* as a "gateway arbitrability" issue, the *Klay* court held that trial courts are without authority to "enjoin arbitration on res judicata grounds because res judicata [i]s for the arbitrator to decide in the first instance." *Id.*; *see also Nicor Int'l Corp. v. El Paso Corp.*, 292 F. Supp. 2d 1357, 1369 (S.D. Fla. 2003) (noting that in the Eleventh Circuit, it is well-settled that "a res judicata defense is to be raised and decided by the arbitrator in the first instance; and that only if the arbitrator ignores the defense would it then be appropriate for the court to vacate an arbitration award.").[3]

The weight of authority supports the Eleventh Circuit's conclusion that the issue of *res judicata*—and by analogy, collateral estoppel—based upon a prior arbitration proceeding is a legal defense and as such, an issue that must be considered by the arbitrator, not the court. *See Triangle Constr. & Maint. Corp. v. Our V.I. Labor Union*, 425 F.3d 938, 947 (11th Cir. 2005) (citing *Klay*, 376 F.3d at 1109); *Basin Elec. Power Coop. v. PPL Energy Plus, L.L.C.*, 313 F. Supp. 2d 1039, 1042 (D.N.D. 2004); *Hoover v. Prudential Secs., Inc.*, 285 F. Supp. 2d 1073, 1075 n.1 (S.D. Ohio 2003); *see also Chiron Corp. v.*

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3. Notably, our research discloses no North Carolina state or federal cases which are dispositive on the points of law addressed in this opinion. Therefore, we look to other jurisdictions for persuasive authority to guide us in reaching our decision. *See Skinner v. Preferred Credit*, 172 N.C. App. 407, 413, 616 S.E.2d 676, 680, *aff'd*, 361 N.C. 114, 638 S.E.2d 203 (2006).

Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1132 (9th Cir. 2000) (decided pre-*Howsam*); *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 140 (3d Cir. 1998) (same); *Nat'l Union Fire Ins. Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 135 (2d Cir. 1996) (same). This accords with the federal policy favoring arbitration:

> The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, 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.

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 785 (1983). Therefore, we hold that, in the context of the FAA, the issues of *res judicata* and collateral estoppel must be decided initially by the arbitrator and not the trial court.[4] Accordingly, the trial court erred in granting defendants' Rule 12(b)(6) motion to dismiss.

Reversed and Remanded.

Judges WYNN and STEELMAN concur.

STATE OF NORTH CAROLINA v. VERNON WEBSTER HATLEY, DEFENDANT

No. COA06-817

(Filed 7 August 2007)

1. Criminal Law— withdrawal of guilty plea—greater than agreed to sentence

The trial court did not err by giving defendant a sentence greater than that set in a plea agreement where the agreement explicitly stated that the district attorney was not bound to the less stringent sentence if defendant did not comply with the

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4. The fact that the trial court entered an order confirming the arbitration award does not change our holding. As other courts have explained, "a judgment upon a confirmed arbitration award is qualitatively different from a judgment in a court proceeding, even though the judgment is recognized under the FAA for enforcement purposes." *Chiron Corp.*, 207 F.3d at 1133-34. Thus, the preclusive effect of an arbitration award on a subsequent arbitration, even when the former is confirmed by a judicial order, is an arbitrable issue to be decided by the arbitrator, not the court. *See id.* at 1134.

terms. There was no ambiguity, defendant did not abide by the terms of his agreement, and N.C.G.S. § 15A-1024 thus did not apply.

2. Criminal Law— withdrawal of plea agreement denied—failure to cooperate—terms of agreement

The trial court did not err by denying defendant's motion to withdraw his guilty plea where defendant asserted that the State breached the plea agreement by not making a sentencing recommendation, and the State asserted that defendant breached the contract by not cooperating. A defendant who breaches a plea agreement is not entitled to go to trial if the agreement provides otherwise.

3. Criminal Law— withdrawal of guilty plea—fair and just reason not shown

The trial court did not err by denying defendant's motion to withdraw his guilty plea, made before sentencing, where defendant did not carry his burden of showing a fair and just reason for the withdrawal.

Appeal by defendant from judgment entered 3 February 2006 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 15 March 2007.

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

Barry Nakell for defendant.

ELMORE, Judge.

Defendant Vernon Webster Hatley (defendant) became the Senior Director of Transportation for the Wake County Public School System (the school system) in 2001 and was responsible for both school bus operations and budgeting. During the 2003 and 2004 fiscal years, defendant participated in a

> scheme to obtain money or property in excess of $100,000 in value from the Wake County school system by signing and allowing the submission of false invoices to the school system, for which no parts or products were purchased from Barnes Motor and Parts Company, Incorporated, at the time payment on the invoices was made by the school system.

Barnes Motor and Parts Company, Incorporated (Barnes) supplied inventory, including parts, office supplies, and furniture, to the school system. Defendant and other employees of the school system received gifts from Barnes, including laptops and gift cards exceeding $600,000.00 in value. Defendant also received new carpet in his home. In exchange for these and other gifts, defendant engaged in "pre-billing" with Barnes. "[T]he pre-bill meant that Wake County would advance funds to Barnes pursuant to invoices that [the school system] would generate." Later, the school system made purchases from Barnes to recover the amounts advanced. The purpose of the pre-billing scheme "was so Wake County could spend its entire budget before the end of the fiscal year without having to give back some of the budget money." Over the course of the year, Barnes delivered items to the school system and deducted the items from the "pre-bill," rather than charging for each item. School system accounting procedures at the time did not allow for advance payments; payments were made only upon receipt of the purchased items.

Barnes benefitted from this arrangement by providing motor parts and bus maintenance supplies to the school system from its inventory, as well as by purchasing the items from other vendors, often at full retail price. Barnes then sold those items to the school system with at least a thirty percent markup. As a result, the school system paid more for those supplies than it would have paid if the supplies had been ordered directly from the vendors.

The pre-billing scheme was not uncovered until 2004, despite a 2003 audit prompted by a cost overrun of $4,000,000.00 for supplies ordered by the Transportation Department of the Wake County Public Schools (the Department). In one instance, defendant and his assistant explained that safety seats installed in every school bus had cost about $1,200.00 per bus, and that other school bus readiness expenses had contributed to the cost overrun. The school system had 727 buses at the time, which would have cost $800,000.00 to equip with safety seats by defendant's calculation. An independent estimate of the cost to equip the school system's buses with safety seats was only $30,000.00.

Shortly before the 2004 audit, defendant asked Barnes to prepare a lease for the large screen television, previously purchased from Barnes, located in the school system's conference room. Defendant told Barnes that he thought a lease would look better to the auditors than a sale because the amount that the school system paid for the television exceeded $2,500.00, the amount defendant was authorized

to approve without an outside bid. Barnes prepared a lease for the television, and defendant signed it and backdated it to 15 May 2001.

A subsequent investigation by the State Bureau of Investigation (SBI) showed that during the 2003 fiscal year, defendant signed and submitted to the accounting department 1,451 invoices for payment to Barnes, totaling $2,612,003.00. During the 2004 fiscal year, defendant signed and submitted 1,084 invoices for payment to Barnes, for a total of $1,200,547.00. Each invoice was less than $2,500.00.

On 13 September 2005, as a result of the SBI investigation, defendant was indicted for one count of obtaining property in excess of $100,000.00 by false pretenses and one count of conspiracy to obtain property in excess of $100,000.00 by false pretenses. On 12 October 2005, defendant entered pleas of guilty to both counts. Defendant entered these pleas pursuant to a plea agreement with the State, whereby the State would recommend a sentence of fifty-eight months to seventy-nine months, which is at the low end of the presumptive sentencing range for these crimes. In exchange, defendant was required to cooperate truthfully with the ongoing investigation. The specific terms of the plea were articulated in a letter from the prosecutor to defendant's attorney:

> I am willing to recommend that your client receive an active sentence of not less than fifty-eight (58) months nor more than seventy-nine (79) months. Any other terms of the sentence would be at the discretion of the sentencing judge. This sentencing recommendation would be conditioned on the truthfulness of your client in the statements he has made to SBI S/A Gil Whitford and his continued complete cooperation and truthfulness. Should we find that your client has made, or does make, false material statements, or fails to cooperate, I would not be bound to recommend the above-described sentence.

Defendant entered his pleas at the same time as two Barnes employees. The trial judge continued the case until the State prayed judgment to allow defendant time to truthfully cooperate with the investigation. After defendant's guilty plea, the SBI interviewed him. Based on that interview, the prosecutor determined that defendant was not being truthful as required by the plea agreement, and defendant was therefore not entitled to the sentencing recommendation in the plea agreement. On 12 January 2006, defendant filed a motion to withdraw his guilty pleas, which the trial judge denied on 1 February 2006. Defendant received a sentence of 89 to 119 months.

I.

[1] Defendant first argues that the trial court erred by imposing a sentence greater than the sentence that had been set in the plea agreement, and also that the trial court erred by not giving defendant an opportunity to withdraw his guilty plea and proceed to trial.

Defendant cites N.C. Gen. Stat. § 15A-1024, which states:

> If at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

N.C. Gen. Stat. § 15A-1024 (2005). In this case, the judge imposed a sentence greater than the one provided for in the plea agreement, and did not inform defendant that he could withdraw his plea.

However, the State avers that section 15A-1024 does not apply in this case because the trial judge found that defendant had failed to comply with the plea agreement, and thus no plea agreement was in place at the time of defendant's sentencing. This Court has held that "[a] plea agreement is treated as contractual in nature, and the parties are bound by its terms." *State v. Russell*, 153 N.C. App. 508, 509, 570 S.E.2d 245, 247 (2002) (citation omitted). In *Russell*, the defendant,

> in accordance with a plea agreement, which provided a prayer for judgment would be entered until Defendant had the opportunity to testify against co-defendants in the case. The plea agreement further provided if Defendant complied with its terms, the State would agree to an active sentence of ten-twelve months to run concurrently with other sentences Defendant was already serving. If Defendant refused to testify against his co-defendants, "the State, at its option, [could] declare this agreement null and void or pray judgment on this plea."

Id. at 508-09, 570 S.E.2d at 246 (alteration in original). The defendant did not testify against his co-defendants, and the trial court subsequently sentenced him to an active sentence of ten to twelve months to run consecutively with the defendant's prior sentences. *Id.* at 509, 570 S.E.2d at 246. This Court affirmed the trial court's decision because "[t]here was no ambiguity in the plea agreement. It simply stated that if Defendant refused to testify against his co-defendants

the State had the option of declaring the plea 'null and void,' necessitating a trial, or praying for judgment." *Id.* at 510, 570 S.E.2d at 247.

In the plea agreement here, the agreement explicitly states that the district attorney is not bound to recommend the less stringent sentence if defendant does not comply with the agreement's terms. N.C. Gen. Stat. § 15A-1024 does not apply in this case because, as in *Russell*, there is no ambiguity in the terms of the plea agreement. Defendant did not abide by the terms of his plea agreement, and the agreement specifically allowed the district attorney to withdraw from his obligation.

II.

[2] We turn now to defendant's second argument, that the trial court erred in denying defendant's motion to withdraw his guilty plea after the State did not make the sentencing recommendation anticipated by the plea agreement. Defendant argues that he should have been allowed to withdraw his guilty plea because the district attorney failed to comply with a material provision of the contract.

"In analyzing plea agreements, 'contract principles will be 'wholly dispositive' because 'neither side should be able . . . unilaterally to renege or seek modification simply because of uninduced mistake or change of mind.' " *State v. Lacey*, 175 N.C. App. 370, 372, 623 S.E.2d 351, 352-53 (2006) (quoting *United States v. Wood*, 378 F.3d 342, 348 (4th Cir. 2004)). Each side argues that the other party violated the contract first. The State asserts that defendant breached the contract by failing to cooperate and be truthful, and defendant asserts that the State breached the contract by making no sentencing recommendation.

Defendant supports his position by citing *Nags Head v. Tillett*, 314 N.C. 627, 632, 336 S.E.2d 394, 398 (1985) for the proposition that, "When one party to a plea agreement, as to a contract, fails to comply with a material provision, thereby defeating the very purpose of the contract, the other party is entitled to be restored to the position he occupied when the plea agreement was entered into." This reliance is wholly unfounded. *Tillett* has no relation to plea agreements, and any analogy between the contract of sale in *Tillett* and the plea agreement here is tenuous at best, especially in light of *Russell*, which clearly states that when a defendant violates his plea agreement, he is not entitled to "go to trial" if the agreement provides otherwise. *Russell*, 153 N.C. App. at 510, 570 S.E.2d at 247.

III.

[3] Finally, defendant argues that the trial court erred in denying his motion to withdraw his guilty plea because he made his motion before sentencing, asserted his innocence, maintained that he had truthfully cooperated with the prosecution as required by the plea agreement, and showed a good, fair, and just reason for withdrawal of his plea.

There is no question that defendant made his motion to withdraw his guilty plea before sentencing. "Although there is no absolute right to withdraw a plea of guilty, a criminal defendant seeking to withdraw such a plea, prior to sentencing, is 'generally accorded that right if he can show any fair and just reason.' " *State v. Marshburn*, 109 N.C. App. 105, 107-08, 425 S.E.2d 715, 717 (1993) (quoting *State v. Handy*, 326 N.C. 532, 536, 391 S.E.2d 159, 161 (1990)). In reviewing the denial of a pre-sentence motion to withdraw a guilty plea, this Court conducts an independent review of the record. *Id.* at 108, 425 S.E.2d at 718.

> The defendant has the burden of showing that his motion to withdraw is supported by some "fair and just reason." Whether the reason is "fair and just" requires a consideration of a variety of factors. Factors which support a determination that the reason is "fair and just" include: the defendant's assertion of legal innocence; the weakness of the State's case; a short length of time between the entry of the guilty plea and the motion to withdraw; that the defendant did not have competent counsel at all times; that the defendant did not understand the consequences of the guilty plea; and that the plea was entered in haste, under coercion or at a time when the defendant was confused. If the defendant meets his burden, the court must then consider any substantial prejudice to the State caused by the withdrawal of the plea. Prejudice to the State is a germane factor against granting a motion to withdraw.

Id. at 108, 425 S.E.2d 715, 717-18 (1993) (citations and quotations omitted).

We examine now the factors that support defendant's contention that his motion to withdraw is supported by a "fair and just" reason.

First, although defendant asserted his legal innocence, the State argues that these assertions were "not credible and were wholly inconsistent with his behavior" because defendant: admitted to the

Superior Court that he lied under oath when he entered his plea; claimed to have been misled by television coverage of other corporate scandals despite having been fully informed of the legal theories of his case; testified that he changed his mind about being guilty after seeing the weakness of the State's evidence; and acknowledged under oath that he was guilty of these crimes. Defendant offers no factual or legal support for his assertion of legal innocence.

Second, defendant asserts that he filed his motion on the basis of a "significant change of circumstances in that the District Attorney had withdrawn from the plea arrangement." As discussed above, the district attorney was within his rights to withdraw from the plea agreement once defendant had breached it.

Third, defendant submits that he filed his motion promptly after the change of circumstances, although three months had elapsed. Defendant relies on two cases to support his position. The first, *State v. Loza-Rivera*, is unpublished. The second, *State v. Deal*, 99 N.C. App. 456, 393 S.E.2d 317 (1990), vacated a judgment resulting from a plea agreement made by a middle-school drop out who could read and write at the second grade level. *Id.* at 458, 393 S.E.2d at 318. This Court noted that the defendant in *Deal* waited four months to withdraw his plea, but explained that "this appears to have resulted from his erroneous expectations and lack of communication with his attorney." *Id.* at 464, 393 S.E.2d at 321. In this case, defendant is well-educated and appears to have had adequate communication with his attorney.

Fourth, defendant avers that "[t]he State had evidence against Defendant, but 'there was clearly a defense.' " The State, however, explains that "[e]ven defendant's appellate counsel had to concede that the State had 'substantial' evidence against defendant." This evidence includes testimony by three witnesses that they were privy to a phone conversation with defendant during which the "pre-bill" was discussed; signatures by defendant on almost 2,500 invoices, each under $2,500.00, in the few days near the close of the 2003 and 2004 fiscal years; and defendant's receipt of gifts from Barnes, along with knowledge that his colleagues had received similar, if not more substantial, gifts. This evidence strongly suggests that defendant had knowledge of and willingly participated in the criminal scheme.

Fifth, "Defendant believed that he had been truthful and cooperative with the prosecution, and that he had complied with his obligations under the plea agreement." Defendant's own brief, however,

states that "the evidence may have suggested that he should have been more aware or that the gifts may have made him more reluctant to challenge [Department Budget Officer Carol] Finch."

Finally, defendant asserts that the State suffered no prejudice, despite a finding by the trial court to the contrary. Under *Marshburn*, we only reach the question of substantial prejudice to the State if defendant has carried his burden of proof that a "fair and just" reason supports his motion to withdraw. 109 N.C. App. at 108, 425 S.E.2d at 718. We hold that defendant has not met this burden of proof and therefore do not reach the question of substantial prejudice.

Accordingly, we affirm the order of the trial judge.

Affirmed.

Chief Judge MARTIN and Judge McGEE concur.

MARCUS COOKE, Plaintiff-appellant v. SUSAN COOKE, Defendant-appellee

No. COA06-1083

(Filed 7 August 2007)

1. Divorce— equitable distribution—antenuptial agreement—interpretation

The trial court did not err in an equitable distribution case by interpreting the language of an antenuptial agreement so that a notice requirement applied to one paragraph only.

2. Divorce— equitable distribution—post-separation mortgage payments—reimbursements

The trial court was within its discretion in an equitable distribution case in requiring that defendant be reimbursed for post-separation mortgage payments made while plaintiff was in exclusive possession of the marital home.

3. Divorce— equitable distribution—post-separation mortgage payments—non-divisible property

The trial court erred in an equitable distribution action by characterizing post-separation mortgage payments as a distribution of divisible property. However, a remand was not necessary

because the trial court had the authority to reimburse defendant for those payments.

4. Divorce— equitable distribution—post-separation mortgage payments

The trial court did not err in an equitable distribution action by determining that reimbursement of post-separation mortgage payments was equitable. The payments were not divisible property and the court was not required to consider the statutory factors concerning whether the payments were equitable.

Appeal by plaintiff from orders entered 26 September 2002 and 5 January 2006, and order and judgment entered 31 March 2006 by Judge Charles T.L. Anderson in Orange County District Court. Heard in the Court of Appeals 15 March 2007.

Judith K. Guibert for plaintiff-appellant.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Adrienne Allison, for defendant-appellee.

ELMORE, Judge.

Marcus Cooke (plaintiff) and Susan Cooke (defendant) were married on 14 February 1991, separated on 25 June 2001, and divorced on 3 December 2002. On the date of their marriage, the parties signed an antenuptual agreement (the agreement), which was drafted by plaintiff's counsel. The parties executed the agreement in Tennessee, the state in which they were married.

In relevant part, the agreement states:

> 2. Property Rights. After the marriage between the parties, each of them shall separately retain all respective rights in his or her own property disclosed and listed in Exhibits "A" and "B", including any appreciation thereon and including[1] property acquired during the marriage with the proceeds of such separate property (as listed in Exhibits "A" and "B") and separate property acquired during the marriage that each, after giving notice to the other, shall segregate and maintain as his or her separate property. Each

1. The words "and including," which immediately precede this footnote, were written in by hand on the original document. It appears that both parties initialed the page, thereby approving this addition. Neither party objects to the words' inclusion, and we therefore read "and including" to be original to the text of the agreement.

> of them shall have the absolute and unrestricted right to dispose of their own property including the proceeds from the disposition of any property or the reinvestment of such proceeds, free from all claims that may be made by the other by reason of their marriage, and with the same effect as if no marriage had been consummated between them.
>
> 3. Disposition of Property. Each party hereto may freely sell or otherwise dispose of his or her own property, whether listed in Exhibits "A" and "B" or property acquired during the marriage, designated and segregated by such party as his or her separate property including any appreciation thereon, and including the proceeds . . . .
>
> 4. Property and Disposition During Marriage. Each party during his or her lifetime shall keep and retain sole ownership, control and enjoyment of his or her own property whether listed in Exhibit "A" and "B" or property acquired during the marriage, designated and segregated by such party as his or her separate property including any appreciation thereon, and including the proceeds from the disposition of any such property or the reinvestment of such proceeds free and clear of any claim by the other arising out of the marriage of the parties . . . .
>
> * * *
>
> 6. Relinquishment of Right to Inherit. With regards to the property set forth in Exhibit "A" and "B", and any other property acquired during the marriage designated and segregated by such party as his or her separate property and any appreciation on such properties, and including the proceeds from the disposition of any such property or the reinvestment of such proceeds, each party hereby releases and relinquishes to the other . . . and is hereby forever barred from any and all rights, interests, or claims by way of past, present and future support, division of property, right of dower, inheritance, descent, distribution, allowance for support, and all . . . rights or claims whatsoever, in or to the aforementioned property of the other, whether real or personal, which may, in any manner, arise or accrue by virtue of said marriage.

Plaintiff's assets owned prior to marriage were listed in Exhibit A and defendant's assets owned prior to marriage were listed in Exhibit B. Defendant listed her investment assets, valued at $57,436.00, which

included tax-free bonds with a value of $4,870.00, individual retirement accounts with a value of $7,398.00, qualified retirement plans with a value of $4,888.00, and other investments with a value of $40,280.00. Defendant also listed bonds and stocks/stock options with values of $0.00. At the time the parties separated, plaintiff had a net worth of $492,794.00 and defendant had a net worth of $1,232,169.00. Included in defendant's net worth were marketable securities with a value of $452,458.00 and a retirement account with a value of $544,000.00.

The parties relocated to North Carolina during their marriage, and purchased a home in Chapel Hill (the marital home). The mortgage on the marital home was in defendant's name only.

After the parties separated in 2001, plaintiff continued to reside in the marital home, and defendant purchased a second home in which she lived with the parties' daughter. Plaintiff exclusively occupied the marital home after June, 2001, but did not pay the mortgage in September, October, and December of 2001. He paid half the mortgage in November of 2001. Defendant paid a total of $11,959.00 in mortgage payments after her separation from plaintiff and while plaintiff had exclusive possession of the marital home. The trial court calculated that defendant received a tax benefit of $1,151.35 in reduction of her tax liability for 2001 as a result of those mortgage payments.

By consent order entered 14 December 2001, the parties agreed to list the marital home for sale, and a later order required plaintiff to make all subsequent mortgage payments on the marital home. Plaintiff made several offers to buy defendant's half interest in the marital home, and the parties ultimately agreed upon a price of $133,500.00.

Plaintiff's counsel then drafted a separation and property settlement agreement, which both parties executed on 18 February 2002. The property settlement agreement states that the parties agreed that the value of defendant's interest in the marital home was $133,500.00, and that plaintiff would pay defendant that amount in exchange for a quitclaim deed conveying her interest in the marital home to plaintiff. The property settlement agreement also states, in relevant part, "This Agreement as entered into between the parties shall not affect either parties' rights regarding the manner in which any prior payment relative to the [marital] residence should be treated in the pending equitable distribution action."

Plaintiff appeals three separate orders entered by Judge Anderson over the course of his litigation with defendant. We address each order individually.

26 September 2002 Order

Plaintiff first argues that the trial court erred by granting partial summary judgment to defendant in its 26 September 2002 order. On 10 May 2002, plaintiff moved for equitable distribution of "certain property which qualifies as marital property as defined by N.C.G.S. § 5-20 *et seq*." Plaintiff asserted that, pursuant to the antenuptual agreement, all "property accumulated during the marriage (except property listed on the parties' exhibits and appreciation thereon, and property acquired during the marriage by inheritance or gift and maintained by a party as his or her separate property with notice of such intent) is marital property subject to equitable distribution." In response, defendant moved for partial summary judgment, which the trial court granted in its 26 September 2002 order. The trial court agreed with defendant that the "Antenuptual Agreement establishe[d] that the only property that was marital property and subject to distribution by [the trial court] was the marital residence and certain items of tangible personal property purchased through the parties' joint account." Defendant's investment property, including her retirement accounts, was therefore not subject to equitable distribution.

This appeal arises from a decree of partial summary judgment, and our review is therefore *de novo*. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). "The trial court should grant summary judgment 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *McCutchen v. McCutchen*, 360 N.C. 280, 285-86, 624 S.E.2d 620, 625 (2006) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005)). We consider the evidence "in a light most favorable to the non-moving party." *Howerton*, 358 N.C. at 470, 597 S.E.2d at 693. Our review entails a two-part analysis: "[s]ummary judgment is appropriate if (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784, 534 S.E.2d 660, 664 (2000).

[1] Plaintiff urges us to reconsider the trial court's interpretation of the language of the antenuptual agreement. "The principles of construction applicable to contracts also apply to premarital agreements[.]" *Harllee v. Harllee*, 151 N.C. App. 40, 46, 565 S.E.2d 678, 682 (2002) (citations omitted). Plaintiff would have us read the notice requirement in Paragraph 2 as applying to the other paragraphs, effectively expanding the property that would fall into the pot of marital property subject to equitable division. Specifically, some or all of defendant's sizable investment portfolio would be subject to division.

When "interpreting contract language, the presumption is that the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean." *Stewart v. Stewart*, 141 N.C. App. 236, 240, 541 S.E.2d 209, 212 (2000) (citing *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946)).

Our review of the antenuptual agreement rendered the same result as the trial court's review: that the notice requirement imposed in Paragraph 2 applies only to Paragraph 2 and not to the other paragraphs of the agreement. The word "notice" is used in Paragraph 2 and does not appear in Paragraphs 3, 4, and 6, which each address the disposition of "separate property." A plain reading of the agreement suggests that the parties intended the notice requirement only to apply to the particular category of rights addressed in Paragraph 2. "Notice" is simply not stated as a requirement in Paragraphs 3, 4, and 6 and there is no language that directs us to read "notice" into those paragraphs. Instead, we read Paragraphs 3, 4, and 6 as creating particular categories of rights for the disposition of property, entirely distinct from the rights created in Paragraph 2. We find no ambiguity in the language of the agreement, nor do we find that the trial court's construction of the document creates an absurd result. Accordingly, we affirm the order of the the trial court granting partial summary judgment.

5 January 2006 Order

[2] We turn next to plaintiff's appeal from the order entered 5 January 2006. This order resolved "defendant's claims against plaintiff for payments made against the mortgage for the benefit of plaintiff after separation," and granted defendant the right to recover a judgment of $10,807.65 from plaintiff.

"[T]he trial court is vested with wide discretion in family law cases, including equitable distribution cases." *Wall v. Wall*, 140 N.C. App. 303, 307, 536 S.E.2d 647, 650 (2000). "Thus, a trial court's ruling will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citations and quotations omitted). "[T]he law affords trial courts wide discretion in determining how to treat post-separation mortgage payments by one spouse. . . . A trial court may also give the payor a dollar for dollar credit in the division of the property, or require that the non-payor spouse reimburse the payor for an appropriate amount." *Hay v. Hay*, 148 N.C. App. 649, 655, 559 S.E.2d 268, 273 (2002) (citation omitted).

Here, the trial court was within its discretion to require plaintiff to reimburse defendant for post-separation mortgage payments that defendant made while plaintiff was in exclusive possession of the marital home. The property settlement agreement specifically stated that it did not affect how defendant's "prior payments" should be treated in the equitable distribution action, leaving the trial court wide latitude to determine the parties' rights with regard to those prior payments. Although plaintiff makes additional arguments that he overpaid for his half-interest in the property, he signed a property settlement agreement that states that he agreed to the price. We will not evaluate the fairness of the agreement's terms, and therefore do not address these arguments.

The trial court made twenty-five findings of fact before reaching its conclusion. These findings of fact are supported by competent evidence, and the conclusion is supported by these findings of fact. It is evident that the order was the result of a reasoned decision, and as such we affirm it.

<u>31 March 2006 Order</u>

[3] The trial court issued its final order and judgment on 31 March 2006. The order awards "judgment against Plaintiff in favor of Defendant in the amount of $10,807.65," which "judgment represents a distribution of the divisible property created by Defendant's post-separation payments of the indebtedness secured by the marital residence" while it was in plaintiff's exclusive possession. The court reasoned that it was equitable to distribute all of "said divisible property" to defendant because she paid it "with her separate funds, and it would be inequitable to distribute any of said divisible property to Plaintiff."

Plaintiff correctly asserts that the trial court erred in categorizing the post-separation payments as "a distribution of divisible property." N.C. Gen. Stat. § 50-20(b)(4)(d) was amended in 2002 to expand the definition of "divisible property" to include decreases in marital debt. *See* N.C. Gen. Stat. § 50-20(b)(4)(d) (2005); *Warren v. Warren*, 175 N.C. App. 509, 516-17, 623 S.E.2d 800, 805 (2006). The amendment applies only to payments made after 11 October 2002. *Warren*, 175 N.C. App. at 517, 623 S.E.2d at 805. The payments pre-date the amendment and therefore do not fall within the statutory definition of "divisible property."

However, this error does not necessitate reversal or remand. As discussed above, the trial court had authority to reimburse defendant for her post-separation mortgage payments under *Hay*. Although we acknowledge the error, we need not remand.

[4] Plaintiff also argues that the trial court erred by determining reimbursement to defendant was equitable because N.C. Gen. Stat. § 50-20(c) requires a trial court to divide marital and divisible property equitably upon consideration of the factors listed therein. N.C. Gen. Stat. § 50-20(c) (2005). Because the post-separation mortgage payments were not "divisible property," the trial court was not required by section 50-20(c) to consider the statutory factors when considering whether payment was equitable. Instead, the trial court was only required to make a "reasoned decision," as in *Wall* and *Hay*, that defendant was entitled to reimbursement for the mortgage payments.

Accordingly, we affirm the orders of the district court.

Affirmed.

Judges McGEE and STEPHENS concur.

HOSPICE & PALLIATIVE CARE CHARLOTTE REGION D/B/A HOSPICE AT CHARLOTTE, PETITIONERS v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT-APPELLEE, AND COMMUNITY HOME CARE OF JOHNSTON COUNTY, INC. D/B/A/ COMMUNITY HOME CARE AND HOSPICE, RESPONDENT-INTERVENOR-APPELLANT

No. COA06-1484

(Filed 7 August 2007)

1. Hospitals and Other Medical Facilities— hospice—licensed and operational—certificate of need oversight

An agency correctly concluded that a contested case was not moot where the mootness claim was based on the erroneous premise that a new hospice office was no longer subject to certificate of need oversight because the office was licensed and fully operational.

2. Hospitals and Other Medical Facilities— hospice—opening office in another county—certificate of need required

A Johnson County hospice was required to obtain a certificate of need before opening a hospice office in Mecklenburg County even though it had obtained a "no review" letter.

Appeal by respondent-intervenor from final agency decision entered 9 August 2006 by North Carolina Department of Health and Human Services, Division of Facility Services Director Robert J. Fitzgerald. Heard in the Court of Appeals 7 June 2007.

Parker Poe Adams & Bernstein, LLP, by Renee J. Montgomery and Robert A. Leandro for Petitioner-Appellee.

Williams Mullen Maupin Taylor, P.C. by Marcus C. Hewitt and Kevin Benedict for Respondent-Intervenor-Appellant.

Attorney General Roy A. Cooper, III, by Assistant Attorney General June S. Ferrell for Respondent-Appellee.

STROUD, Judge.

Respondent-intervenor Community Home Care of Johnston County, Inc. [Community] appeals from the final agency decision entered by North Carolina Department of Health and Human Services [DHHS], Division of Facility Services [DFS] in a contested case. Petitioner Hospice & Palliative Care Charlotte Region [HPC] contested the DHHS, DFS Certificate of Need Section's [CON Section]

issuance of a "No Review" letter to Community, which authorized Community to open a hospice office in Mecklenburg County, North Carolina without first obtaining a Certificate of Need [CON] from the department. Community contends that its Mecklenburg County office is a "branch office" of its existing licensed and certified Johnston County hospice. The final DHHS agency decision granted summary judgment in favor of HPC based upon the agency's conclusion that Community's Mecklenburg County hospice office was a "new institutional health service" for which Community was required to obtain a CON. Community obtained a license for its Mecklenburg County hospice office from the DHHS DFS License and Certification Section four days before HPC filed this contested case.

This Court must resolve two issues on appeal: (1) whether the License and Certification Section's issuance of a license for Community's Mecklenburg County hospice office, which then became "fully operational," mooted the contested case filed by HPC, and (2) whether Community established a "new institutional health service" in Mecklenburg County for which it was required to obtain a CON. We affirm.

I. Factual Background

Community is a health service provider that has previously obtained a CON for the establishment of a hospice in Johnston County, North Carolina. On 29 June 2005, Community opened a hospice office in Mecklenburg County, North Carolina and began serving its first patient, who was named M.D. That same day, Community sent correspondence to the CON Section, describing the hospice services it was providing to M.D. in Mecklenburg County and requesting a "No Review" letter for the development of a "branch office" in that location. A "No Review" letter documents the CON Section's determination that a proposed project is not a "new institutional health service" for which the health service provider is required to obtain a CON. The CON Section privately issued Community a "No Review" letter dated 20 July 2005 for its Mecklenburg County hospice office.

Based on the 20 July 2005 "No Review" letter, Community submitted a licensure application to the DHHS DFS Licensure and Certification Section. The Section issued Community a license for its Mecklenburg County hospice office on 25 July 2005.[1] According to

1. Although the letter accompanying the license was dated 25 July 2005, the license itself was effective 22 July 2005, which is the date on which Community filed its licensure application.

Community, its Mecklenburg County hospice office "has been properly licensed and fully operational since that time."

On 29 July 2005, nine days after the CON Section's private issuance of the "No Review" letter to Community and four days after the Licensure and Certification Section's public issuance of a license for Community's Mecklenburg County hospice office, HPC filed a contested case pursuant to N.C. Gen. Stat. § 131E-188 (2005). In its written and oral argument to the trial tribunal, HPC argued that Community's Mecklenburg County hospice office is a "new institutional health service" for which Community is required to obtain a CON and that the CON Section erred by issuing Community a "No Review" letter for that location. Community responded that the contested case filed by HPC was moot because the CON Section has "no continuing oversight of a project once the project is licensed and operational." Alternatively, Community argued that its Mecklenburg County hospice office was a "branch office" of its licensed and certified existing Johnston County hospice, not a "new institutional health service."

On 9 August 2006, DFS Director Robert J. Fitzgerald issued a final agency decision ordering the CON Section to withdraw the "No Review" letter and deciding that "Community must obtain a CON before developing or offering a hospice office in Mecklenburg County because Mecklenburg County was not in Community's Johnston County office's service area." Community appealed, and on 31 August 2006 Community also filed petition in this Court for writ of supersedeas and a motion for temporary stay of the final agency decision (COAP06-724). This Court granted Community's petition on 19 September 2006 and motion on 1 September 2006.

II. Mootness

[1] Community argues that DFS erred by concluding that the contested case is not moot. In support of its argument Community states that "the CON Section has no continuing oversight of the project after the issuance of a no-review letter." Citing, *Mooresville v. Hosp. Mgmt Assocs. Inc. v. N.C. Dep't of Health & Human Servs.*, 360 N.C. 156, 622 S.E.2d 621 (2005) (per curiam), Community reasons that "this case is rendered moot by the subsequent licensure of the [Mecklenburg County hospice] office and its becoming operational and serving patients." We disagree.

The Supreme Court of North Carolina has explained that a case should be considered moot when "a determination is sought on a mat-

ter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison Cty Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996); *Lange v. Lange*, 357 N.C. 645, 588 S.E.2d 877 (2003). If a case becomes moot "at any time during the course of the proceedings, the usual response should be to dismiss the action." *In re Peoples*, 296 N.C. 109, 148, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979).[2] Community argues that the final agency decision entered by DFS "cannot have any practical effect" on the case *sub judice* because its Mecklenburg County hospice office "has been properly licensed and fully operational since" 25 July 2005.

Initially, we note that Community's "mootness" claim is based on the premise that its Mecklenburg County hospice office is no longer subject to CON Section "oversight" because the office is "licensed and fully operational." This is not true.

N.C. Gen. Stat. § 131E-190 (2005) confers authority on DHHS to impose multiple penalties on any health service provider that "proceeds to offer or develop a new institutional health service without having first obtained a certificate of need for such services." Such penalties include "the withholding of federal and State funds under Titles V, XVII, and XIX of the Social Security Act for reimbursement of capital and operating expenses related to the provision of the new institutional health service." N.C. Gen. Stat. § 131E-190(d) (2005). Most importantly, DHHS is empowered to "revoke or suspend the license of any person who proceeds to offer or develop a new institutional health service without having first obtained a certificate of need for such services." N.C. Gen. Stat. § 131E-190(e) (2005).

Whether Community has offered a "new institutional health service" for which a CON is required is precisely the substantive issue raised by HPC in its contested case. In light of N.C. Gen. Stat. § 131E-190, the trial tribunal's resolution of this issue has a significant "practical effect on the existing controversy," as DHHS may revoke the license for Community's Mecklenburg County hospice office, at which time the office would cease to be "fully operational." In fact, the Licensure and Certification Section letter accompanying

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2. "In federal courts the mootness doctrine is grounded primarily in the 'case or controversy' requirement of Article III, Section 2 of the United States Constitution and has been labeled 'jurisdictional' by the United States Supreme Court." *In re Peoples*, 296 N.C. at 147, 250 S.E.2d at 912 (1978). "In state courts the exclusion of moot questions from determination is not based on a lack of jurisdiction but rather represents a form of judicial restraint." *Id.* at 147, 250 S.E.2d at 912-13.

this license expressly stated: "It should be noted that this decision is based only on the facts represented by you in your July 22, 2005 correspondence [requesting licensure] and the July 20, 2005 "No Review" letter [issued by the CON Section.]"

Community cites the North Carolina Supreme Court's per curiam decision in *Mooresville Hosp. Mgmt Assocs Inc. v. N.C. Dep't of Health & Human Servs.*, 360 N.C. 156, 622 S.E.2d 621 (2005) in support of its position. In *Mooresville*, the Court described the procedural posture of that case as follows:

> While the appeal was pending, respondent-intervenor Presbyterian Hospital obtained an operating license from DHHS. On 19 November 2004, before the Court of Appeals issued its decision, respondent-intervenors filed in that court a motion to dismiss petitioner's appeal as moot because construction of Presbyterian Hospital had been completed and the hospital was fully operational.

360 N.C. 156, 157-58, 622 S.E.2d 621, 622. Later, the Court announced, "[w]e conclude that the Court of Appeals erred in denying respondent-intervenors' motion to dismiss as moot." *Id.*

Based on the above-quoted statements, Community urges this Court to conclude *Mooresville* established the rule that a contested case is always moot when the challenged health service becomes "fully operational." We do not believe that the per curiam opinion in *Mooresville* stands for this broad proposition. Such an interpretation would accelerate the unlawful development of new institutional health services, encouraging health service providers to make questionable projects "fully operational" before an "affected party" has time to challenge the action.[3] For example, in the case *sub judice*, Community alleges that HPC could not file a contested case on 29 July 2005 because its Mecklenburg County hospice office became "properly licensed and fully operational" on 25

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3. N.C. Gen. Stat. § 131E-188(a) provides that "any affected person" may contest the CON Section's decision to "issue, deny, or withdraw a certificate of need or exemption." *See also Hospice at Greensboro, Inc. v. N.C. Dep't of Health & Human Servs.*, ––– N.C. App. –––, –––, ––– S.E.2d –––, ––– (2007) (COA06-1204) (holding that the CON Section's issuance of a "No Review" letter is an "exemption" for purposes of N.C. Gen. Stat. § 131E-188). "[A]ny person who provides services, similar to the services under review, to individuals residing within the service area or the geographic area proposed to be served by the applicant," is an "affected party." N.C. Gen. Stat. § 131E-188(c) (2005). HPC is an existing hospice care provider in Mecklenburg County and is, therefore, an "affected party" pursuant to N.C. Gen. Stat. § 131E-188(c).

July 2005, just five days after the CON Section privately issued the "No Review" letter.

The facts of *Mooresville* are dispositively different from the facts of the contested case *sub judice*. In *Mooresville*, a respondent-intervenor obtained a CON before constructing the replacement hospital, but the petitioner contested an alleged procedural defect in the CON review process. *Id.* Here, Community did not obtain a CON before developing its Mecklenburg County hospice office. The substantive question on appeal is whether Community's Mecklenburg County hospice office is a "new institutional health service" for which it was required to obtain a CON and this Court's resolution of Community's appeal may subject Community to sanctions pursuant to N.C. Gen. Stat. § 131E-190.

For the reasons stated above, we hold that DFS did not err by concluding that the Licensure and Certification Section's issuance of a license for Community's Mecklenburg County hospice office, which then became "fully operational," did not moot the contested case filed by HPC. This assignment of error is overruled.

III. "New Institutional Health Service"

[2] Community argues that DFS erred by deciding that its Mecklenburg County hospice office is a "new institutional health service" for which it must obtain a CON. Citing *In re Total Care*, 99 N.C. App. 517, 393 S.E.2d 338, *disc. rev. denied*, 327 N.C. 635, 399 S.E.2d 122 (1990), Community contends that it was not required to obtain a CON before opening its Mecklenburg County hospice office because the office is a "branch office" of its Johnston County hospice. Community reasons that before 31 December 2005, a CON was not required to open a branch hospice office, even if the branch office was located outside the parent hospice's service area. We disagree.

In *Hospice at Greensboro*, which is filed concurrently with this opinion, this Court held that "an existing institutional health service must obtain a new CON to open a 'branch office' outside its service area." *Hospice at Greensboro, Inc. v. N.C. Dep't of Health & Human Servs.*, 185 N.C. App. ----, ----, ---- S.E.2d ----, ---- (2007). "Such an office, regardless of the label affixed by its developer, is a 'new institutional health service' for which a CON is required." *Id.* Our holding in *Hospice at Greensboro* applied to the definition of "new institutional health service" as set forth in N.C. Gen. Stat. § 131E-176 prior to 31 December 2005, *Hospice at Greensboro*, 185 N.C. App. at ----

n.7, ––– S.E.2d at ––– n.7,[4] and is applicable to the instant case, in which Community obtained a "No Review" letter from the CON Section on 20 July 2005.

Accordingly, we hold that Community's Mecklenburg County hospice office is a "new institutional health service" for which it must obtain a CON. This assignment of error is overruled.

IV. Conclusion

For the reasons stated above, the final agency decision entered by DHHS, DFS Director Robert J. Fitzgerald on 9 August 2006 awarding summary judgment to HPC is affirmed.

AFFIRMED.

Judges ELMORE and STEELMAN concur.

STATE OF NORTH CAROLINA v. AARON MICHAEL BURKE, DEFENDANT

No. COA06-1327

(Filed 7 August 2007)

1. Appeal and Error— assignments of error—citation to transcript rather than record—merits addressed

The merits of defendant's appeal were addressed even though he violated Appellate Rule 28(b)(6) by citing the transcript rather than the record for the assignments of error. Defendant's mistake does not prevent a full understanding of the issues at hand or obstruct the process of the appeal.

2. Public Records— alteration of child support order—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss for insufficient evidence a charge of altering an official record (a child support record).

4. Recently, the General Assembly further amended the statutory definition of "new institutional health service" to include "the opening of an additional office by an existing . . . hospice within its service area . . . or outside its service area." 2005 N.C. Sess. Laws 1179. Although this session law was ratified by the General Assembly on 16 August 2005 and signed by the Governor on 26 August 2005, it did not "become[] effective for hospices and hospice offices" until 31 December 2005. 2005 N.C. Sess. Laws 1184.

3. Trials— questioning by judge—clarification of testimony

The trial court did not abuse its discretion by asking a witness two questions which were intended to clarify the witness's testimony. The questions did not communicate any opinion or prejudice defendant's case.

4. Criminal Law— instructions—reasonable doubt—no plain error

There was no plain error in the trial court's jury instruction on reasonable doubt in a prosecution for altering an official document. The language to which defendant takes issue is substantially the same as that which the N.C. Supreme Court has upheld. Moreover, defendant did not prove that any error affected the instruction as a whole or prejudiced his case.

Appeal by defendant from judgment entered 14 December 2005 by Judge D. Jack Hooks, Jr. in Brunswick County Superior Court. Heard in the Court of Appeals 25 April 2007.

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

Attorney General Roy Cooper, by Assistant Attorney General David D. Lennon, for the State.

ELMORE, Judge.

Adam Michael Burke (defendant) was required to pay child support since 2002 for his minor children, a responsibility that included providing health insurance pursuant to a 19 March 2002 family court "Consent Agreement and Order to Modify Child Support Order" (consent order). During the years 2004 and 2005, Jackie Capps oversaw defendant's child support responsibilities on behalf of the Brunswick County Department of Social Services (DSS). Previously, defendant had been issued show cause orders for contempt for failure to pay child support, and a hearing for one such order was held on 30 August 2004.

In February, 2005, DSS sent Southport Concrete, defendant's then employer, a National Medical Support Notice seeking health insurance for defendant's minor children. On 23 February 2005, Southport Concrete sent DSS a response stating that "Adam Burke is not required to have health insurance on his children," attached to which was a purported copy of the 30 August 2004 order. Ms. Capps noticed

that the attached order differed from the copy she had from the hearing on 30 August 2004. The copy from Southport Concrete included handwritten portions relieving defendant of his obligation to provide medical insurance to his children through his employer. Ms. Capps also knew that an order from a show cause hearing would not have an effect on defendant's obligations regarding his children's medical insurance through his employer. Ms. Capps went to the Clerk of Court and found the original order, which did not contain the hand-written language, made copies of it, and had a clerk in the civil department stamp each page to certify that it was a true copy.

On 3 March 2005, Ms. Capps was summoned to the clerk's office, where she learned that the order in the file had been changed to match the one sent to her by Southport Concrete. Defendant was asked to provide handwriting samples, which Captain John P. Roggina of the New Hanover County Sheriff's Department analyzed.[1] Upon Captain Roggina's written opinion that the handwriting of the altered portion of the court order was consistent with defendant's handwriting samples, defendant was arrested and charged with the felony of intentionally and materially altering an official case record.

During the ensuing trial, the trial judge asked Ms. Capps two questions regarding testimony that she had just given during redirect examination; defendant did not object to these questions. Also, when giving jury instructions, the trial judge added the following to the pattern jury instruction: "A reasonable doubt is not a vain doubt; it's not a fanciful doubt; it's not proof beyond all doubt; it's not proof beyond a shadow of a doubt. There are few things in human existence we can prove beyond all doubt and a shadow of a doubt." Defendant did not object to this instruction. The jury found defendant guilty and defendant now appeals.

[1] The State contends that defendant violated the North Carolina Rules of Appellate Procedure and that for this reason, defendant's appeal should be dismissed. The State argues that defendant violated Rule 28(b)(6), which states, in relevant part:

> Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appel-

1. Captain Roggina is certified in handwriting analysis and has over thirty-two years of experience in this area.

> lant'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). In his brief, defendant cited the transcript rather than the record for the assignments of error. The State argues that our Supreme Court has stated that an appellate court may not create an appeal for a defendant who violates the Rules of Appellate Procedure. *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). However, our Supreme Court has more recently noted that although "compliance with the Rules is required[,] . . . every violation of the rules does not require dismissal of the appeal or the issue, although some other sanction may be appropriate, pursuant to Rule 25(b) or Rule 34 of the Rules of Appellate Procedure." *State v. Hart*, 361 N.C. 309, 311, 644 S.E.2d 201, 202 (2007) (citations omitted). Further, defendant's mistake does not prevent this Court or the litigants from a full understanding of the issues at hand, nor does it obstruct the process of this appeal. We therefore address the merits of defendant's appeal.

[2] Defendant first argues that the trial court erred in denying his motion to dismiss for insufficiency of the evidence. The standard of review for ruling on a defendant's motion to dismiss is whether "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)). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Peoples*, 167 N.C. App. 63, 67, 604 S.E.2d 321, 324 (2004) (citations and quotations omitted). The evidence should be considered "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. Combs*, 182 N.C. App. 365, 368, 642 S.E.2d 491, —— (2007).

The State makes three contentions: (1) that the second page of the court order was swapped with another page between 23 February and 2 March 2005; (2) that the swap was a material alteration; and (3) that defendant swapped the pages. Defendant argues that the State's evidence is insufficient to prove any of the above, while the State counters that, looking at the undisputed facts in the light most favorable to the State, a jury could rationally conclude that all three of the State's contentions are correct. We agree with the State.

Based on the undisputed facts, a jury could rationally have concluded that defendant was the individual who swapped the pages in the court order. First, the handwriting expert's opinion was that defendant wrote the handwritten parts of the altered page. Second, defendant was the only one who had a motive to swap the documents; the swap gave him a benefit that he sought before the swap occurred. Finally, defendant's communication with an employee at Southport Concrete revealed that he was aware of the language that was added to the altered order and the benefit it accorded him. On these facts, we hold that there was sufficient evidence to take the case to a jury. Accordingly, the trial court properly denied defendant's motion to dismiss.

[3] Defendant next argues that the trial judge abused his discretion in asking Ms. Capps two questions of clarification while she was on the stand. However, "it is well recognized that a trial judge has a duty to question a witness in order to clarify his testimony or to elicit overlooked pertinent facts." *State v. Fleming*, 350 N.C. 109, 126, 512 S.E.2d 720, 732 (1999) (citations and quotations omitted). Likewise, it is "well settled" that a trial judge may question witnesses in the interests of supervising and controlling the course of a trial. *State v. Rushdan*, 183 N.C. App. 281, 284, 644 S.E.2d 568, 571 (2007).

> The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury. In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized.

Id. at 283-84, 644 S.E.2d at 571 (quoting N.C. Gen. Stat. § 15A-1222 (2005); *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995)). "A new trial is not required if, considering the totality of the circumstances under which the remark was made, defendant fails to show prejudice." *Id.* at 284, 644 S.E.2d at 571 (citation omitted).

Defendant contends that the trial judge's questions were not made for the purpose of clarification, but reiterations of certain facts. Defendant argues that these facts therefore received undue weight in the eyes of the jury. The interchange between the trial judge and Ms. Capps is as follows:

> A. He has never said that but there has been some testimony as to he has never seen an order that ordered him to provide medical insurance.

THE COURT: BY "THERE'S BEEN SOME TESTIMONY," YOU MEAN IN PERHAPS A CHILD SUPPORT CASE?

A. Yes.

THE COURT: YOU MEAN TESTIMONY BY HIM?

A. Yes.

We find that these questions were intended to clarify the witness's testimony because of the ambiguity in the phrase "there has been some testimony." It was not clear to what case or type of case Ms. Capps was referring. Nor was it clear to whose testimony she referred. The trial judge's questions did not communicate any opinion or prejudice defendant's case in any way. Because defendant is unable to show prejudice as a result of the trial judge's questioning, we find no error.

[4] Finally, defendant argues that the trial court committed plain error in its charge to the jury, which he argues contained a material addition in the instruction on reasonable doubt. Though defendant acknowledges that he did not object to the jury instruction and that this Court may therefore decline to review this issue, he claims that the "rhetorical imbalance" caused by the judge's jury instruction prejudiced his case. Defendant's contention is without merit.

Because defendant failed to preserve this issue on appeal by neglecting to object to the jury instruction during the trial, "we may review it only for plain error." *State v. Walters*, 357 N.C. 68, 91, 588 S.E.2d 344, 358 (2003) (citations omitted). "[I]t is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury." *State v. Wiley*, 182 N.C. App. 437, 444, 642 S.E.2d 717, 722 (2007). Defendant must prove that the error was "so prejudicial, so lacking in its elements that justice cannot have been done, . . . or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial." *State v. Steward*, 183 N.C. App. 492, ——, 645 S.E.2d 231, —— (2007).

"[A] jury instruction is unconstitutional if there is a reasonable likelihood that the jury understood the instruction to allow conviction without proof beyond a reasonable doubt." *Tyler v. Cain*, 533 U.S. 656, 658, 150 L. Ed. 2d 632, 640 (2001). Our Supreme Court has held that "no particular formation of words is necessary to properly define reasonable doubt, but rather, the instructions, in their totality,

must not indicate that the State's burden is lower than 'beyond a reasonable doubt.' " *State v. Taylor*, 340 N.C. 52, 59, 455 S.E.2d 859, 862-63 (1995) (citing *Victor v. Nebraska*, 511 U.S. 1, 5, 127 L. Ed. 2d 583, 590 (1994)). In *Taylor*, our Supreme Court affirmed a previous holding in which language substantially similar to the jury instruction in the instant case was approved. *Id.* at 69, 455 S.E.2d at 863 (citing *State v. Bryant*, 337 N.C. 298, 446 S.E.2d 71 (1994)). The jury instruction given in *Bryant* was, in relevant part:

> A reasonable doubt is not a mere possible doubt, for most things that relate to human affairs are open to some possible or imaginary doubt.
>
> A reasonable doubt is not a vain, imaginary or fanciful doubt, but it is a sane, rational doubt arising out of the evidence or lack of evidence or from its deficiency.
>
> When it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it is meant that they must be fully satisfied or entirely convinced or satisfied to a *moral certainty* of the truth of the charge.
>
> If, after considering, comparing and weighing all the evidence, the minds of the jurors are left in such condition that they cannot say they have an abiding faith to a *moral certainty* in the defendant's guilt, then they have a reasonable doubt; otherwise not.
>
> A reasonable doubt, as that term is employed in the administration of criminal law, is *an honest substantial misgiving* generated by the insufficiency of the proof. An insufficiency which fails to convince your judgment and confidence and satisfy your reasons as to the guilt of the defendant.

Bryant, 337 N.C. at 302, 446 S.E.2d at 73. The portion of the jury instruction in the instant case to which defendant takes issue is as follows: "A reasonable doubt is not a vain doubt; it's not a fanciful doubt; it's not proof beyond all doubt; it's not proof beyond a shadow of a doubt. There are few things in human existence we can prove beyond all doubt and a shadow of a doubt." The added language on reasonable doubt is substantially the same as that which our Supreme Court has upheld. We therefore find no error in the instruction.

Moreover, even if we were to find the additional language in error, which we do not, defendant fails to prove either that the error affected the instruction as a whole, or that it prejudiced his case. We

find it highly unlikely that the altered jury instruction changed the outcome of defendant's trial. Defendant has therefore failed to establish plain error.

Having conducted a thorough review of the record, we find both that there was sufficient evidence to take the case to the jury, and that the trial judge's questions and instructions were appropriate under the circumstances. Accordingly, we find no error in defendant's trial.

No error.

Judges HUNTER and GEER concur.

STATE OF NORTH CAROLINA v. ADRIAN GAYTON

No. COA06-1225

(Filed 7 August 2007)

1. **Evidence— testimony about gangs—unrelated to charges—not prejudicial**

   The admission of testimony about gangs was erroneous but not prejudicial in a prosecution for cocaine trafficking and carrying a concealed weapon. The information had nothing to do with the charges, but there was overwhelming undisputed evidence of defendant's guilt.

2. **Evidence— hollow point bullets—not probative of issues—not prejudicial**

   The admission of testimony about hollow point bullets found in defendant's gun was erroneous but not prejudicial in a prosecution for cocaine trafficking and carrying a concealed weapon. The State provided evidence of each element of the offense that was not challenged.

3. **Evidence— photographs of gang tattoos—not revealed in discovery**

   The trial court did not abuse its discretion by declining to exclude as a discovery sanction photographs of tattoos indicating defendant's possible gang membership, for the stated reason that

defendant was aware of his own tattoos. Given the overwhelming evidence of defendant's guilt, the court was within its rights to hold that the photographs need not be excluded.

Appeal by defendant from judgment entered 20 March 2006 by Judge Abraham P. Jones in Durham County Superior Court. Heard in the Court of Appeals 9 May 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Judith Tillman, for the State.

Duncan B. McCormick for defendant-appellant.

HUNTER, Judge.

Adrian Gayton ("defendant") appeals from a jury verdict of guilty on charges of trafficking cocaine by possession and carrying a concealed weapon. After careful review, we find no prejudicial error.

In May 2005, Detectives T.J. Cote, Claiborne Clark, and Spencer Chamberlain, along with other members of the Durham County Sheriff's office, conducted an undercover narcotics operation in Durham. In early May 2005, Detective Cote set up and carried out two small cocaine purchases with a suspected drug dealer named Martin Estrada ("Estrada"). The officers then set up a larger transaction for 17 May 2005.

On that date, Detective Cote had arranged to meet Estrada in a parking lot to conduct the transaction while the other detectives maintained surveillance. When Estrada arrived, defendant was in his passenger seat. Estrada exited the vehicle and got into the front seat of Detective Cote's car, where the transaction took place. Defendant remained in Estrada's car during this time, watching the transaction.

Once the transaction was complete, the surveillance team approached. Two detectives extracted defendant from the car, at which point one detective saw a handgun on the passenger seat where defendant had been sitting. Both defendant and Estrada were arrested.

Defendant was convicted of one count each of trafficking in cocaine and carrying a concealed weapon and sentenced to 175 to 219 months imprisonment. Defendant appeals.

I.

Three of defendant's arguments[1] concern evidence that defendant claims was admitted erroneously by the trial court because such evidence was irrelevant and its probative value was substantially outweighed by the danger of unfair prejudice.

These arguments are based on the rule of evidence stating that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2005).

> Whether to exclude evidence pursuant to Rule 403 is a matter left to the sound discretion of the trial court. A ruling by the trial court will be reversed for an abuse of discretion only upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision.

State v. Jones, 347 N.C. 193, 213, 491 S.E.2d 641, 653 (1997) (internal citation omitted). We thus review the trial court's decision as to the admission of this evidence for abuse of discretion.

A.

[1] Defendant first argues that certain testimony from Detectives Cote and Clark giving general information regarding gangs was irrelevant and unduly prejudicial. While the admission of this evidence was indeed error, we do not find that it was prejudicial, and as such we overrule this assignment of error.

Specifically, defendant objected to the following pieces of testimony: Detective Cote's testimony that Estrada, who actually sold him the cocaine, had a "13" inscribed on his neck, which he stated indicated Estrada's affiliation with one of two gangs in the area; Detective Cote's testimony that a person who pretends to be a gang member may be subjected to violence by actual members, who might cut the tattoo off that person; Detective Clark's testimony that members of the gang in question associate only with members of their own gang, and never with outsiders; and Detective Cote's testimony that gangs, including the one to which Estrada likely belonged, are notoriously violent and commonly associated with guns, violence, and drugs, as

1. Defendant has five arguments in his brief. However, one of the five is the same argument as his first argument below (as to the admission of gang-related testimony) but argued against a plain error standard, in case we found his objections during trial insufficient. Since his objections were sufficient, we have not separately addressed his plain error argument.

well as Detective Clark's reiteration of the reputation for violence the gangs have.

Further, in discussing how his beliefs and expectations as to the drug buy were affected by his realization that defendant and Estrada were gang members, Detective Cote testified: "When you're dealing with $20,000 [gang members will] take your life in a heartbeat."

In overruling defendant's objections to this testimony, the trial judge stated that it was relevant because it helped explain how the officers went about planning the operation—that is, it showed that the officers' knowledge that they were dealing with gang members affected the way they set up the buy. Further, the court noted, this testimony was elicited from police officers testifying based upon their own experiences working in the narcotics field or undercover.

Even if it were true that the officers felt forced to revamp the entire operation after finding out defendant and Estrada were possible gang members and decided to take specific precautions because they feared the two men might become violent, this information has nothing to do with defendant trafficking cocaine by possession and carrying a concealed weapon. It does not tend "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2005). Indeed, the only probative value the information had in this case was to portray defendant as a gang member. Therefore, we must conclude that the admission of this evidence was error.

However, defendant has the burden to show not only that it was error to admit this evidence, but also that the error was prejudicial: A defendant must show that, but for the error, a different result would likely have been reached. *State v. Freeman*, 313 N.C. 539, 548, 330 S.E.2d 465, 473 (1985). Where there exists "overwhelming evidence of defendant's guilt[,]" defendant cannot make such a showing; this Court has so held in cases where the trial court improperly admitted evidence relating to defendant's membership in a gang. *See, e.g.*, *Freeman*, 313 N.C. at 548, 330 S.E.2d at 473 (holding that evidence of the defendant's gang membership was properly admitted to explain his presence at the murder scene, but evidence that the gang was a " 'motorcycle gang' " was erroneously admitted because it was "irrelevant to the issue of defendant's guilt"; however, because of the "overwhelming evidence of defendant's guilt[,]" this error could not

have influenced the outcome of the trial), *State v. Hightower*, 168 N.C. App. 661, 667, 609 S.E.2d 235, 239 (2005) (holding that testimony as to the defendant's gang membership provided evidence of his motive and reason for involvement in the crime, but not reaching whether it was admitted erroneously because of the overwhelming evidence of the defendant's guilt).

The same holds true in the case at hand: At trial, overwhelming undisputed evidence was presented as to defendant's guilt. The crime of trafficking by possession consists simply of the sale, manufacture, delivery, transportation, or possession of twenty-eight grams or more of certain illicit substances, acts which the legislature determined indicate an intent to distribute on a large scale. *See* N.C. Gen. Stat. § 90-95(h)(3) (2005); *see also State v. McCoy*, 105 N.C. App. 686, 689, 414 S.E.2d 392, 394 (1992). "Possession can be actual or constructive. When the defendant does not have actual possession, but has the power and intent to control the use or disposition of the substance, he is said to have constructive possession." *State v. Baldwin*, 161 N.C. App. 382, 391, 588 S.E.2d 497, 504-05 (2003) (internal citation omitted). Further, when the State has shown "that a defendant was present while a trafficking offense occurred and that he acted in concert with others to commit the offense pursuant to a common plan or purpose," we have held that the State need not specifically prove constructive possession. *State v. Diaz*, 317 N.C. 545, 552, 346 S.E.2d 488, 493 (1986).

Here, defendant does not dispute any of the officers' testimony as to his presence at or conduct during the drug buy. Ignoring all evidence related to gangs and gang activity, the unchallenged evidence presented by the State at trial showed that defendant arrived with Estrada in the car to the sale, was in the seat next to Estrada during the sale, observed the sale of the drugs, and apparently acted as security of sorts for Estrada. Thus, even had all the evidence as to gangs been excluded, the State presented enough evidence—unchallenged to this Court—that the statute was violated.

Defendant argues to this Court that the jury's request for clarification with respect to the aiding and abetting instruction they had been given is evidence that without the gang-related evidence a reasonable possibility exists that the result might have been different. However, defendant's argument on this point is to simply state the fact about the jury's request and follow it with this bare assertion about the change in outcome. This argument is unconvincing.

We see no proof that, without this error, a different result would likely have been reached. As such, we overrule this assignment of error.

B.

[2] Detective Chamberlain also testified that, among the bullets recovered from the guns of defendant and Estrada, the police found hollow point bullets. He stated that "a hollow point bullet, once it hits its impact, actually expands and does a whole lot more damage." Again, this evidence does not tend "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. Therefore, we must conclude that the admission of this evidence was also error.

Again, however, defendant cannot carry the burden of showing that this error was prejudicial. As to the charge of carrying a concealed weapon, the elements of the offense are: "(1) The accused must be off his own premises; (2) he must carry a deadly weapon; [and] (3) the weapon must be concealed about his person." *State v. Williamson*, 238 N.C. 652, 654, 78 S.E.2d 763, 765 (1953); N.C. Gen. Stat. § 14-269(a1) (2005). Defendant does not dispute that the take-down occurred in a public parking lot; nor does he argue that a loaded weapon is not a deadly weapon. As to the final element, the statutory language requires that the weapon be " 'within his convenient control and easy reach, so that he could promptly use it, if prompted to do so by any violent motive.' " *State v. Gainey*, 273 N.C. 620, 623, 160 S.E.2d 685, 687 (1968) (quoting *State v. McManus*, 89 N.C. 555 (1883)). According to Detective Clark's unchallenged testimony, when he approached the passenger side of the car where defendant sat, defendant had his right arm extended down between his legs, with his hand stuck under his left leg. After pulling defendant from the passenger seat, the detective discovered a loaded handgun on the passenger seat "in the area where [defendant's] leg and hand would have been[.]" Thus, the State provided evidence at trial which defendant does not challenge to this Court to prove each element of the offense. In addition, this Court has specifically held that even where evidence as to hollow-point bullets was improperly admitted, "the error was harmless beyond a reasonable doubt in light of the overwhelming evidence of defendant's guilt." *State v. Cummings*, 346 N.C. 291, 323, 488 S.E.2d 550, 569 (1997).

As such, the admission of this evidence was not prejudicial error and does not warrant a new trial.

II.

[3] Defendant next argues that the gang-related evidence should have been excluded because the State violated discovery rules as to this evidence. This argument is without merit.

Defendant made a motion *in limine* to the trial court to exclude any gang-related evidence or testimony. Once the trial had begun, the only specific piece of evidence that defendant argued to the trial court that he had not properly received during discovery were photographs of his client's tattoos indicating possible gang membership. The trial judge ruled that all the evidence would be admitted, noting that defendant was, obviously, aware of his own tattoos, and thus his attorney could have found out about them at any time; and, further, that defendant's motion *in limine* to exclude any gang-related evidence showed clearly that he had some notice that such materials were going to be presented at trial.

Per N.C. Gen. Stat. § 15A-903(a)(1) (2005), the State must "[m]ake available to the defendant the complete files of all law enforcement and prosecutorial agencies," where " 'file' " includes "any . . . matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant." *Id.* When a party fails to comply with these guidelines, "[p]rior to finding any sanctions appropriate, the court shall consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply with this Article[.]" N.C. Gen. Stat. § 15A-910(b) (2005).

This Court reviews such decisions by the trial court for abuse of discretion:

> It is within the trial court's sound discretion whether to impose sanctions for a failure to comply with discovery requirements, including whether to admit or exclude evidence, and the trial court's decision will not be reversed by this Court absent an abuse of discretion. An abuse of discretion results from a ruling so arbitrary that it could not have been the result of a reasoned decision or from a showing of bad faith by the State in its noncompliance.

State v. McClary, 157 N.C. App. 70, 75, 577 S.E.2d 690, 693, *appeal dismissed and disc. review denied*, 357 N.C. 466, 586 S.E.2d 466 (2003) (internal citation omitted).

We cannot say that the trial court abused its discretion in admitting this evidence. The court was not required to exclude the evidence even had it found that the State violated discovery requirements. As mentioned above, the court must consider the totality of the circumstances, and given the overwhelming evidence of defendant's guilt, the court was within its rights to hold that these few photographs need not be excluded. As such, we overrule this assignment of error.

III. Conclusion

Although the disputed evidence was irrelevant and thus improperly admitted, defendant cannot show that without the evidence a different result would likely have been reached. As such, we find no prejudicial error.

No error.

Judges ELMORE and GEER concur.

MONIQUE R. FARLEY, JOHN N. MEEHAN, MARCIA J. MEEHAN, PATRICK S. O'HARA, EMILY C. O'HARA, ALEXIS G. BLANCHARD, WILLIAM J. LEE, MILLIE L. LEE, MONTY R. WILLIS, LUZ M. WILLIS, AND GEORGE D. PHILLIPS, PLAINTIFFS v. LARRY HOLLER, SHARON Y. HOLLER, ROBERT E. LEE, JR., JANE D. LEE, THERON LEVON McLAMB, LARRY C. LEWIS, BECKY LEWIS, VICTOR A. ARMSTRONG, JUNE J. ARMSTRONG, CHARLES E. RUMBLEY, PATRICIA D. RUMBLEY, CURTIS NORTHROP STRANGE, SARA JONES STRANGE, DAVID T. UPCHURCH, LYNN UPCHURCH, JANICE F. BYNUM, RANDY GREGORY, MICHELLE GREGORY, RICHARD S. GLADWELL, JR., ROBERT T. MONK, JR., RICHARD V. WILKINS, AWNI M. HAMAD, THURAIA A. HAMAD, JACK KELLEY NELSON, JOLENE LOUISE NELSON, MARVIN MILLER, GLENDA MILLER, TERENCE P. McLAUGHLIN, SHARON MEALOR McLAUGHLIN, ANTHONY M. HASLAM, LYNN B. HASLAM, CARLTON S. ASHBY, JR., CORA B. ASHBY, V. DIXON PROPERTIES, LLC, MANLEY EDWARD McLAWHORN, JOHN G. EAGAN, ELLEN S. EAGAN, CHARLES A. RIDGWAY, VIVAIN RIDGWAY, HUNTER B. HADLEY, III, DIANE HADLEY, ROBERT S. DAVES, LYNN A. DAVES, WILLIAM S. SMITH, SR., LAURA T. SMITH, NIKKI L. WHITLEY, AND MART L. BELL, INC., DEFENDANTS

No. COA06-1534

(Filed 7 August 2007)

Laches— action on the closing of a road—summary judgment

The trial court did not err by granting summary judgment for defendants on their claim of laches in an action arising from the closing of a road in a subdivision where the undisputed facts showed a delay of 9 years in bringing the claim, $100,000 spent to repair the street one year before the claim was brought, and the purchase and sale of properties in the subdivision. These facts satisfy all of the conditions for laches.

Appeal by plaintiffs from judgment entered 21 August 2006 by Judge Gary E. Trawick in Carteret County Superior Court. Heard in the Court of Appeals 21 May 2007.

Davis, Murrelle, Lyles & Huber, P.A., by Edward L. Murrelle, for plaintiffs-appellants.

Wheatly, Wheatly, Weeks, Valentine, & Lupton, P.A., by Claud R. Wheatly, Jr. and Claud R. Wheatly, III, for defendants-appellees.

MARTIN, Chief Judge.

Plaintiffs appeal from a judgment granting defendants' motion for summary judgment based on the affirmative defense of laches.

Plaintiffs and defendants are all property owners in Spooners Creek subdivision in Morehead City, North Carolina. The subdivision was created in April 1973 when a plat, showing thirty-five residential lots, was filed in the Carteret County Registry. The plat showed two streets, Harbor Drive and South Spooners Street, both of which intersected with Lands End Road. South Spooners Street runs from Harbor Drive at its north end to Lands End Road at its south end. All of the lots in the subdivision are located on either Harbor Drive, South Spooners Street, or Lands End Road. Plaintiffs' lots all have access to Harbor Drive, while defendants' lots access either South Spooners Street or Lands End Road.

Between 1994 and 1996, some residents of the subdivision attempted to get all residents to sign a "Road Closing Agreement" to close South Spooners Street at its south end where it intersects with Lands End Road. Although all the residents did not sign the agreement, the southern terminus of South Spooners Street at Lands End Road was closed in 1996 and made into a cul-de-sac, at a cost of approximately $18,000.00. In approximately 2004, residents on South Spooners Street, including some of the defendants, contributed $100,000 to resurface and repair the street, and to add curbs.

In 2005, property to the east of the subdivision, on Lands End Road, was purchased by a developer and was rezoned for construction of a number of multi-family homes, which increased traffic over Harbor Drive to Lands End Road. Plaintiffs, who own lots on Harbor Drive, filed this action against defendants, who own all of the other lots in the subdivision, seeking relief in equity to reopen South Spooners Street in order to diffuse the extra flow of traffic to Lands End Road which the new development will bring. Plaintiffs' complaint alleged that the closing of South Spooners Street in 1996 was wrongful and unlawful and constitutes a continuing trespass and nuisance on the easements and rights of ingress and egress, which are covenants running with the land. Defendants answered, asserting the affirmative defense of laches, based on plaintiffs' delay of nine years in bringing this action and defendants' alleged injury of purchasing their lots in reliance upon the road ending in a cul-de-sac and spending $100,000 to improve the road during the intervening time.

Both plaintiffs and defendants moved for summary judgment. The trial court found "[t]he pleadings, affidavits, and exhibits do not show any dispute as to the facts the defendants rely on to show laches on part of the plaintiffs, and these undisputed facts establish

plaintiffs' laches" and granted defendants' motion for summary judgment. Plaintiffs appeal.

"A trial court's ruling on a motion for summary judgment is reviewed *de novo* as the trial court rules only on questions of law." *Coastal Plains Utils., Inc. v. New Hanover County*, 166 N.C. App. 333, 340-41, 601 S.E.2d 915, 920 (2004). A court shall grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact . . . ." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005).

By their first three arguments, plaintiffs assert that the trial court erred when it granted summary judgment based on the finding that "[t]he pleadings, affidavits, and exhibits do not show any dispute as to the facts the defendants rely on to show laches on part of the plaintiffs, and these undisputed facts establish plaintiffs' laches; therefore, it is appropriate that defendants' motion for summary judgment . . . be granted." We are guided in our review by the following principles:

> In determining whether plaintiffs' suit is, at [the summary judgment] stage of the proceeding, barred by the doctrine of laches, we face a three-fold question: (1) Do the pleadings, affidavits and exhibits show any dispute as to the facts upon which defendants rely to show laches on the part of plaintiffs? (2) If not, do the undisputed facts, if true, establish plaintiffs' laches? (3) If so, is it appropriate that defendants' motion for summary judgment . . . be granted?

Taylor v. City of Raleigh, 290 N.C. 608, 621, 227 S.E.2d 576, 584 (1976).

Plaintiffs first argue that the court erred in finding that the undisputed facts established plaintiffs' laches. The undisputed facts before the court show that (1) plaintiffs waited approximately nine years to bring this claim, although they knew the road had been improperly closed during that time, (2) defendants spent $100,000 to repair the street one year before the claim was brought, and (3) properties in the subdivision have been bought and sold during the time the road has been closed.

> To establish the affirmative defense of laches, our case law recognizes that 1) the doctrine applies where a delay of time has resulted in some change in the condition of the property or in the relations of the parties; 2) the delay necessary to constitute

> laches depends upon the facts and circumstances of each case; however, the mere passage of time is insufficient to support a finding of laches; 3) the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke the doctrine of laches; and 4) the defense of laches will only work as a bar when the claimant knew of the existence of the grounds for the claim.

MMR Holdings, LLC v. City of Charlotte, 148 N.C. App. 208, 209-10, 558 S.E.2d 197, 198 (2001). The undisputed facts in the case before us establish the existence of each of these principles.

With regard to the first principle, the undisputed facts show that the delay of time has resulted in both a change in the condition of the property through the $100,000 in repairs to the street and a change in the relations of the parties through the changing of the owners of the lots in the subdivision. With regard to the second principle, the delay has been approximately nine years, and although this passage of time alone is not sufficient for finding laches, it creates an obstacle to overcome in the third consideration: the reasonableness of the delay. We note: "The defense of laches is one frequently raised by summary judgment motion. When it is so raised the plaintiff, of course, is permitted to counter by showing a justification for the delay, and whenever this assertion raises triable issues, defendant's motion will not be granted." *Taylor*, 290 N.C. at 622, 227 S.E.2d at 584 (internal quotation marks and citation omitted). Plaintiffs offered no justification, explanation, or reason for the delay in bringing their claim, other than the expenses associated with legal action. However, these expenses ceased to deter plaintiffs from bringing their claim when their incentive to reopen the street increased. A reason more compelling than the one given would be needed to justify a nine-year delay. With regard to the second part of the third consideration, defendants have shown disadvantage, injury, or prejudice where they spent $100,000 to repair the road, believing that the traffic on the road would continue to be minimal due to the presence of the cul-de-sac and plaintiffs' failure to assert their claim to have it reopened. As for the final principle, it is an undisputed fact that plaintiffs were aware of the existence of their claim when the road was closed.

Notwithstanding that the undisputed facts satisfy all the conditions for laches, plaintiffs cite evidence which they claim creates a genuine issue as to the existence of laches, including (1) that there was no Road Closing Agreement signed by all lot owners, (2) that the

owner of the land on which the cul-de-sac was built did not convey his interest or agree to the closure, (3) that defendants knowingly violated the County Planning Department's instructions regarding the appropriateness of the barrier, (4) that many of the defendants were on notice that the road was improperly closed when they bought their lot, and (5) that circumstances changed in 2005. Although this evidence may bear on the propriety of the defendants' action, it is insufficient to negate any of the conditions required to find laches.

Plaintiffs also suggest that the undisputed facts could not establish laches because laches requires a change in conditions that is substantial. *See Hatfield v. Jefferson Standard Life Ins. Co.*, 85 N.C. App. 438, 446, 355 S.E.2d 199, 203 (1987) ("To constitute laches a change in conditions must have occurred that would render it inequitable to enforce the claim." (quoting *East Side Builders v. Brown*, 234 N.C. 517, 521, 67 S.E.2d 489, 491 (1951)). Plaintiffs' analogy to *Hatfield* overlooks some distinguishing characteristics. "To establish the affirmative defense of laches, our case law recognizes that . . . the doctrine applies where a delay of time has resulted in some change in the condition of the property or in the relations of the parties." *MMR Holdings*, 148 N.C. App. at 209, 558 S.E.2d at 198. In *Hatfield*, the change in the condition of the property was that defendant, believing plaintiffs did not have an easement through its alleyway, built a wall that was one foot high and extended one foot underground with areas for plants. *Hatfield*, 85 N.C. App. at 441, 355 S.E.2d at 200. This Court found that laches did not apply in *Hatfield* because these changes were not substantial. *Id.* at 446, 355 S.E.2d at 203. In the present case, plaintiffs argue that the barrier placed by defendants is even less substantial than the wall in *Hatfield*. However, the barrier is not the change in condition that establishes laches. Rather, it is the repairs made to the road at a cost of $100,000. Accordingly, the change in condition in the present case is substantial enough to "render it inequitable to enforce the claim." *East Side Builders v. Brown*, 234 N.C. at 521, 67 S.E.2d at 491.

Plaintiffs also contend summary judgment was improper because laches only bars plaintiffs' equitable claims; thus, their claims in law should have survived summary judgment. *See Scott Poultry Co. v. Brian Oil Co.*, 272 N.C. 16, 22, 157 S.E.2d 693, 698 (1967) ("Ordinarily equitable defenses such as estoppel and laches are not recognized as pleas tenable in a court of law . . . ."). However, plaintiffs sought only two remedies, either that the court grant a mandatory injunction requiring defendants to reopen South Spooners Street, or that the

court grant plaintiffs the right to reopen the street and enjoin defendants from interfering with the reopening or attempting to re-close the street after it is reopened. "It is fundamental that an injunction is an equitable remedy." *Pelham Realty Corp. v. Bd. of Transp. of N.C.*, 303 N.C. 424, 431, 279 S.E.2d 826, 831 (1981). Thus, both remedies sought by plaintiffs are equitable remedies, and the trial court did not err in concluding that the relief sought by plaintiffs was barred by laches.

Finally, plaintiffs argue that the doctrine of unclean hands prevents defendants from relying on laches as a defense and bar to plaintiffs' claims. Plaintiffs contend that, because the doctrine of unclean hands defeats the equitable defense of equitable estoppel, the doctrine of unclean hands should also defeat the equitable defense of laches. Plaintiffs have presented no authority for such application of the doctrine of unclean hands, and we find no precedent for its application to the doctrine of laches; therefore, we reject plaintiffs' argument that the trial court erred in failing to consider the doctrine of unclean hands.

We conclude that there is no genuine issue as to any material fact, and the court properly granted summary judgment in favor of defendants.

Affirmed.

Judges STEELMAN and STEPHENS concur.

PURCELL INTERNATIONAL TEXTILE GROUP, INC., A NORTH CAROLINA COMPANY, PLAINTIFF v. ALGEMENE AFW N.V.; ALGEMENE USA, LLC; BRUVATEX N.V.; COSITEX, N.V., BRUVATEX USA, INC., ZENITH EXPORTS, LTD., ZENSILK, INC.; DECOVIZ-PRODUTOS DE DECORACAO LDA; TEVIZ DE VIZELA S.A.; PENELOPE; PENELOPE USA, LLC; HIGH FIVE TEXTILES, LLC; AND LUC CALLENS, DEFENDANTS

No. COA06-1075

(Filed 7 August 2007)

1. Attorneys— exceeding authority in settling case—Rule 60 motion for relief—not an extraordinary circumstance

The trial court did not abuse its discretion by denying defendants' motion for relief under N.C.G.S. § 1A-1, Rule 60(b)(6) for extraordinary circumstances where defendants' attorney ex-

ceeded his authority in reaching a settlement. The attorney acted with apparent authority as defendants' agent.

2. Attorneys— exceeding authority in reaching settlement—Rule 60 motion for relief—not excusable neglect

The trial court did not abuse its discretion in denying defendants' motion for relief under N.C.G.S. § 1A-1, Rule 60(b)(1) for excusable neglect after their attorney exceeded his authority in negotiating a settlement.

3. Agents— attorney exceeding authority—joint and several liability by defendants

The trial court did not err by entering judgments against defendants jointly and severally where their attorney, acting as their agent, exceeded his actual authority in negotiating a settlement which called for joint and several liability.

4. Compromise and Settlement— agreement entered over telephone—confession of judgment not executed

Legal agreements are not required to be in writing, and an unauthorized settlement agreement concluded over the telephone by defendants' attorney and plaintiff was valid.

Appeal by defendants from judgment entered 21 February 2006 by Judge Richard D. Boner in Catawba County Superior Court. Heard in the Court of Appeals 27 March 2007.

Horack, Talley, Pharr & Lowndes, P.A., by John W. Bowers, and Wuersch & Gering LLP, by Gregory F. Hauser, for defendants-appellants.

Sigmon, Clark, Mackie, Hutton, Hanvey, & Ferrell, P.A., by Warren A. Hutton and Stephen L. Palmer, for plaintiff-appellee.

ELMORE, Judge.

Judge Richard D. Boner of the Catawba County Superior Court ordered an enforcement of judgment against Algemene AFW N.V.; Algemene USA, LLC; Bruvatex N.V.; Cositex N.V.; Bruvatex USA, Inc.; Zenith Exports, Ltd.; Zensilk, Inc.; Decoviz-Produtos de Decoracao Lda; Teviz de Vizela S.A.; Penelope; Penelope USA, LLC; High Five Textiles, LLC; and Luc Callens (collectively, defendants) on 21 February 2006. Defendants appeal from this order, as well as from a pre-judgment order of attachment and from a post-judgment order denying relief from the judgment under Rule 60(b).

Purcell International Textile Group (plaintiff), a North Carolina corporation, purchased an Illinois corporation that had entered into sales contracts with several of the defendants. The parties terminated the contracts on or about 27 November 2003, and on 20 April 2004, plaintiff filed suit against defendants with claims based in contract, fraud, and unfair and deceptive trade practices. W. Rickert Hinnant (Hinnant) represented defendants in the litigation.

Hinnant began settlement negotiations with plaintiff as the 9 January 2006 trial date approached. Hinnant reached a settlement agreement with plaintiff via telephone, and the parties announced the agreement in open court on the trial date. Pursuant to the agreement, defendants would pay plaintiff a total of $850,000.00 in three payments over a six-month time period. The first payment was due 31 January 2006. The total payment of $850,000.00 exceeded the authority defendants had vested in Hinnant; however, Hinnant represented to plaintiff that he had obtained defendants' approval. Plaintiff reduced the settlement agreement to writing, and Hinnant returned the writing with what purported to be the signatures of representatives from all but four of the defendant companies. In fact, Hinnant never informed any of the defendants of the agreement, never sent defendants the written agreement, never produced a signed confession of judgment, and forged all of the signatures forwarded to plaintiff.

Meanwhile, Hinnant tried to convince defendants to agree to the terms of the settlement agreement, which he had negotiated without defendants' knowledge or consent. Defendants agreed to the monetary portion of the agreement but objected to several other material terms. As these discussions continued, defendants failed to make the 31 January 2006 payment due to plaintiff pursuant to the settlement agreement Hinnant had negotiated.

On 1 February 2006, plaintiff informed Hinnant that the first payment had not been made, and on 7 February 2006, plaintiff served a motion to enforce the settlement by entry of a judgment against all defendants jointly and severally. On 17 February 2006, the court granted plaintiff's motion for a pre-judgment attachment of up to the full amount of the judgment against any of the defendants. On 21 February 2006, the court entered judgment against defendants for $850,000.00 plus fifteen percent to cover attorneys' fees (as provided for in the settlement agreement in case of breach), for a total of $977,500.00. On 24 February and 27 February 2006, the court granted plaintiff's requests for a temporary restraining order

and preliminary injunction to freeze defendants' funds in a trust account accessible by Hinnant.

Defendants had no knowledge of the settlement agreement that Hinnant negotiated until after the court entered judgment against them. They claim that they never saw the written agreement until March, 2006. At that time, defendants retained new counsel, and on 9 March 2006 moved for relief from the judgment and the pre-judgment attachment pursuant to Rule 60(b) of our Rules of Civil Procedure. On 15 March 2006, the trial court denied the motion, and this appeal followed.

[1] Defendants first argue that the court abused its discretion in denying defendants' Rule 60(b)(6) motion for relief from judgment. Defendants contend that Hinnant committed fraud on the court and that he exceeded his authority in the settlement agreement. They further contend that these two acts together resulted in circumstances so extraordinary that justice demands relief. We disagree.

To demonstrate an abuse of discretion, an appellant must show that the trial court's ruling was "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). Rule 60(b)(6) allows a court to relieve a party from a judgment for "any . . . reason justifying relief." N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (2005). This Court has held that setting aside judgments pursuant to Rule 60(b)(6) is only appropriate if (1) extraordinary circumstances exist, (2) there is a showing that justice demands it, and (3) the movant shows a meritorious defense. *Royal v. Hartle*, 145 N.C. App. 181, 184-85, 551 S.E.2d 168, 171 (2001). Relief from attorney fraud on the court "is to be granted only where the judgment was obtained by the improper conduct of the party in whose favor it was rendered." *Henderson v. Wachovia Bank of N.C. N.A.*, 145 N.C. App. 621, 625, 551 S.E.2d 464, 468 (2001).

"The attorney-client relationship is based upon principles of agency." *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 830, 534 S.E.2d 653, 655 (2000) (citations omitted). North Carolina presumes an attorney has the authority to act for a client he represents, and that presumption must be rebutted by proving to the satisfaction of the court that the attorney's actions were unauthorized. *Id.* at 829, 534 S.E.2d at 654-55.

> An act is within the power of an agent if the agent has the legal ability to bind the principal to a third person thereby, even though

> the act constitutes a violation of the agent's duty to the principal . . . . When a[n] . . . agent acts within the scope of his apparent authority, and the third party has no notice of the limitation on such authority, the [principal] will be bound by the acts of the agent, and . . . where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence or by his negligent conduct made it possible for the loss to occur, must bear the loss.

Zimmerman v. Hogg & Allen Professional Assoc., 286 N.C. 24, 30, 209 S.E.2d 795, 799 (1974) (citations, quotations, and emphasis omitted).

Henderson allows a court to grant relief on the basis of attorney fraud only when the adverse party's attorney commits the fraud. *Henderson*, 145 N.C. App. at 625, 551 S.E.2d at 468. Hinnant worked as defendants' attorney, and the court did not rely on any representations he made to render a judgment in favor of his clients. Therefore, defendants are not entitled to relief from any fraud Hinnant may have committed. *Id.* at 625, 551 S.E.2d at 468.

Hinnant's actions were binding on defendants, who hired him to act as their agent in handling the case and negotiating a settlement. *Harris*, 139 N.C. App. at 830, 534 S.E.2d at 655. Defendants granted Hinnant the authority to settle the case and never stripped him of that authority. *Id.* at 829, 534 S.E.2d at 654-55. Based on his actual authority, Hinnant engaged in negotiations offering settlement figures of $400,000.00 and $500,000.00, and plaintiff declined both offers. Each time plaintiff declined a settlement offer, Hinnant established a pattern of following up with a new offer featuring a larger amount of money. Thus, when Hinnant offered a settlement of $850,000.00, which exceeded his actual authority, plaintiff could have reasonably assumed that offer was within Hinnant's authority and had no reason to know that Hinnant had exceeded his limits. *Zimmerman*, 286 N.C. at 30, 209 S.E.2d at 799. Thus, the agreement negotiated by Hinnant bound defendants despite the fact that Hinnant exceeded his authority and violated his duty to defendants. *Id.* at 30, 209 S.E.2d at 799.

Because Hinnant acted with apparent authority as defendants' agent, defendants fail to meet the criteria for setting aside the judgment. N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (2005): *Royal*, 145 N.C. App. at 184-85, 551 S.E.2d at 171. The circumstances were not extraordinary, but dealt with basic North Carolina agency law. *Id.* at

184-85, 551 S.E.2d at 171. Furthermore, defendants failed to offer a meritorious defense as required by *Royal*, simply stating, "[W]e need not show a meritorious defense." *Id.* at 184-85, 551 S.E.2d at 171. Accordingly, the court acted within its discretion, and defendants' assignment of error is without merit.

[2] Defendants next argue that the trial court abused its discretion in denying the Rule 60(b)(1) motion for relief from judgment for excusable neglect. We disagree.

Rule 60(b)(1) provides that a party may be granted relief from judgment for "[m]istake, inadvertence, surprise, or excusable neglect." N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (2005). A trial court's ruling on a Rule 60(b) motion stands unless the court abused its discretion. *Thomas M. McInnis & Associates, Inc. v. Hall*, 318 N.C. 421, 425, 349 S.E.2d 552, 554 (1986). However, a court's finding of excusable neglect, and what constitutes excusable neglect, is a question of law reviewable based on the court's findings of fact. *Id.* at 425, 349 S.E.2d at 554. "Clearly, an attorney's negligence in handling a case constitutes inexcusable neglect and should not be grounds for relief under the 'excusable neglect' provision of Rule 60(b)(1) . . . . Holding the client responsible for the lawyer's deeds ensures that both clients and lawyers take care to comply." *Briley*, 348 N.C. at 546, 501 S.E.2d at 655 (citations and quotations omitted).

Defendants admit that Hinnant was negligent in handling the case. They attempt to rely on *Dishman v. Dishman*, 37 N.C. App. 543, 246 S.E.2d 819 (1978), and *Wood v. Wood*, 297 N.C. 1, 252 S.E.2d 799 (1979), for the proposition that attorney negligence may constitute grounds for excusable neglect. However, *Dishman* and *Wood* were decided well before *Briley*. This Court subsequently has recognized *Briley* as the controlling authority on the issue of excusable neglect under Rule 60(b)(1). *Henderson*, 145 N.C. App. at 626, 551 S.E.2d at 468. Accordingly, we hold that the trial court did not abuse its discretion.

[3] Finally, defendants argue that the trial court erred in entering judgments against defendants jointly and severally. Again, we disagree.

A trial court's conclusions of law are reviewable *de novo* and are binding on appeal if supported by findings of fact based on competent evidence. *Resort Realty of Outer Banks, Inc. v. Brandt*, 163 N.C. App. 114, 116, 593 S.E.2d 404, 407-08 (2004). "A valid contract is formed

when parties assent to the same thing in the same sense, and their minds meet as to all terms. Moreover, there is no law requiring a compromise contract to be put in writing." *Smith v. Young Moving & Storage, Inc.*, 167 N.C. App. 487, 493, 606 S.E.2d 173, 177 (2004) (citations and quotations omitted).

The trial court's conclusion that defendants entered into a settlement agreement with joint and several liability was supported by competent evidence. As we have noted, Hinnant had the legal authority as defendants' agent to bind defendants through his actions. The oral settlement agreement Hinnant and plaintiff reached called for joint and several liability of defendants. Therefore, Hinnant legally bound defendants to a settlement agreement with joint and several liability.

[4] Defendants contend that the settlement agreement was invalid because it was not signed by all the parties after it was reduced to writing. However, Hinnant finalized the settlement negotiation via telephone with plaintiff, and *Smith* does not require legal agreements to be reduced to writing. *Id.* at 493, 606 S.E.2d at 177.

Defendants also contend that because they never signed the confession of judgment, there was no meeting of the minds and no legal settlement agreement. However, the trial court stated that executing the confession of judgment was a term of the settlement agreement; defendants' failure to execute the confession did not void the agreement, but instead constituted a further breach.

The trial court did not abuse its discretion in denying defendants relief from the judgment entered against them, nor did it err in enforcing the settlement agreement against defendants jointly and severally. Hinnant, as defendants' agent, entered into a valid settlement agreement on their behalf. As in *Henderson*, defendants' proper remedy is to seek relief through a malpractice claim against Hinnant. *Henderson*, 145 N.C. App. at 625-26, 551 S.E.2d at 468.

Affirmed.

Judges McGEE and STEPHENS concur.

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY HARVEY L. BIGELOW AND SHIRON J. BIGELOW DATED JULY 26, 1999 AND RECORDED IN BOOK 1315 AT PAGE 160 IN THE ALAMANCE COUNTY PUBLIC REGISTRY, NORTH CAROLINA

No. COA06-1372

(Filed 7 August 2007)

1. Mortgages and Deeds of Trust— check not accepted—foreclosure—not allowed

The evidence supported the trial court's finding that there was no default on a mortgage where respondent testified that petitioner had refused a check because the numeric and written amounts differed, that she had attempted to pay the amounts owed, and that petitioner was not communicative.

2. Mortgages and Deeds of Trust— foreclosure—not allowed—mortgage holder's conduct

The trial court did not impermissibly rely on an equitable defense in refusing to allow a foreclosure where the apparent lack of communication between petitioner's different departments or personnel supported the factual determination that respondents were not in default.

Appeal by petitioner from order entered 4 May 2006 by Judge Narley L. Cashwell in Alamance County Superior Court. Heard in the Court of Appeals 4 June 2007.

Shapiro & Ingle, LLP, by Jason K. Purser, for petitioner-appellant.

David K. Holley for respondents-appellees.

MARTIN, Chief Judge.

Petitioner-appellant ABN AMRO Mortgage Group, Inc., ("Petitioner") appeals from an order of the Alamance County Superior Court denying its request for foreclosure on a deed of trust executed by respondent-appellees ("Respondents"). We affirm.

Evidence before the trial court tended to show that respondents entered into a loan agreement secured by a deed of trust and recorded in Book 1315 at Page 160 of the Alamance County Registry. Petitioner acquired the mortgage on the deed of trust. Respondents

eventually defaulted on making their monthly payments. In October 2003, the parties entered into a Repayment Plan under which respondents would increase their monthly payments until they had cleared their arrearage, at which point the monthly payments would return to their prior levels.

Respondents made only two payments under the plan. At the superior court hearing, Ms. Bigelow testified that the current default alleged by petitioner occurred after petitioner returned a personal check from her in December 2003 which she tendered as the payment due 1 December 2003. She further testified that the Bigelows received a letter along with the returned check indicating that the check was being returned because the numeric and written amounts differed on the check. However, evidence offered at trial showed that the numbers were the same. According to Ms. Bigelow, she subsequently followed up with petitioner, attempting to contact them "at least 200 times" to clear up the bank's mistake but was unable to establish contact with petitioner.

Petitioner commenced these foreclosure proceedings on 16 November 2004. In February 2005, after the commencement of foreclosure proceedings, petitioner sent the Bigelows payment coupons stating that their monthly payment would be $1001.17. Ms. Bigelow sent petitioner a check in March 2005, but it was returned, and respondents were still unable to contact the bank. On 26 July 2005, the Alamance County Clerk of Court entered an order permitting foreclosure. On 4 August 2005, respondents posted a written notice of appeal and posted a cash bond to secure the same. The matter came up for hearing *de novo* in the superior court on 13 April 2006. The superior court overturned the clerk's decision and denied foreclosure on 8 May 2006. This appeal follows.

[1] Petitioner first avers that the trial erred by disallowing petitioner's foreclosure because the substitute trustee presented competent evidence sufficient to satisfy the four requirements of N.C.G.S. § 45-21.16(d). The statute states, in relevant part:

> (d) . . . the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents. If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to

> such under subsection (b), then the clerk shall authorize the mortgagee or trustee to proceed under the instrument. . . .
>
> (d1) The act of the clerk in so finding or refusing to so find is a judicial act and may be appealed to the judge of the district or superior court having jurisdiction at any time within 10 days after said act. Appeals from said act of the clerk shall be heard de novo.

N.C. Gen. Stat. § 45-21.16 (2005). "The role of the clerk is limited to making findings on those four issues. If the foreclosure action is appealed to the superior court for a *de novo* hearing, the inquiry before a judge of superior court is also limited to the same issues." *Espinosa v. Martin*, 135 N.C. App. 305, 308, 520 S.E.2d 108, 111 (1999) (citations omitted). Furthermore, the trial court may not hear equitable defenses, although evidence of legal defenses is permissible. *In re Foreclosure of Azalea Garden Bd. & Care, Inc.*, 140 N.C. App. 45, 57, 535 S.E.2d 388, 396 (2000).

"We note at the outset that the applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support its findings of fact and whether the conclusions reached were proper in light of the findings." *In re Foreclosure of Land Covered by a Certain Deed of Trust Given by Aal-Anubiaimhotepokorohamz*, 123 N.C. App. 133, 135, 472 S.E.2d 369, 370, *disc. review denied*, 345 N.C. 179, 479 S.E.2d 203 (1996) (quoting *Walker v. First Federal Savings and Loan*, 93 N.C. App. 528, 532, 378 S.E.2d 583, 585 (1989)). The pivotal finding in this case was the trial court's determination that the Bigelows were not in default. The court determined that the disruption to the payment schedule stemmed from the petitioner's refusal to accept the Bigelow's December check. The relevant part of the order states:

> Shiron J. Bigelow presented evidence tending to show that ABN AMRO Mortgage wrongfully refused to honor a check dated December 23, 2003 in the amount of $1920.00, and that said note-holder's alleged default herein was based on said wrongful refusal to accept patment [sic] from the Bigelows.

We have previously held that the determination of whether a party is in default on a contract is a question of fact. *Lowman v. Huffman*, 15 N.C. App. 700, 704, 190 S.E.2d 700, 703 (1972). Therefore, we review the superior court's order to determine only

whether its findings are supported by competent evidence. In this case, Ms. Bigelow testified under oath, as follows:

> Q: After that check [December 2003] was sent back to you, did you attempt to contact ABN AMRO?
>
> A: Sir, I tried at least 200 times, and I have it in my notebook everybody that I talked to.
>
> Q: Did you attempt to send additional funds to them after this, after this check was sent back?
>
> A: I sent them another payment and they sent it back to me.
>
> Q: Did they claim that you were in default because of this check they had returned?
>
> A: They never did call me back, sir. I never did get anybody on the phone return call.

Ms. Bigelow also testified about her later efforts to send $7,000 to the petitioner in an attempt to stop the foreclosure proceedings at issue here:

> Q: Were you, were you told by ABN AMRO that you were suppose [sic] to receive a packet for you to fill out to send back with the $7000?
>
> A: That's correct.
>
> Q: Did you ever receive any of that material?
>
> A: No, sir. I did not.
>
> Q: Did you attempt to contact them to determine when you would receive that material?
>
> A: Yes, sir. I did. And I also called Shapiro out of Charlotte, and one of their employees did an e-mail to them to tell them what was going on. And that's the only way I got a call because they would not return any of my calls.
>
> Q: Were you instructed by anyone with ABN AMRO not to send the $7000 in until you had the financial packet that you were suppose [sic] to also submit?
>
> A: Yes, sir, with my signature.
>
> Q: You then, did you then receive a third notice of foreclosure?

A: Yes, sir. I did.

Q: And that is the proceeding that we have before the Court today?

A: That's correct.

Q: During the pendency of this proceeding here, did you receive a mortgage coupon book from ABO Ammo [sic] mortgage?

A: Yes, sir, I did. . . .

Q: Did you in fact send a check to ABN AMRO for the March payment called for in that coupon book?

A: Yes, sir, I did. . . .

Q: Was that check honored by ABN AMRO?

A: No, sir. It wasn't. It took I don't know how long for it to get back.

Q: They returned it to you?

A: Yes, sir. They did. . . .

Q: Ms. Bigelow, did you encounter difficulties in speaking to ABN AMRO regarding these various work-out plans or payments that were supposed to be made or returned checks?

A: Yes, sir, I have tried for the last I don't know how many years to try to talk with them. They do not return any call. You leave messages, after message. No one will call you back. The only way you can get them is going through Shapiro out of Charlotte, and they would e-mail. But to return a call to this day, they will not return no calls.

Q: Did you and your husband Harvey Bigelow make efforts to comply with the requests from ABN AMRO with regard to payments to be made or information to be submitted?

A: Sir, I have did [sic] everything they asked of us to do, and they still did not comply with anything they told us they was [sic] going to do.

While petitioner presented evidence to the contrary, this Court does not function as an appellate fact finder. *Rose v. City of Rocky Mount*, 180 N.C. App. 392, 399, 637 S.E.2d 251, 256 (2006). Our review of the

foregoing testimony leads us to conclude that it fully supports the superior court's finding of fact that there was no default.

[2] Turning to petitioner's argument that the trial court impermissibly relied on equitable defense, we note that our Supreme Court has held that a mortgage is a contract. *Palmer v. Latham*, 173 N.C. 103, 105, 91 S.E. 525, 525 (1917). Therefore, the principles of contract law are applicable. A cardinal principle of contract law is that a party to a contract may not take advantage of its nonperformance if its own actions prevented performance of the contract. *Cater v. Barker*, 172 N.C. App. 441, 446, 617 S.E.2d 113, 117 (2005). *See also Mullen v. Sawyer*, 277 N.C. 623, 633, 178 S.E.2d 425, 431 (1971) ("It is a salutary rule of law that one who prevents the performance of a condition, or makes it impossible by his own act, will not be permitted to take advantage of the nonperformance.") In this case, counsel for petitioner conceded that bureaucratic tangles might have hampered payment. When questioned about the additional booklets sent to respondents, he stated:

> I find that working with large companies, sometimes the left hand doesn't know what the right hand is doing.

The apparent lack of communication between different departments or personnel of petitioner bank supports the trial court's factual determination that the respondents were not in default. The absence of a default bars the entry of an order for foreclosure. *In re Kitchens*, 113 N.C. App. 175, 178, 437 S.E.2d 511, 512 (1993). Therefore, the trial court was correct in denying petitioner's request for foreclosure, and its order must be affirmed.

We note that petitioner has argued that respondents were in default of their obligations because even by their own account, their December 2003 check was a personal, not a cashier's check, and was late. However, this matter was not raised before the trial court, and petitioner may not, therefore, raise it now. "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 getter a better mount in the appellate courts." *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (citations and quotations omitted).

Petitioner argues that it is still owed payment on an outstanding debt. However, this appeal pertains only to the immediate foreclosure proceedings, which are governed by the strict statutory criteria out-

lined above. Other claims may be litigated in subsequent proceedings. *In re Watts*, 38 N.C. App. 90, 94, 247 S.E.2d 427, 429 (1978).

Affirmed.

Judges McCULLOUGH and TYSON concur.

THE CADLE COMPANY, PLAINTIFF v. ROBERT BUYNA, T/A WHISPERS STYLING SALON, DEFENDANT

No. COA06-792

(Filed 7 August 2007)

Appeal and Error— record—not timely filed in Court of Appeals

An appeal from a district court order dismissing plaintiff's complaint was properly dismissed for failure to timely file a settled record with the Court of Appeals.

Appeal by plaintiff from order entered 7 February 2006 by Judge Chester C. Davis in Forsyth County District Court. Heard in the Court of Appeals 27 March 2007.

Parrish, Smith & Ramsey, LLP, by Steven D. Smith, for plaintiff-appellant.

David E. Shives, PLLC, by David E. Shives, for defendant-appellee.

GEER, Judge.

Plaintiff, The Cadle Company, appeals from an order entered by the Forsyth County District Court dismissing plaintiff's attempted appeal of a prior order of the same court. Although the proceedings following plaintiff's filing of its first notice of appeal are confusing, at least this much is apparent: plaintiff failed to file a settled record on appeal with this Court within the time allowed by our appellate rules. As a result, the district court acted within its authority, pursuant to N.C.R. App. P. 25(a), when it dismissed plaintiff's appeal. Accordingly, we affirm.

Facts and Procedural History

This appeal arises out of a dispute between the parties over a commercial lease. On 21 March 2005, plaintiff instituted an action in summary ejectment, and a magistrate granted judgment in plaintiff's favor. Defendant then appealed to the district court, which overruled the magistrate in an order dated 10 June 2005. In this order, Judge Lawrence J. Fine decreed: "Plaintiff's complaint and claims are dismissed, and the judgment of the Magistrate is superceded by this order in every respect." On 8 July 2005, plaintiff filed a notice of appeal "to the Superior Court of Forsyth County." On 19 August 2005, 42 days after the notice of appeal, plaintiff served defendant with a proposed record on appeal.

On 23 August 2005, defendant filed a motion to dismiss plaintiff's appeal, asserting: (1) that in violation of N.C.R. App. P. 3, plaintiff failed to direct its appeal to the proper court, i.e., to the Court of Appeals rather than "to the Superior Court of Forsyth County" and (2) that in violation of N.C.R. App. P. 11, plaintiff failed to serve its proposed record on appeal within the required 35-day time frame. At the 6 September 2005 hearing on defendant's motion to dismiss, plaintiff made an oral motion to extend the time to serve its proposed record on appeal. On 29 September 2005, Judge Lisa V.L. Menefee entered an order granting plaintiff's oral motion and deeming "timely filed" the proposed record that plaintiff served on 19 August 2005. Judge Menefee denied defendant's motion to dismiss the appeal, but granted him "30 days from the signing of this Order to serve objections or corrections to the Plaintiff/Appellant's Proposed Record on Appeal."

Subsequently, on 27 October 2005, defendant filed a "Notice of Appeal/Cross-Appeal" from Judge Menefee's order. On the same date, defendant also served his "Objections and Amendments" to plaintiff's proposed record on appeal. Over two months later, on 6 January 2006, plaintiff delivered a "final" record on appeal, by hand, to defendant.

On 13 January 2006, defendant filed his second motion to dismiss plaintiff's appeal, contending that "[t]he Record on Appeal has never been filed with the N.C. Court of Appeals." That motion to dismiss was accompanied by an affidavit of defendant's counsel, David E. Shives, and several exhibits. According to Mr. Shives, he made several unsuccessful attempts in early November 2005 to contact plaintiff's counsel regarding settlement of the record. On 16 November

2005, the two attorneys finally communicated and, according to Mr. Shives, plaintiff's counsel "stated that: (a) Plaintiff had no problem with Defendant's Objections and Amendments to Proposed Record on Appeal; and (b) that counsel for Plaintiff would prepare the final Record on Appeal."

On 26 January 2006, plaintiff filed with the district court a "Response to Motion to Dismiss and Motion to Extend Time Pursuant to Rule 27(c) of the North Carolina Rules of Appellate Procedure." Plaintiff asserted that it "feels that the Final Record on Appeal was properly submitted to the Defendant['s] attorney on January 6, 2006 and was ready to file same with the North Carolina Court of Appeals on that date and therefore was able to be timely served on the North Carolina Court of Appeals on January 6, 2006." In its response, plaintiff did not dispute Shives' assertion that "[p]laintiff had no problem with [d]efendant's Objections and Amendments" as of 16 November 2005. Indeed, according to plaintiff's version of the relevant events, "shortly" after 27 October 2005 "the Plaintiff[] and the Defendant[] *agreed* upon the contents and the setup of the 'Record on Appeal' for both the Order . . . by Judge Lawrence Fine and the Order of Judge Menefee . . . ." (Emphasis added.)

On 30 January 2006, Judge Chester C. Davis conducted a hearing on the pending motions. On 7 February 2006, the court entered an order denying plaintiff's motion for an extension of time and granting defendant's motion to dismiss plaintiff's appeal of the June 2005 decision by Judge Fine. Following the district court's dismissal of the appeal, plaintiff gave timely notice of appeal of Judge Davis' order.

Discussion

"If after giving notice of appeal from any court, . . . 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) (emphasis added). The appellate rules that regulate the timing of the settlement and filing of the record on appeal are not arbitrary formalities, but " 'are designed to keep the process of perfecting an appeal flowing in an orderly manner.' " *Kellihan v. Thigpen*, 140 N.C. App. 762, 763, 538 S.E.2d 232, 234 (2000) (quoting *Craver v. Craver*, 298 N.C. 231, 236, 258 S.E.2d 357, 361 (1979)). N.C.R. App. P. 12(a) establishes a 15-day window for the filing of a settled record on appeal with the clerk of the appel-

late court: "Within 15 days after the record on appeal has been settled by any of the procedures provided in Rule 11 or Rule 18, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken."

In determining whether Judge Davis properly dismissed plaintiff's appeal, we first observe that Judge Menefee had no authority, under the circumstances of this case, to grant plaintiff an extension of time for service of its proposed record on appeal. Under N.C.R. App. P. 11, plaintiff was required to serve a proposed record on appeal upon defendant within 35 days of the date of the notice of appeal—in other words, within 35 days of 8 July 2005. When plaintiff served the proposed record upon defendant on 19 August 2005, the time allowed for service had clearly expired.

Although a "trial tribunal for good cause shown by the appellant may extend once for no more than 30 days the time permitted by Rule 11," N.C.R. App. P. 27(c)(1), "motions made after the expiration of the time allowed in these rules for the action sought to be extended *must be in writing* and with notice to all other parties and may be allowed only after all other parties have had opportunity to be heard," N.C.R. App. P. 27(d) (emphasis added). Because plaintiff made only an oral motion after the time for service of the proposed record had expired, Judge Menefee lacked authority to grant plaintiff's motion, and her order was ineffective. *See Richardson v. Bingham*, 101 N.C. App. 687, 689, 400 S.E.2d 757, 759 (1991) (holding that trial court's order extending appellant's time to serve proposed record on appeal "was ineffective" because of Rule 27 violation).

Similarly, we see no authority in the appellate rules for Judge Menefee's decision to grant defendant an additional 30 days for the service of his objections to plaintiff's proposed record on appeal. Rule 27(c)(1) grants authority to the trial tribunal to allow one extension of 30 days "for the service of the proposed record on appeal." Rule 27(c)(2) in turn provides that "[a]ll motions for extensions of time other than those specifically enumerated in Rule 27(c)(1) *may only be made to the appellate court* to which appeal has been taken." (Emphasis added.) In other words, a motion to extend the time for making objections to the proposed record on appeal should have been directed to this Court.

Since Judge Menefee had no authority to extend defendant's time to object, arguably the record on appeal was settled under N.C.R. App. P. 11(b) ("If all appellees within the times allowed them either

serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal."). Plaintiff was then required to file the record on appeal with this Court 15 days after the non-extended deadline for serving objections. N.C.R. App. P. 12(a).

Even if Judge Menefee had authority to enter her order and regardless of any impact of defendant's notice of appeal from that order,[1] the record establishes that the parties agreed upon the record on appeal "shortly" after 27 October 2005, according to plaintiff, and by 16 November 2005, according to defendant. Once the parties settled the record by agreement, plaintiff was required to file the agreed-upon record with this Court within 15 days. *Id. See also White v. Carver*, 175 N.C. App. 136, 143, 622 S.E.2d 718, 723 (2005) (holding that appeal was not properly filed in accordance with appellate rules when appellant agreed to some of appellee's amendments and objections to the proposed record, did not seek judicial settlement regarding those points upon which agreement not reached, and did not file record with this Court within 15 days of the record being settled by operation of Rules 11 and 12).

When, on 13 January 2006, defendant filed his second written motion to dismiss plaintiff's appeal, plaintiff, in violation of Rule 12(a) of the Rules of Appellate Procedure, had still not filed a record of any kind with this Court. Since plaintiff "fail[ed] within the time[] allowed . . . to take an[] action required to present the appeal for decision," N.C.R. App. P. 25(a), the trial court could properly dismiss plaintiff's appeal. *See Kellihan*, 140 N.C. App. at 766, 538 S.E.2d at 235 ("Plaintiffs failed to meet the time deadline set out in N.C.R. App. P. 12(a), and therefore their filing of the record on appeal in this case was late. This violation of our appellate rules subjects this appeal to dismissal on defendants' motion."); *Bledsoe v. County of Wilkes*, 135 N.C. App. 124, 124-25, 519 S.E.2d 316, 317 (1999) (dismissing appeal where, among other things, appellant "failed to file the record on appeal with this Court within fifteen (15) days after it was settled, in violation of Rule 12(a)").

Plaintiff contends that the trial court erred in dismissing its appeal because the record was "available for filing in a timely man-

1. Plaintiff contends that defendant's notice of appeal from Judge Menefee's order somehow started the clock anew with respect to the settlement of its already-served record on appeal relating to Judge Fine's order. Plaintiff cites no authority that supports this argument, and we have found none.

ner . . . ." Our appellate rules require actual filing and not mere "availability" for filing. We note that rather than attempting to file the record on appeal after receipt of the second motion to dismiss, plaintiff instead asked the trial court for a second extension of time—a motion the trial court had no authority to grant under N.C.R. App. P. 27. Plaintiff has presented no persuasive basis for setting aside the trial court's dismissal of its appeal, and accordingly, we affirm Judge Davis' order.

Affirmed.

Chief Judge MARTIN and Judge WYNN concur.

BRUNING & FEDERLE MFG. CO., PLAINTIFF v. RICKY D. MILLS AND ASSOCIATED METAL WORKS, INC., DEFENDANTS

No. COA06-1047

(Filed 7 August 2007)

Trade Secrets— misappropriation—attorney fees

The trial court did not err by denying attorney fees in a trade secret appropriation case based on a finding that defendant had not offered evidence of or made an argument to support bad faith. Although N.C.G.S. § 6-21 and N.C.G.S. § 66-154(d) both address the award of attorney fees in actions under the Trade Secrets Protection Act, a trial court may award attorney fees to the prevailing party only if a claim of misappropriation is made in bad faith or if willful and malicious misappropriation exists pursuant to N.C.G.S. § 66-154(d).

Appeal by Defendants from order entered 27 April 2006 by Judge Kimberly S. Taylor in Iredell County Superior Court. Heard in the Court of Appeals 15 March 2007.

Eisele, Ashburn, Greene & Chapman, PA, by Douglas G. Eisele, for Plaintiff-Appellee.

Mayer, Brown, Rowe & Maw LLP, by Robert B. Cordle and W.C. Turner Herbert, and Pope McMillan Kutteh Simon & Privette, P.A., by William P. Pope, for Defendants-Appellants.

STEPHENS, Judge.

On 13 September 2002, Plaintiff brought an action against Defendants for alleged misappropriation of trade secrets under the North Carolina Trade Secrets Protection Act ("TSPA"), N.C. Gen. Stat. § 66-152 *et seq.*, and for alleged unfair or deceptive trade practices under the Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1 *et seq.* The trial court granted summary judgment in favor of Defendants on 12 April 2004. In addition to stating "there [are] no genuine issue[s] as to any material fact[,]" the order granting summary judgment stated that "Plaintiff is hereby [] taxed with all costs of this action pursuant to N.C. Gen. Stat. § 6-21." Plaintiff filed notice of appeal on 10 May 2004 challenging the order granting summary judgment. In *Bruning & Federle Mfg. Co. v. Mills*, 173 N.C. App. 641, 619 S.E.2d 594 (unpublished) (No. COA04-999) (Oct. 4, 2005), *disc. review denied*, 360 N.C. 174, 625 S.E.2d 782 (2005), this Court affirmed the trial court's grant of summary judgment in favor of Defendants.

On 29 December 2005, Defendant Ricky D. Mills filed a motion with the trial court seeking "an [o]rder awarding and quantifying the amount of attorneys' fees and costs to be taxed to the Plaintiff" pursuant to the court's earlier summary judgment order. Defendant Associated Metal Works, Inc. had filed a similar motion on 15 December 2005. In response, Plaintiff filed a request that the trial court make findings of fact and conclusions of law under N.C. Gen. Stat. § 1A-1, Rule 52(a)(2). In its order following a hearing on Defendants' motions, the trial court concluded as a matter of law that

> N.C. Gen. Stat. § 6-21 does not itself form the legal basis for an award of attorney fees in a TSPA case; rather, it only allows such award (1) if the conditions provided in N.C. Gen. Stat. § 66-154(d) exist, and (2) if the Court then exercises its discretion to award attorney fees based on evidence offered in support of an appropriate Motion.

Concluding that "[n]either Defendant offered any evidence to establish, or made any argument to support, a finding by the Court that Plaintiff acted in 'bad faith' [one of the conditions provided in N.C. Gen. Stat. § 66-154(d)] in prosecuting its TSPA claims," the trial court denied Defendants' motions for attorneys' fees, but allowed "the recovery of costs other than attorney fees[.]" From the order denying their motions for attorneys' fees, Defendants appeal. Defendants' sole

issue on appeal is that the trial court erred in interpreting N.C. Gen. Stat. § 6-21 as only allowing a trial court to award attorneys' fees in a TSPA case if the conditions provided in N.C. Gen. Stat. § 66-154(d) exist. For the reasons stated herein, we affirm.

In this case, we must interpret two statutes that both address the award of attorneys' fees in actions under the TSPA. Under Section 66-154(d) of that Act, as enacted by the legislature in 1981 and since unamended,

> [i]f a claim of misappropriation is made in bad faith or if willful and malicious misappropriation exists, the court may award reasonable attorneys' fees to the prevailing party.

N.C. Gen. Stat. § 66-154(d) (2005). In the same legislation by which it enacted the TSPA, the General Assembly added subsection twelve (12) to Section 6-21 of our General Statutes. Act of Jul. 9, 1981, ch. 890, sec. 2, 1981 N.C. Sess. Laws 1326. That statute, after the 1981 addition, reads in pertinent part:

> Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:
>
> . . . .
>
> (12) In actions brought for misappropriation of a trade secret under [the TSPA].
>
> The word "costs" as the same appears and is used in this section shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow[.]

N.C. Gen. Stat. § 6-21 (2005). Defendants contend that these statutes "may be harmonized and given separate effect," that the statutes "are in no way contradictory[,]" and that the trial court erred in interpreting N.C. Gen. Stat. § 6-21 as only allowing a trial court to award attorneys' fees in a TSPA case if the conditions provided in N.C. Gen. Stat. § 66-154(d) exist. We disagree.

"The case law in North Carolina is clear that to overturn the trial judge's determination [on the issue of attorneys' fees], the defendant must show an abuse of discretion." *Hillman v. U.S. Liab. Ins. Co.*, 59 N.C. App. 145, 155, 296 S.E.2d 302, 309 (1982) (citations

omitted), *disc. review denied*, 307 N.C. 468, 299 S.E.2d 221 (1983). However, " 'where an appeal presents [a] question[] of statutory interpretation, full review is appropriate,' " and we review a trial court's conclusions of law *de novo*. *Coffman v. Roberson*, 153 N.C. App. 618, 623, 571 S.E.2d 255, 258 (2002) (quoting *Edwards v. Wall*, 142 N.C. App. 111, 115, 542 S.E.2d 258, 262 (2001)), *disc. review denied*, 356 N.C. 668, 577 S.E.2d 111 (2003).

"As always, our primary task in statutory construction is to ensure that the purpose of the Legislature in enacting the law, the legislative intent, is accomplished." *State ex rel. Hunt v. N.C. Reinsurance Facil.*, 302 N.C. 274, 288, 275 S.E.2d 399, 405 (1981) (citing *In re Dillingham*, 257 N.C. 684, 127 S.E.2d 584 (1962)). "The best indicia of that legislative purpose are 'the language of the statute, the spirit of the act, and what the act seeks to accomplish.' " *Id.* (quoting *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972)). "Moreover, we must be guided by the rules of construction that statutes *in pari materia*, and all parts thereof, should be construed together and compared with each other." *Id.* (citing *Redevelopment Comm'n of Greensboro v. Sec. Nat'l Bank of Greensboro*, 252 N.C. 595, 114 S.E.2d 688 (1960)). "Such statutes should be reconciled with each other when possible and any irreconcilable ambiguity should be resolved in a manner which most fully effectuates the true legislative intent." *Id.* (citing *Duncan v. Carpenter & Phillips*, 233 N.C. 422, 64 S.E.2d 410 (1951), *overruled on other grounds*, *Taylor v. J. P. Stevens & Co.*, 300 N.C. 94, 265 S.E.2d 144 (1980)).

Section 66-154(d) is at odds with Section 6-21. A trial court "may" award attorneys' fees under Section 66-154(d), while under Section 6-21, a trial court "shall" award costs, which "shall be construed to include" attorneys' fees. Under Section 66-154(d), the trial court may only award attorneys' fees *to the prevailing party* if "a claim of misappropriation is made in bad faith or if willful and malicious misappropriation exists[.]" Under Section 6-21, a trial court has the discretion to tax costs *against either party* or apportion costs between the parties, and has the discretion to determine the amount of a "reasonable" fee. Importantly, neither party must show "bad faith" or "willful and malicious misappropriation" under Section 6-21 to be awarded costs. While we agree with Defendants that to superimpose the conditions of Section 66-154(d) on Section 6-21 would "eviscerate[] [Section 6-21] for TSPA cases," we also note that to ignore the conditions of Section 66-154(d) when awarding "costs"

under Section 6-21 would render Section 66-154(d) meaningless. We must resolve the statutes' conflict in a manner which most fully effectuates the legislative intent.

Based on our principles of statutory construction, we conclude that in an action under the TSPA, a trial court may only award attorneys' fees to the prevailing party "[i]f a claim of misappropriation is made in bad faith or if willful and malicious misappropriation exists," pursuant to N.C. Gen. Stat. § 66-154(d). While we agree with Defendants that "had the legislature intended to limit the assessment of attorneys' fees in [Section 6-21] by *cross referencing* the bad faith requirement of [Section 66-154(d)], it could have easily done so[,]" we are nevertheless persuaded that our reading of the two statutes accomplishes the legislative intent. As Defendants do not dispute the trial court's conclusion "that the actions of Plaintiff [do not] merit the award of attorney fees under . . . N.C. Gen. Stat. § 66-154(d)[,]" the order of the trial court is affirmed.

AFFIRMED.

Judges McGEE and ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

Filed 7 August 2007

Case	County	Disposition
ALEKMAN v. ASHLEY'S LAWN CARE & LANDSCAPING, INC. No. 06-1446	Beaufort (05CVS1408)	Affirmed
ALLTEL COMMUNICATIONS, INC. v. DAVIDSON CTY. No. 06-1137	Davidson (06CVS593)	Affirmed
BANK OF GRANITE v. READ No. 06-763	Catawba (05CVS1527)	Reversed and remanded
BOONE PODIATRY, P.A. v. FEHRING No. 06-1554	Watauga (06CVS408)	Reversed and remanded
BURRILL v. LONG No. 06-955	Wake (03CVS13415)	Reversed and remanded
CHEWNING-BASS v. BASS No. 06-1020	New Hanover (03CVD4703)	Affirmed
CORDELL v. DOYLE No. 06-980	Buncombe (03CVD460)	Dismissed as moot in part; affirmed in part; reversed in part
COX v. COX No. 06-873	Buncombe (02CVD1748)	Affirmed
CURRIE v. POTEAT No. 06-526	Caswell (04CVS336)	Affirmed
DEMPSEY v. SILVER CREEK HOMEOWNERS ASS'N No. 06-699	Orange (05CVS113)	Affirmed
DYE v. DYE No. 06-1290	Guilford (05CVD5293) (05CVD5295)	Dismissed
HAWKS v. PATTON No. 06-1275	Forsyth (03CVS308)	Dismissed
HOOD v. MANGUM GRP., INC. No. 06-1078	Ind. Comm. (I.C. #273087)	Affirmed
IN RE A.H. No. 07-301	Guilford (04J320)	Affirmed
IN RE D.B., C.B. No. 06-1426	Cumberland (03JT86-87)	Vacated
IN RE D.D.D., S.L.N. No. 07-415	Johnston (06JT110-11)	Affirmed

IN RE D.J.D. No. 06-1627	Davie (04J92)	Affirmed
IN RE D.M., B.M., & A.M. No. 07-405	Wake (05JT744)	Affirmed
IN RE D.Q.M.D., M.D.D., A.M.D. No. 07-485	New Hanover (06J423-25)	Affirmed
IN RE D.R.G., D.D.P. No. 07-341	New Hanover (98J159) (02J87)	Affirmed in part, reversed in part, and remanded
IN RE ESTATE OF LINDLEY No. 06-1281	Guilford (90E1895)	Affirmed in part; remanded in part
IN RE FORECLOSURE OF WOODARD No. 06-1243	Wilson (05SP422)	Affirmed
IN RE H.S. No. 07-361	Forsyth (03JT167)	Affirmed
IN RE J.L.B. No. 06-1030	Burke (03J169)	Affirmed
IN RE K.S.E. & B.N.E. No. 07-210	New Hanover (06J38-39)	Affirmed
IN RE M.D.L., K.D.L. & J.D.L. No. 07-249	Iredell (06JA18) (06JA42-43)	Affirmed
IN RE M.G. No. 07-245	Mecklenburg (06JT784)	Affirmed
IN RE M.T.B., C.G.B. No. 07-398	Wake (06JA255-56)	Affirmed
IN RE R.P.C. No. 07-244	Cumberland (03JT707)	Affirmed
IN RE S.B. No. 07-197	Orange (02J5)	Affirmed
JETTON v. CALDWELL CTY. BD. OF EDUC. No. 05-1389	Caldwell (04CVS795)	Affirmed
LAKEVIEW CONDO. ASS'N v. VILLAGE OF PINEHURST No. 06-1001	Moore (04CVS718)	No error
LEONARD v. TANT No. 06-1256	Onslow (04CVS3559)	Affirmed

MASSEY v. PRIME INTERNAL MED., P.A. No. 06-1408	Johnston (03CVS3414)	Affirmed in part, Reversed in part
RUPPE v. WOODY No. 06-1191	Burke (05CVS1405)	Affirmed
SLEATH v. ADAMS No. 07-41	Orange (03CVD1510)	Dismissed
SNIPES v. WARREN No. 06-1590	Haywood (04CVS803)	Affirmed
STATE v. AIKEN No. 06-1456	Forsyth (04CRS64976) (05CRS8654)	No error in part; reversed and remanded in part
STATE v. BRYANT No. 06-1023	Edgecombe (04CRS54377)	No prejudicial error
STATE v. COLTRANE No. 06-1286	Randolph (02CRS58476-78)	No error
STATE v. DAWSON No. 06-1457	Beaufort (04CRS51543) (04CRS51405)	Affirmed
STATE v. DIEZ No. 06-1516	Durham (05CRS50179-80)	Dismissed
STATE v. DOUTHIT No. 07-38	Forsyth (05CRS20130) (05CRS51583)	No error
STATE v. FLOWERS No. 06-1651	Edgecombe (05CRS7461-62)	Dismissed
STATE v. GRAHAM No. 06-1695	New Hanover (06CRS52203-04)	No error
STATE v. HARDIE No. 07-1	Craven (05CRS55787)	No error
STATE v. McCOY No. 06-1052	Alamance (04CRS55515)	No error
STATE v. MICHAUX No. 06-1040	Guilford (03CRS99568) (04CRS23105)	No error
STATE v. POTTER No. 07-180	Forsyth (05CRS42545) (05CRS63145-46)	Dismissed
STATE v. WHITE No. 06-1389	Forsyth (04CRS46235) (04CRS63977)	Affirmed

STATE v. WILSON No. 07-48	Gaston (05CRS21702)	No error
STATE v. WITHERSPOON No. 06-275	Catawba (03CRS15263) (04CRS15397)	Affirmed in part and remanded in part
WEBB v. ALAMANCE REG'L MED. CTR., INC. No. 06-446	Alamance (04CVS1220)	Affirmed

PULTE HOME CORPORATION, PLAINTIFF v. AMERICAN SOUTHERN INSURANCE COMPANY AND TRANSAMERICA INVESTMENT, L.L.C., DEFENDANTS

No. COA06-747

(Filed 7 August 2007)

1. Insurance— subcontractor's general liability policy—additional insured endorsement—coverage for general contractor's negligence

An additional insured endorsement adding a general contractor to a subcontractor's commercial general liability policy "as an insured but only with respect to liability arising out of [the subcontractor's] operations" covered the general contractor for its independent negligence if a causal nexus exists between the general contractor's liability and the subcontractor's operations; it did not cover the general contractor only for vicarious liability based on the negligence of the subcontractor.

2. Insurance— subcontractor's general liability policy—additional insured endorsement—coverage for general contractor's negligence

A general contractor's alleged negligence in failing to provide safety devices or fall protection for a worker who fell while installing trusses in a house for a framing subcontractor arose out of the subcontractor's operations and was thus covered by an additional insured endorsement in the subcontractor's commercial general liability policy since the general contractor's alleged liability was a natural and reasonable incident or consequence of the subcontractor's operations. Therefore, the commercial general liability insurer had a duty to defend the general contractor in a suit to recover for the worker's injuries.

3. Insurance— subcontractor's general liability policy—additional insured endorsement—suit against general contractor—delay in notice to insurer

Defendant insurer was not justified in refusing to defend plaintiff general contractor under the additional insured endorsement in a subcontractor's commercial general liability policy on the ground that plaintiff failed to give defendant notice of the suit against it "as soon as practicable" as required by the policy where plaintiff showed that it acted in good faith during a six-month delay in notifying defendant insurer because the delay was a func-

tion of its internal polices for processing claims, and defendant conceded that it was not materially prejudiced by the delay.

4. Insurance— insurer's unjustifiable refusal to defend—liability for reasonable settlement and defense costs

An insurer who unjustifiably refused to provide a defense to an insured is liable for the settlement entered into by the insured and the costs of defense in the amount of $805,957 where the insured submitted evidence to the trial court regarding the reasonableness of the settlement and its defense costs, and the insurer presented no counter evidence and made no argument on appeal that the settlement or defense costs were unreasonable.

Appeal by plaintiff and defendant from order entered 8 December 2005 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 25 January 2007.

Taylor, Penry, Rash & Riemann, PLLC, by Neil A. Riemann, for plaintiff-appellant.

Smyth & Cioffi, LLP, by Theodore B. Smyth, for TransAmerica Investment, L.L.C., defendant-appellant.

Mabry & McClelland, LLP, by Robert M. Darroch; and Brown, Crump, Vanore & Tierney, L.L.P., by O. Craig Tierney, Jr., for American Southern Insurance Company, defendant-appellee.

GEER, Judge.

Plaintiff Pulte Home Corporation and defendant TransAmerica Investment, L.L.C. appeal from an order denying their motions for summary judgment against defendant American Southern Insurance Company and granting American Southern's motion for summary judgment. This appeal is resolved by the principle, well-established in North Carolina, that an insurer who unjustifiably refuses to provide an insured with a defense is liable for the amount and costs of a reasonable settlement entered into by the insured. *See Ames v. Cont'l Cas. Co.*, 79 N.C. App. 530, 538, 340 S.E.2d 479, 485, *disc. review denied*, 316 N.C. 730, 345 S.E.2d 385 (1986).

As this Court has previously pointed out, an insurer undertakes a substantial risk when it chooses not to provide a defense. *Pa. Nat'l Mut. Cas. Ins. Co. v. Associated Scaffolders & Equip. Co.*, 157 N.C. App. 555, 559, 579 S.E.2d 404, 407 (2003) ("We note that any insurer who denies a defense takes a significant risk that he is breaching his

duty to defend."). Although in *Pennsylvania National*, we concluded the risk was "well-taken," *id.* at 560, 579 S.E.2d at 408, the same cannot be said in this appeal. Because we have determined that the policy language covered the claims asserted against Pulte, American Southern unjustifiably refused to defend Pulte and is now liable for the settlement and Pulte's defense costs. Accordingly, we reverse and remand for entry of judgment in Pulte's and TransAmerica's favor.

Facts and Procedural History

Pulte is a home-building company doing business in North Carolina. In the course of its business, Pulte, acting as a general contractor, hired TransAmerica, as a subcontractor, to frame houses in a residential subdivision in Wake County called Breckenridge. The contract between TransAmerica and Pulte required TransAmerica to have Pulte named as an additional insured under the subcontractor's commercial general liability coverage. To comply with this requirement, TransAmerica obtained an additional insured endorsement to its policy with American Southern. That endorsement provided that Pulte was covered "as an insured but only with respect to liability arising out of [TransAmerica's] operations or premises owned by or rented to [TransAmerica]."

In August 2002, Pulte, TransAmerica, and a third company, Morlando Enterprises, L.L.C., were sued by Marcos Antonio Mejia, who had worked at the Breckenridge site for a TransAmerica subcontractor named Rudolfo Sanchez. Mejia alleged that Sanchez "worked under the immediate direction, supervision, and control of [TransAmerica]" and, further, that Pulte "oversaw and directed the work of [TransAmerica] and other contractors at the work site, including the workers employed by Rudolfo Sanchez." Mejia's complaint alleged that, in October 2001, he was instructed to help install trusses on the houses.

Mejia claimed that, during the installation of the trusses, he was required to "work well above the floor level of the house [and] he was not provided any safety devices or means of fall protection." According to the complaint, a crane operator working for Morlando Enterprises was moving trusses from the ground to the roof when the crane knocked Mejia from the roof, causing him to fall to the ground and suffer severe, permanent injuries, including paraplegia.

In March 2003, approximately 7 months after the filing of the Mejia action, Pulte tendered the Mejia claims to American Southern,

seeking legal defense and indemnity under the TransAmerica policy. In June 2003, American Southern rejected Pulte's tender and denied any obligation under the insurance policy to defend or indemnify Pulte in connection with the Mejia action. Pulte ultimately paid $700,000.00 to settle Mejia's claims and incurred approximately $105,000.00 in legal fees, expenses, and expert costs.

On 9 September 2004, Pulte filed this action against TransAmerica and American Southern, asserting that both parties had breached a contractual agreement to defend and indemnify Pulte in the Mejia case and were, therefore, liable for any losses incurred by Pulte in that litigation. Following discovery, all three parties moved for summary judgment. By its motion, TransAmerica sought a declaration that the American Southern policy provided coverage for Pulte's costs of defense and settlement in the Mejia action. Pulte moved for summary judgment against only American Southern, seeking (1) a declaration that American Southern was obligated to pay its defense and settlement costs and (2) an award of damages totaling $804,925.14 together with prejudgment interest. American Southern, in its motion, sought a declaration that the insurance policy did not cover the allegations against Pulte in the Mejia litigation and that it therefore had no duty to defend or indemnify Pulte.

A hearing on the motions was held, and on 8 December 2005, Judge Narley L. Cashwell of the Wake County Superior Court entered an order granting summary judgment to American Southern and denying Pulte's and TransAmerica's motions for summary judgment. Following a voluntary dismissal without prejudice of Pulte's claims against TransAmerica, both Pulte and TransAmerica gave timely notice of appeal.

Discussion

It is well established in North Carolina that "[w]hen an insurer without justification refuses to defend its insured, the insurer is estopped from denying coverage and is obligated to pay the amount of any reasonable settlement made in good faith by the insured of the action brought against him by the injured party." *Ames*, 79 N.C. App. at 538, 340 S.E.2d at 485. *See also Penske Truck Leasing Co. v. Republic W. Ins. Co.*, 407 F. Supp. 2d 741, 753-54 (E.D.N.C. 2006) (noting that "North Carolina cases consistently hold" that insurer who unjustifiably refuses to defend insured is obligated to pay amount of reasonable settlement and insured's attorneys' fees); *Naddeo v. Allstate Ins. Co.*, 139 N.C. App. 311, 320, 533 S.E.2d 501, 507 (2000)

(holding that when carrier "unjustifiably refused to provide a defense," it obligated itself to pay the amount and costs of reasonable settlement); *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 735, 504 S.E.2d 574, 578 (1998) ("If a duty to defend could be found, then the trial court's granting of summary judgment for [the insured as to settlement and defense costs] is correct."); *Duke Univ. v. St. Paul Fire & Marine Ins. Co.*, 96 N.C. App. 635, 637, 386 S.E.2d 762, 763 ("By refusing to defend the wrongful death action [where such a defense was required by the policy], defendant obligated itself to pay the amount and costs of a reasonable settlement if its refusal was unjustified."), *disc. review denied*, 326 N.C. 595, 393 S.E.2d 876 (1990).

[1] The dispositive question in this case is whether American Southern unjustifiably refused to defend Pulte. It is undisputed that the American Southern policy contained a provision requiring the carrier to defend its insureds. Our Supreme Court has observed that "the insurer's duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy." *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986). This duty to defend "is ordinarily measured by the facts as alleged in the pleadings . . . ." *Id.* "When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable." *Id.* An insurer is excused from its duty to defend only "if the facts are not even arguably covered by the policy." *Id.* at 692, 340 S.E.2d at 378. *See also Builders Mut. Ins. Co. v. N. Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006) (reaffirming principles set forth in *Waste Management*). Moreover, "[i]f the claim is within the coverage of the policy, the insurer's refusal to defend is unjustified even if it is based upon an honest but mistaken belief that the claim is not covered." *Bruce-Terminix*, 130 N.C. App. at 735, 504 S.E.2d at 578.

In support of its contention that it had no duty to defend, American Southern points to the policy endorsement naming Pulte as an additional insured. That provision specifies: "WHO IS AN INSURED (Section II) is amended to include as an insured [Pulte Home Corporation] but only with respect to liability arising out of [TransAmerica's] operations . . . ." American Southern construes this provision as meaning that it has insured Pulte only for vicarious liability based on the negligence of TransAmerica and not for any independent negligence of Pulte itself. American Southern then argues

that the Mejia complaint only sues Pulte for its independent negligence and, therefore, does not assert claims within the scope of the policy's coverage. We disagree.

The proper construction of the additional insured endorsement turns on the phrase "arising out of." In the insurance context, this phrase frequently appears in policy provisions both extending and excluding coverage. When construing policies, North Carolina applies the rule that "[w]hile policy provisions excluding coverage are strictly construed in favor of the insured, those provisions which extend coverage 'must be construed liberally so as to provide coverage, whenever possible by reasonable construction.' " *City of Greenville v. Haywood*, 130 N.C. App. 271, 276, 502 S.E.2d 430, 433 (quoting *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986)), *disc. review denied*, 349 N.C. 354, 525 S.E.2d 449 (1998). Further, when, as here, the policy does not define the phrase "arising out of," we must read the phrase in accordance with "the ordinary meaning of [that phrase]." *Id.*, 502 S.E.2d at 433-34.

If used to extend, rather than exclude, coverage, our courts have broadly construed the phrase "arising out of" to require a simple "causal nexus," *id.* at 277, 502 S.E.2d at 434, and not causation rising to the level of proximate cause, *State Capital*, 318 N.C. at 539-40, 350 S.E.2d at 69. As explained by the Supreme Court in reference to the words "arising out of the use of an automobile":

> "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 (ellipsis original) (quoting *Fid. & 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)). The Supreme Court then held that, when applying the phrase "arising out of" the use of an automobile, "the test is whether there is a causal connection between the use of the automobile and the accident," such that the "injuries were a natural and reasonable incident or consequence of the use of the motor vehicle." *Id.* at 540, 350 S.E.2d at 69-70.

In *Haywood*, 130 N.C. App. at 276, 502 S.E.2d at 433, this Court applied the *State Capital* test in construing an insurance policy's coverage for injuries that "arise out of the performance of the INSURED'S law enforcement duties." After noting that *State Capital* called for "a liberal construction" of the phrase "arising out of," *id.*, 502 S.E.2d at 434, the Court held that because the conduct at issue would not have occurred "but for" the insured's position as a police officer, there was the required "causal nexus" to establish that the insured's conduct arose out of his law enforcement duties. *Id.* at 277, 502 S.E.2d at 434.

In this case, we are—like the Supreme Court in *State Capital* and this Court in *Haywood*—construing a provision extending coverage. Accordingly, American Southern's duty to defend rests on whether there is a causal nexus between Pulte's liability in the Mejia matter and TransAmerica's "operations." A sufficient nexus exists if that liability is "a natural and reasonable incident or consequence of" those operations. *State Capital*, 318 N.C. at 540, 350 S.E.2d at 70.

American Southern does not address *State Capital*, but rather argues that the phrase "arises out of TransAmerica's operations" equates with "arises out of Transamerica's [sic] negligence." American Southern states in its brief: "Because the additional insured endorsement limits coverage to liability arising out of TransAmerica's operations, i.e. arises out of Transamerica's [sic] negligence, Pulte is not an additional insured or entitled to a defense for the specific allegations made by Mejia." The simple answer to this argument is that the policy reads "operations" and not "negligence." It does not define "operations," and we can perceive no reasonable basis for equating the two words. To the extent that this clause can even be viewed as ambiguous, American Southern's argument disregards the principle that the policy must be construed in favor of the insured, Pulte. *Id.* at 541, 350 S.E.2d at 70.

Moreover, if we were to construe the endorsement in the manner American Southern urges—to extend coverage to Pulte only to the extent that Pulte's liability might arise out of TransAmerica's negligence—coverage would be almost non-existent. As American Southern has acknowledged, in North Carolina, an employer of an independent contractor generally cannot be held vicariously liable for the negligent acts of that independent contractor. *See Gordon v. Garner*, 127 N.C. App. 649, 658, 493 S.E.2d 58, 63 (1997) ("Generally, one who employs an independent contractor is not liable for the independent contractor's negligence."), *disc. review denied*, 347 N.C.

670, 500 S.E.2d 86 (1998). Thus, limiting American Southern's coverage of Pulte to vicarious liability would provide no genuine insurance for Pulte. American Southern suggests that the endorsement would still provide insurance for "false allegations" of vicarious liability and liability arising from the actions of "loaned servants." Such a cramped reading of coverage cannot be reconciled with our State's policy of construing ambiguous insurance policies in favor of the insured and in a manner that provides coverage.

In support of its narrow reading of the endorsement, American Southern relies upon a single federal case construing North Carolina law: *St. Paul Fire & Marine Ins. Co. v. Hanover Ins. Co.*, 187 F. Supp. 2d 584 (E.D.N.C. 2000). At issue in that case was an additional insured endorsement to a commercial general liability policy that provided as follows:

> WHO IS AN INSURED (Section II) is amended to include any person or organization you are required by written contract to include as an insured, but only with respect to liability arising out of "your work." *This coverage does not include liability arising out of the independent acts or omissions of such person or organization.*

Id. at 587 (emphasis added).

Unlike the endorsement in this case, the endorsement in *St. Paul* contains express language excluding coverage for the "independent acts or omissions" of the additional insured.[1] The district court noted first that the insurer "contends that, because the policy specifically excludes coverage for liability arising from independent acts or omissions of the additional insured, the language of the 'Who is an Insured' paragraph effectively limits coverage to coverage for vicarious liability, i.e., liability imposed upon the general contractor as a result of the subcontractor's acts and not as a result of the general contractor's own acts or failure to act." *Id.* at 589-90. The district court agreed, holding that "to give meaning to the 'independent acts' provision of the endorsement, the court must construe the 'arising out of [the subcontractor's work]' provision as one providing coverage in cases where the alleged liability is vicarious." *Id.* at 590.

Given the absence of similar qualifying language in this case, *St. Paul*, although not controlling on this Court in any event, is not con-

1. In its brief, American Southern, when quoting the policy at issue in *St. Paul*, conveniently omits this portion of the provision, substituting an ellipsis.

trary to our conclusion that the additional insured endorsement here must be broadly interpreted to provide coverage for liability arising from Pulte's independent negligence if there is a causal nexus with TransAmerica's operations. Indeed, *St. Paul* demonstrates that insurers are well able to write policies to accomplish the result urged by American Southern when they desire to do so. American Southern's position that this endorsement must be construed to include a limitation that is conspicuously absent from the policy is untenable.

Moreover, we find persuasive those decisions from other jurisdictions where similar endorsement language contained within a commercial general liability policy has been interpreted to provide coverage to the additional insured even for liability arising from the additional insured's own independent negligence. *See Acceptance Ins. Co. v. Syufy Enters.*, 69 Cal. App. 4th 321, 330, 81 Cal. Rptr. 2d 557, 563 (Cal. Ct. App.) ("We believe the better view is that when an insurer chooses not to use such clearly limited language [covering only vicarious liability] in an additional insured clause, but instead grants coverage for liability 'arising out of' the named insured's work, the additional insured is covered without regard to whether injury was caused by the named insured or the additional insured."), *review denied*, 1999 Cal. LEXIS 2212 (Cal. 1999); *Cas. Ins. Co. v. Northbrook Prop. & Cas. Ins. Co.*, 150 Ill. App. 3d 472, 474-76, 501 N.E.2d 812, 814-15 (Ill. App. Ct. 1986) (where general contractor was listed as additional insured on subcontractor's policy "but only with respect to liability arising out of operations performed for [general contractor] by [subcontractor]," insurer had duty to defend general contractor irrespective whether subcontractor was negligent); *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451, 454 (Tex. App. 1999) ("The majority view of these cases is that for liability to 'arise out of operations' of a named insured it is not necessary for the named insured's acts to have 'caused' the accident.").

In response to Pulte's citation of cases in other jurisdictions, American Southern, both before the trial court and this Court, made the broad assertion that, in reality, our sister jurisdictions are substantially divided as to the proper interpretation of endorsements of the type at issue here. Notably, however, American Southern did not cite to any authority, either in its principal brief or in a memorandum of additional authority pursuant to N.C.R. App. P. 28(g), save for the one lone example, *St. Paul*, that we find distinguishable.

[2] Consequently, we agree with Pulte and TransAmerica that the additional insured endorsement, by its plain terms, triggered

American Southern's duty to defend Pulte against the Mejia claims, when those claims bore a causal nexus with TransAmerica's "operations" at the job site. The parties do not dispute that TransAmerica's "operations" included TransAmerica's framing activities at Pulte's job site.

In determining whether an insurer has a duty to defend the underlying lawsuit, "our courts employ the so-called 'comparison test.' " *Holz-Her U.S., Inc. v. U.S. Fid. & Guar. Co.*, 141 N.C. App. 127, 128, 539 S.E.2d 348, 349 (2000) (quoting *Smith v. Nationwide Mut. Fire Ins. Co.*, 116 N.C. App. 134, 135, 446 S.E.2d 877, 878 (1994)). That test requires us to read the pleadings in the underlying suit side-by-side with the insurance policy to determine whether the alleged injuries are covered or excluded. *Id.*

An insurer is excused from its duty to defend only "if the facts [alleged in the complaint] are not even arguably covered by the policy." *Waste Mgmt.*, 315 N.C. at 692, 340 S.E.2d at 378. Any doubt as to coverage must be resolved in favor of the insured. *Bruce-Terminix*, 130 N.C. App. at 735, 504 S.E.2d at 578. If the "pleadings allege multiple claims, some of which may be covered by the insurer and some of which may not, *the mere possibility* the insured is liable, and that the potential liability is covered, may suffice to impose a duty to defend." *Id.* (emphasis added).

In this case, the Mejia complaint alleges that Mejia's injuries occurred while he was working for a TransAmerica subcontractor helping with the installation of trusses on a house, part of TransAmerica's framing activities. Mejia was performing the work that TransAmerica wanted done, and "Pulte's principals, agents, and employees oversaw and directed the work of Defendant TransAmerica and other contractors at the work site, including the workers employed by Rudolfo Sanchez," which would include Mejia. In his specific claims against Pulte, Mejia further alleged that Pulte was negligent in failing to ensure that the work performed by its subcontractors—including TransAmerica—was carried out in a reasonably safe manner and failed to ensure that those subcontractors took necessary precautions to reduce risks accompanying the work performed at the construction site.

On its face, the allegations of the Mejia complaint indicate that Pulte's liability was "a natural and reasonable incident or consequence of" TransAmerica's operations. *State Capital*, 318 N.C. at 540, 350 S.E.2d at 70. These allegations set forth a sufficient con-

nection between the work that Mejia was performing—part of TransAmerica's framing operations—and the liability that Mejia sought to impose on Pulte to require us to conclude that at least "arguably" the conduct alleged in the complaint is covered by the additional insured endorsement.

[3] We therefore hold that American Southern had a duty to defend Pulte in the Mejia litigation. American Southern further contends, however, that its refusal to defend Pulte in the Mejia matter was nevertheless justified, and summary judgment was proper, because Pulte failed to comply with the policy's notice requirements. The policy requires any insured to notify American Southern "as soon as practicable" after a claim is made or suit is brought against the insured.

Our Supreme Court has articulated the following three-part test to determine whether, under a policy requiring notice "as soon as practicable," untimely notice by the insured will excuse the insurer from an otherwise existing duty to defend and indemnify:

> When faced with a claim that notice was not timely given, the trier of fact must first decide whether the notice was given as soon as practicable. If not, the trier of fact must decide whether the insured has shown that he acted in good faith, *e.g.*, that he had no actual knowledge that a claim might be filed against him. If the good faith test is met the burden then shifts to the insurer to show that its ability to investigate and defend was materially prejudiced by the delay.

Great Am. Ins. Co. v. C. G. Tate Constr. Co., 303 N.C. 387, 399, 279 S.E.2d 769, 776 (1981) (*Great American I*). The Supreme Court reaffirmed and further explained the three-pronged approach in *Great Am. Ins. Co. v. C. G. Tate Constr. Co.*, 315 N.C. 714, 340 S.E.2d 743 (1986) (*Great American II*).

With respect to the first prong—"whether there has been any delay in notifying the insurer"—the Court held in *Great American II* that "[i]n most instances, unless the insurer's allegations that notice was not timely are patently groundless, this first part of the test is met by the fact that the insurer has introduced the issue to the court." *Id.* at 719, 340 S.E.2d at 747. In light of the six-month delay between Pulte's receipt of the Mejia complaint and Pulte's tender to American Southern, we hold that the first prong of the *Great American I* test has been met. Since American Southern conceded at oral argument that it was never materially prejudiced by the delay (the third prong),

our focus here is confined to the second prong of the test: whether Pulte acted in good faith.

We note that American Southern, in its 10 June 2003 letter declining to provide a defense to Pulte, asserted only that "[t]hese six months clearly materially impaired American Southern's ability to investigate the claim"—an argument now abandoned on appeal. The letter contained no suggestion that Pulte lacked good faith in delaying its tender of the claim. When asked in interrogatories to identify any facts on which American Southern relied to establish the defense of untimely notification, American Southern stated only: "The facts are laid out clearly in the June 10, 2003 correspondence to Plaintiff's counsel from counsel for this Defendant which is enclosed." American Southern raised the issue of good faith for the first time shortly before the summary judgment hearing.

As indicated in *Great American I*, the burden is initially on the insured to demonstrate that it acted in good faith. In this case, Pulte furnished the trial court with an affidavit of its corporate counsel, Michael Laramie. The Laramie affidavit stated that at the time Pulte was served with the Mejia lawsuit, Pulte had the policy of investigating to determine whether Pulte could tender to a subcontractor or an insurer. The affidavit explained further: "That investigation is not simple, however, as records regarding our vendors and their insurance are kept in our local market offices. Under ordinary circumstances, it would involve inquiring of the local market to retrieve those vendor records and ascertain which vendors, and which vendor insurers, might be responsible."

Pulte made inquiry of the local market in Raleigh, obtained the necessary information regarding TransAmerica's insurer, and tendered the claim to American Southern. The affidavit concludes:

> At no time did [Pulte] purposely, knowingly, or deliberately delay or fail to notify a potentially responsible vendor or insurer of the suit. At no time did [Pulte] instruct its counsel to do those things. At no time did [Pulte] act in bad faith. No conceivable benefit would accrue from such actions, and they would have been contrary to [Pulte's] policy. Any delays on [Pulte's] part were either inadvertent or the result of difficulty obtaining information.

American Southern submitted no affidavits, depositions, or other evidence in response to this affidavit and Pulte's showing of good faith.

On appeal, American Southern argues solely that it was entitled to summary judgment on this ground because: "Pulte knew that a claim had been filed against it for which it may be at fault and failed to notify American Southern. Therefore, as the test laid out by *Great American* requires, 'if the insured knows that he is liable or . . . that others claim he is at fault, an untimely delay in notification . . . is a delay without good faith.' " (Quoting *Great American II*, 315 N.C. at 720, 340 S.E.2d at 747.)

American Southern has, however, misread *Great American II*. In that decision, the Supreme Court specifically held:

> This test of lack of good faith involves a two-part inquiry:
>
> 1) Was the insured aware of his possible fault, and
>
> 2) Did the insured *purposefully and knowingly* fail to notify the insurer.
>
> Both of these are, in the legal sense of the term, "subjective" inquiries . . . .
>
> *The good faith test is phrased in the conjunctive: both knowledge and the deliberate decision not to notify must be met for lack of good faith to be shown. If the insured can show that either does not apply, then the trial court must find that the insured acted in good faith.*

Id. (emphases added). Contrary to American Southern's contention, the test thus is not simply whether Pulte knew of its potential liability.

In analyzing the evidence (all presented by Pulte) American Southern first asserts that a delay of six months was not reasonable—an assertion that only goes to the first prong of *Great American I*. American Southern then does not point to anything that suggests that Pulte made a "deliberate decision not to notify" American Southern, the proper test for the good faith prong. *Id.* Instead, American Southern asserts simply that "[a]ll of this [evidence] reveals actual knowledge on the part of Pulte that shows a lack of good faith in its delayed notification to American Southern."

Because Pulte has presented evidence that it did not make a deliberate decision not to notify American Southern, but rather any delay was a function of its internal policies for processing claims, American Southern was not entitled to summary judgment on this

argument. Moreover, because American Southern has pointed to no evidence contrary to that of Pulte, suggesting a purposeful, intentional, or deliberate decision by Pulte to delay notification, Pulte is entitled to summary judgment on the question whether Pulte's delayed notification justified American Southern's refusal to defend. *See Duke Univ. v. St. Paul Mercury Ins. Co.*, 95 N.C. App. 663, 678, 384 S.E.2d 36, 45 (1989) (holding that delay of three and a half months was in good faith when delay was due to insured's system of reporting because while such a system "may be unwise or negligent, reliance on that system does not constitute a deliberate failure to notify the insurer under *Great American II*").

[4] Finally, although Pulte, in support of its motion for summary judgment, submitted evidence to the trial court regarding the reasonableness of the settlement and its defense costs, American Southern presented no counter evidence and makes no argument on appeal that the settlement or defense costs were unreasonable. Accordingly, the trial court should have entered summary judgment in Pulte's favor in the amount of $805,957.74 together with prejudgment interest, as requested by Pulte.[2]

Pulte has also addressed, on appeal, arguments made by American Southern before the trial court regarding other insurance covering Pulte's activities during the relevant time frame. In response, American Southern argues only that because it had no duty to defend, one of the other carriers, Legion Insurance Company, was the primary carrier. Since we have concluded that American Southern did in fact have a duty to defend, American Southern has presented no argument on appeal supporting any contention that it should not be held liable for the amount of $805,957.74 based on the existence of other coverage. We express no opinion whether American Southern would be entitled to seek relief from the other carriers.

Conclusion

For the foregoing reasons, we hold that Pulte and TransAmerica were entitled to declarations that American Southern owed a duty to defend Pulte and that American Southern was unjustified in refusing to provide that defense. Since American Southern does not contend that Pulte's settlement or its defense costs in the Mejia litigation were unreasonable, Pulte is entitled to judgment in the amount of $805,957.74 plus prejudgment interest. We, therefore, reverse the trial

2. This sum is greater than the amount sought in Pulte's motion for summary judgment, but is supported by an affidavit filed prior to the summary judgment hearing.

court's order granting summary judgment to American Southern and remand for entry of judgment in favor of Pulte and TransAmerica.

Reversed and remanded.

Judges CALABRIA and JACKSON concur.

BRIAN W. CAIL AND WIFE, DANA S. CAIL; AND JERRY M. DEAL, PLAINTIFFS v. DR. ROBERT A. CERWIN; CHRISTINA CERWIN; JOHN M. DUNLOW, SUBSTITUTE TRUSTEE; CANUSA MORTGAGE CORPORATION; AND D.B. LANCASTER, DEFENDANTS

No. COA06-304

(Filed 7 August 2007)

1. Civil Procedure; Jurisdiction— summary judgment—same legal issues for first and second motion for summary judgment

The trial court's order of 3 March 2005 is vacated to the extent that it overrules the 27 February 2004 order with respect to plaintiffs' first, second, third, fourth, and sixth claims for relief and defendant Christina Cerwin's counterclaim, because: (1) only when the legal issues differ between the first motion for summary judgment and a subsequent motion may a trial court hear and rule on the subsequent motion; and (2) the key legal issues once again were agency, both apparent and actual, and the applicability of the Uniform Commercial Code. Although it was permissible for Judge Cashwell to grant summary judgment against plaintiffs on the fifth issue of unfair or deceptive trade practices since Judge Titus neither granted nor denied that motion for summary judgment, the remainder of Judge Titus' judgment is reinstated.

2. Appeal and Error— appealability—interlocutory order—denial of motion for summary judgment

Although defendants appeal from and assign error to Judge Titus' order denying defendant Christina Cerwin's motion for summary judgment, this appeal is dismissed, because: (1) the denial of a motion for summary judgment is interlocutory and not immediately appealable unless it affects a substantial right; and

(2) defendants failed to articulate or argue any substantial right affected by the denial of defendant's motion and by the trial court's permitting the matter to proceed to the jury.

3. Costs— no statutory basis—pertinent portion of summary judgment order vacated

The trial court erred in part by taxing defendant Christina Cerwin with certain costs, because: (1) there was no statutory basis for awarding $6,684 for expenses incurred in defending against the foreclosure proceeding filed by defendant; (2) the $500 civil penalty awarded under N.C.G.S. § 45-36.3 to the Cails and Deal based on defendant's failure to cancel the Deal deed was improper when the pertinent portion of Judge Cashwell's summary judgment order was vacated and Judge Titus ruled that defendants' alleged violation of N.C.G.S. § 45-36.3 was an issue for the jury; and (3) N.C.G.S. § 45-36.3 cannot support the court's award of $25,200 to plaintiffs when the pertinent portion of Judge Cashwell's summary judgment order was vacated.

4. Discovery— improper denial of admissions—sanctions—attorney fees

The trial court did not abuse its discretion by taxing defendant Christina Cerwin with costs of $25,200 under N.C.G.S. § 1A-1, Rule 37(c), because: (1) defendants failed to request that the trial court make findings with respect to the four exceptions under Rule 37(c); (2) Judge Cashwell listed the specific requests for admissions that defendants improperly denied, and noted that plaintiffs ultimately proved those matters; and (3) Judge Cashwell provided an itemized list of attorney fees attributable to the failure to admit, and concluded that attorney fees were reasonable.

Appeal by defendants Cerwin from order entered 27 February 2004 by Judge Ken Titus and orders entered 3 March 2005 and 1 July 2005 by Judge Narley L. Cashwell in Granville County Superior Court. Heard in the Court of Appeals 6 February 2007.

Boxley, Bolton, Garber & Haywood, L.L.P., by Ronald H. Garber, for plaintiff-appellees.

J. Michael Weeks, P.A., by J. Michael Weeks, for Robert A. Cerwin, M.D. and Christina Cerwin, defendant-appellants.

JACKSON, Judge.

On 6 June 1995, Robert A. Cerwin ("defendant Robert Cerwin") entered into an agreement with Canusa Mortgage Corporation ("Canusa") for the purpose of investing in residential mortgage loans. D.B. Lancaster ("Lancaster") was the president of Canusa, a licensed broker engaged in originating long-term mortgage loans.

Defendant Robert Cerwin also brought his daughter, Christina Cerwin ("defendant Christina Cerwin") (collectively, "defendants"), into the business dealings with Canusa. She had no direct contact with Canusa and relied upon her father to make arrangements with Canusa for the investment of her money and collection of payments due to her. Defendant Christina Cerwin ultimately invested approximately $357,646.00 with Canusa, and as of 15 May 2002, defendant Robert Cerwin had made loans in the amount of $993,543.50 through Canusa.

On 20 June 1997, Jerry M. Deal ("Deal") obtained from Canusa a construction loan in the amount of $45,000.00 ("the Deal loan"). From applying for the loan to making payments, Deal worked solely with Canusa and its employees. Deal signed a promissory note ("the Deal Note") and a deed of trust ("the Deal Deed"), naming Canusa as the beneficiary and granting Canusa a lien on two lots owned by Deal. On 27 June 1997, defendant Robert Cerwin delivered $45,000.00 of defendant Christina Cerwin's money to Canusa for the initial funding of the Deal loan. That same day, Canusa assigned the Deal Note and Deal Deed to defendant Christina Cerwin, and the assignment was recorded.

Following the initial loan of $45,000.00, defendant Christina Cerwin made additional advances on the Deal Note in July, October, and November 1997. The funds for these loans were delivered to Canusa by defendant Robert Cerwin and disbursed by Canusa to Deal. Lancaster delivered to defendant Robert Cerwin a monthly check drawn on Canusa's bank account payable to defendant Christina Cerwin for payments on the Deal Note.

In May 2000, Deal refinanced his mortgage and hired Kathryn S. Drake ("Drake") to represent him. Drake requested a payoff figure from Canusa to satisfy Deal's mortgage. Canusa sent Drake a letter quoting the payoff figure as $64,291.00 to be mailed to the Canusa office. After Deal produced a series of cancelled checks reflecting certain payments that had not been credited by Canusa, Canusa sent a letter with a revised payoff amount of $59,162.50. On 19 May 2000,

the refinance loan closed, and Drake mailed a check in the amount of $59,162.50 to Canusa at the Canusa office, requesting that the Deal Note and Deal Deed be forwarded to her and marked "Paid in Full." In 2001, Deal sold his house to Brian and Dana Cail ("the Cails").

Amanda S. Stadler ("Stadler"), the Canusa employee responsible for calculating the payoff figure, received Deal's payoff check for the Deal loan and, after Lancaster approved it, marked the account "Paid in Full" as of 25 May 2000. However, Canusa did not: (1) pay the funds received to defendant Christina Cerwin; (2) notify defendant Christina Cerwin that the Deal Note had been paid in full; or (3) request that defendant Christina Cerwin cancel the Deal Note. Rather, Lancaster continued to make payments on the Deal loan to the Cerwins as if the loan had not been paid off.

Around 1 March 2002, the Cerwins calculated the remaining balance on the Deal Note as approximately $43,500.00. In May 2002, after a check from Canusa was returned for insufficient funds, the Cerwins investigated Lancaster and Canusa. Lancaster ultimately was indicted for obtaining property by false pretenses and was sentenced to prison.

On 23 September 2002, Canusa was placed in receivership by court order, and on 2 October 2002, defendant Christina Cerwin instituted a foreclosure action to sell the property in the Deal Note. On 8 January 2003, the Cails and Deal (collectively, "plaintiffs") filed a complaint against defendants, Lancaster, Canusa, and Canusa's substitute trustee, seeking: (1) a declaratory judgment determining the status of the Deal Note and Deal Deed; (2) an injunction staying the foreclosure; (3) a civil penalty and attorneys' fees for failure to cancel the Deal Note and Deal Deed pursuant to North Carolina General Statutes, section 45-36.3; (4) damages and attorney's fees for false representation of the alleged debt in violation of Title 15, section 1692(e) of the United States Code; and (5) damages and attorneys' fees for unfair and deceptive trade practices.

On 12 February 2003, the trial court entered a preliminary injunction staying the foreclosure. On 6 March 2003, plaintiffs amended their complaint to demand recovery of a civil penalty of up to $1,000.00 for defendants' failure to cancel the Deal Deed. Defendant Christina Cerwin filed a counterclaim against plaintiffs, seeking: (1) a declaratory judgment determining the balance due on the Deal Note; (2) judgment for the counterclaim; (3) dissolution of the preliminary injunction staying the foreclosure; and (4) the costs of the action.

On 4 December 2003, defendant Christina Cerwin filed a motion for summary judgment, asking the court to: (1) dismiss all claims alleged in plaintiffs' amended complaint; and (2) grant the relief demanded in her counterclaim. Plaintiffs filed a response to the motion, and on 15 December 2003, Superior Court Judge Ken Titus ("Judge Titus") heard defendants' motion for summary judgment. By order entered 19 February 2004, Judge Titus denied the motion, except as to plaintiffs' claim for unfair and deceptive trade practices, for which the court neither granted nor denied summary judgment.

On 21 January 2005, plaintiffs filed a motion for summary judgment, and on 28 January 2005, defendants filed a response to the motion. On 31 January 2005, Superior Court Judge Narley Cashwell ("Judge Cashwell") heard the motion, and on 3 March 2005, Judge Cashwell entered an order: (1) granting judgment for plaintiffs with respect to their request for a declaratory judgment determining the status of the Deal Note and Deal Deed; (2) granting judgment for plaintiffs with respect to their request for a temporary restraining order, preliminary injunction, and permanent injunction staying the foreclosure of the Deal Deed; (3) granting judgment against plaintiffs with respect to their claim that defendants falsely represented the debt; (4) granting judgment against plaintiffs with respect to their claim for unfair and deceptive trade practices; (5) reserving judgment on plaintiffs' demand for a civil penalty and attorneys' fees for defendants' failure to cancel the Deal Note and Deal Deed; (6) reserving judgment on plaintiffs' demand for a civil penalty against defendants for their failure to cancel the Deal Note and Deal Deed; and (7) granting judgment against defendant Christina Cerwin on her counterclaim.

On 21 April 2005, plaintiffs filed a motion to tax costs to the Cerwins, and by order entered 1 July 2005, Judge Cashwell ordered that: (1) plaintiffs recover from defendant Christina Cerwin $6,684.90 for the expenses incurred in defending the foreclosure proceedings;[1] (2) plaintiffs recover from defendant Christina Cerwin $25,200.00 for refusing to cancel the Deal Deed, or, in the alternative, as sanctions for failure to admit pursuant to Rule 37(c) of the Rules of Civil Procedure; and (3) both the Cails and Deal recover from defendant Christina Cerwin a civil penalty of $500.00 pursuant to North Carolina General Statutes, section 45-36.3. Thereafter, defendants filed notice

1. Although defendants contend in their brief that an alternative basis for the $6,684.90 award was failure to admit pursuant to Rule 37(c) of the Rules of Civil Procedure, there is no such finding or conclusion in the order.

of appeal from Judge Titus' order denying their motion for summary judgment, Judge Cashwell's order granting summary judgment in part to plaintiffs, and Judge Cashwell's order taxing costs to defendant Christina Cerwin.

On appeal, defendants contend that the trial court erred by: (1) denying defendant Christina Cerwin's motion for summary judgment; (2) ordering defendant Christina Cerwin to pay attorneys' fees and expenses pursuant to Rule 37(c) of the North Carolina Rules of Civil Procedure; (3) assessing defendant Christina Cerwin with costs that are not listed in North Carolina General Statutes, section 7A-305; and (4) assessing defendant Christina Cerwin with attorneys' fees, costs, and civil penalties pursuant to North Carolina General Statutes, section 45-36.3.

Preliminarily, we must address the relationship between Judge Titus' order on defendant Christina Cerwin's motion for summary judgment and Judge Cashwell's subsequent order on plaintiffs' motion for summary judgment. Although not raised by the parties, the issue relates to jurisdiction, and jurisdictional issues " 'can be raised at any time, even for the first time on appeal and even by a court *sua sponte*.' " *Brown v. Brown*, 171 N.C. App. 358, 362, 615 S.E.2d 39, 41 (2005) (quoting *Hedgepeth v. N.C. Div. of Servs. for the Blind*, 142 N.C. App. 338, 341, 543 S.E.2d 169, 171 (2001)).

It is well-established "that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). Although an exception has been established for orders that do not resolve an issue but direct some further proceeding prior to a final ruling, "when the [trial] judge rules as a matter of law, not acting in his discretion, the ruling finally determines the rights of the parties unless reversed upon appellate review." *Carr v. Great Lakes Carbon Corp.*, 49 N.C. App. 631, 633, 272 S.E.2d 374, 376 (1980), *disc. rev. denied*, 302 N.C. 217, 276 S.E.2d 914 (1981).

In the context of summary judgment, this Court has held that "[i]n the granting or denial of a motion for summary judgment, the court is ruling as a matter of law . . . Such a ruling is determinative as to the issue presented." *Id.* (internal citations omitted). Thus, although "[t]here may be more than one motion for summary judgment in a

lawsuit, . . . *the second motion will be appropriate only if it presents legal issues that are different from those raised in the earlier motion.*" *Huffaker v. Holley*, 111 N.C. App. 914, 915, 433 S.E.2d 474, 475 (1993) (emphasis added) (internal citations omitted).[2] Additionally, it is immaterial whether a different party brings the second motion for summary judgment, *see*, *e.g.*, *Furr v. Carmichael*, 82 N.C. App. 634, 637, 347 S.E.2d 481, 483-84 (1986), because, as this Court has explained,

> [Rule] 56 [of the North Carolina Rules of Civil Procedure] contemplate[s] a single hearing on a motion for summary judgment involving the same case on the same legal issues. Rule 56(c) provides that judgment shall be rendered if pleadings and other supporting materials show that there is no genuine issue as to any material fact and *that any party is entitled to judgment as a matter of law*. Rule 56(f) permits the opposing party to move for additional time to obtain affidavits or complete discovery essential to justify his opposition. . . . Generally, motions for summary judgment should not be decided until all parties are prepared to present their contentions on all the issues raised and determinable under Rule 56.

Am. Travel Corp. v. Cent. Carolina Bank & Trust Co., 57 N.C. App. 437, 441, 291 S.E.2d 892, 895 (emphasis in original) (internal citations and alteration omitted), *disc. rev. denied*, 306 N.C. 555, 294 S.E.2d 369 (1982). In sum, "where one judge denies a motion for summary judgment, another judge may not reconsider . . . and grant summary judgment on the same issue." *Whitley's Elec. Serv., Inc. v. Walston*, 105 N.C. App. 609, 611, 414 S.E.2d 47, 48 (1992).

In the case *sub judice*, defendant Christina Cerwin filed a motion for summary judgment on 4 December 2003, alleging that there was no genuine issue as to any material fact and requesting that the trial court grant judgment: (1) against plaintiffs on all of the claims alleged in their complaint; and (2) for defendant Christina Cerwin on her counterclaim. At the hearing on the motion, defense counsel contended that there were four issues: (1) "is Christina Cerwin a holder in due course of the . . . Deal note" pursuant to the Uniform

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2. *Compare Fox v. Green*, 161 N.C. App. 460, 462-63, 588 S.E.2d 899, 902 (2003) (different issues), *with Hastings v. Seegars Fence Co.*, 128 N.C. App. 166, 169, 493 S.E.2d 782, 784 (1997) (same issues). *See also* Thomas L. Fowler & Thomas P. Davis, *Reconsideration of Interlocutory Orders: A Critical Reassessment of* Calloway v. Ford Motor Co. *and Whether One Judge May Overrule Another*, 78 N.C. L. Rev. 1797, 1856 n.244 (2000).

Commercial Code ("UCC") as codified in North Carolina; (2) "on May 24th, 2000, when the check was delivered to Canusa to pay the Deal note, did Mr. Deal have constructive notice that Christina Cerwin was the holder of the Deal note"; (3) did Deal's 24 May 2000 payment to Canusa discharge his obligation on the Deal Note; and (4) "what is the balance due and payable on the Deal note." Counsel for plaintiffs, on the other hand, contended that: (1) "[t]he big question in this case is agency," as opposed to the applicability of the UCC provisions governing negotiable instruments; and (2) "[i]t is a case for the jury, if it is not a case for summary judgment for [plaintiffs]."

After hearing argument from the parties, Judge Titus stated, "I am not going to grant summary judgment because there is a significant agency issue here. The extent of the agency is really the question. . . . *This is a question of fact that is to be determined by the jury.*" (Emphasis added). Judge Titus, however, expressly reserved ruling on plaintiffs' fifth claim for relief for unfair and deceptive trade practices because he did not believe there had been adequate time for discovery:

> What I will do is not rule on the unfair and deceptive trade practices claim in terms of summary judgment. Leave that outstanding because I think it is appropriate for that to be heard prior to a jury trial. It will confuse everyone if that goes forward and if there are no facts that are sufficient to push it forward at that point.

Therefore, on 27 February 2004, Judge Titus entered an order agreeing with plaintiffs' contention that "[i]t is a case for the jury" but disagreeing with plaintiffs' contention that summary judgment should be entered in favor of plaintiffs. The trial court's order denied defendant Christina Cerwin's motion for summary judgment except as to the Fifth Claim for Relief, stating, "[T]he Court[] neither grants nor denies the Motion for Summary Judgment as to the Fifth Claim for Relief."

Approximately one year later, on 21 January 2005, plaintiffs filed a motion for summary judgment, and Judge Cashwell heard the motion on 31 January 2005. Although additional evidence was before the court[3]—particularly with respect to the alleged agency relation-

3. The evidence before Judge Titus consisted of seven affidavits, four exhibits, the transcripts from two related criminal matters, and various discovery documents. The evidence before Judge Cashwell consisted of the evidence before Judge Titus plus twelve additional affidavits, transcripts from six depositions, a bench brief submitted by defendant Christina Cerwin, and additional discovery documents. In *Carr*, 49 N.C.

ship between Canusa and the Cerwins—the legal issues were the same as those at issue in defendant Christina Cerwin's motion. As this Court has explained, "[t]he presentation of a new legal issue is distinguishable from the presentation of additional evidence," *Fox*, 161 N.C. App. at 463, 588 S.E.2d at 902, and only when the legal issues differ between the first motion for summary judgment and a subsequent motion may a trial court hear and rule on the subsequent motion. *See Carr*, 49 N.C. App. at 634, 272 S.E.2d at 377. Before Judge Cashwell, the key legal issues once again were agency—both apparent and actual—and the applicability of the UCC. As pointed out by counsel for plaintiffs, "[i]t may be a complex factual case, but the legal issue is a simple one . . . . It's just a legal question on agency, on the UCC point and the assignment point." On 3 March 2005, Judge Cashwell entered an order: (1) granting judgment for plaintiffs with respect to their first and second claims for relief; (2) granting judgment against plaintiffs with respect to their fourth and fifth claims for relief; (3) granting judgment against defendant Christina Cerwin with respect to her counterclaim; and (4) reserving judgment with respect to plaintiffs' third and sixth claims for relief. As such, Judge Cashwell's order overrules Judge Titus' order in several respects, and as Judge Cashwell had no jurisdiction to overrule Judge Titus on the same legal issues, Judge Cashwell's order must be vacated to the extent that it contradicts Judge Titus' earlier order. *See Shiloh Methodist Church v. Keever Heating & Cooling Co.*, 127 N.C. App. 619, 622 n.1, 492 S.E.2d 380, 382 (1997); *see also Furr*, 82 N.C. App. at 637, 347 S.E.2d at 483-84.

[1] First, Judge Titus denied defendant Christina Cerwin's motion for summary judgment on plaintiffs' first and second claims for relief, thereby concluding as a matter of law that there was a genuine issue of material fact. Therefore, Judge Cashwell was without jurisdiction to grant summary judgment in favor of plaintiffs on those same claims for relief and to conclude that there was no genuine issue of material fact. Similarly, Judge Titus denied defendant Christina Cerwin's motion with respect to plaintiffs' fourth claim for relief, but Judge Cashwell granted summary judgment against plaintiffs on their fourth claim for relief. In doing so, Judge Cashwell effectively overruled Judge Titus' ruling concerning the existence of a genuine issue of

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App. 631, 272 S.E.2d 374, the second trial judge was able to consider fourteen additional depositions and seven additional affidavits, but this Court held that the additional evidence did not change the fact that "the *legal* issue raised by the second motion was identical to the *legal* issue on the first motion." *Carr*, 49 N.C. App. at 634, 272 S.E.2d at 377 (emphases added).

material fact. With respect to plaintiffs' third and sixth claims for relief, Judge Titus denied defendant Christina Cerwin's motion for summary judgment, but Judge Cashwell reserved ruling on those claims for relief. By reserving ruling, Judge Cashwell effectively rescinded Judge Titus' denial of summary judgment. Finally, on the counterclaim, Judge Titus denied summary judgment, but Judge Cashwell granted summary judgment against defendant Christina Cerwin, thereby overruling Judge Titus' conclusion that there remained a genuine issue of material fact.

The only portion of Judge Cashwell's order that does not overrule Judge Titus' order is with respect to plaintiffs' fifth claim for relief. Judge Titus neither granted nor denied the motion for summary judgment, and thus, it was permissible for Judge Cashwell to grant summary judgment against plaintiffs on that issue. *See Carr*, 49 N.C. App. at 633, 272 S.E.2d at 376 (holding that a second trial judge may modify a prior order that does not determine the issue). However, as plaintiffs did not cross-appeal from this portion of Judge Cashwell's order, this issue is not before this Court. *See* N.C. R. App. P. 10(a) (2006).

Accordingly, we vacate the trial court's order of 3 March 2005 to the extent that it overrules the 27 February 2004 order with respect to plaintiffs' first, second, third, fourth, and sixth claims for relief and defendant Christina Cerwin's counterclaim.

[2] By vacating Judge Cashwell's order to the extent it overrules Judge Titus' order, we effectively are reinstating Judge Titus' order, from which defendants also have appealed. Although defendants appeal from and assign error to Judge Titus' order denying defendant Christina Cerwin's motion for summary judgment, it is well-settled that "[t]he denial of a motion for summary judgment is interlocutory and not immediately appealable unless it affects a substantial right." *Williams v. Allen*, 182 N.C. App. 121, 127, 641 S.E.2d 391, 395 (2007) (internal quotation marks and citations omitted). In the section of their brief stating the grounds for appellate review, defendants contend they are appealing "the entry of interlocutory orders affecting substantial rights." Defendants, however, fail to articulate or argue any substantial right affected by the denial of defendant Christina Cerwin's motion for summary judgment and by the trial court's permitting the matter to proceed to the jury. As this Court has held,

> [i]t is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory

> order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). Accordingly, we dismiss this portion of defendants' appeal as interlocutory.

[3] Finally, defendants appeal from Judge Cashwell's order taxing defendants with costs and attorneys' fees. In the order, the trial court ordered that: (1) plaintiffs shall recover $6,684.90 from defendant Christina Cerwin for expenses incurred in defending against the foreclosure proceeding filed by defendant Christina Cerwin; (2) plaintiffs shall recover $25,200.00 from defendant Christina Cerwin for refusing to cancel the Deal Deed or, in the alternative, as a sanction pursuant to Rule 37(c) of the Rules of Civil Procedure; (3) the Cails shall recover from defendant Christina Cerwin a civil penalty of $500.00 pursuant to North Carolina General Statutes, section 45-36.3; and (4) Deal shall recover from defendant Christina Cerwin a civil penalty of $500.00 pursuant to section 45-36.3.

It is well-established that " 'costs in this State, are entirely creatures of legislation, and without this they do not exist.' " *Charlotte v. McNeely*, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972) (quoting *Clerk's Office v. Comm'rs*, 121 N.C. 29, 30, 27 S.E. 1003 (1897)) (alteration omitted). As this Court has noted, "[s]ince costs may be taxed solely on the basis of statutory authority, it follows *a fortiori* that courts have no power to adjudge costs 'against anyone on mere equitable or moral grounds.' " *Dep't of Transp. v. Charlotte Area Manufactured Hous., Inc.*, 160 N.C. App. 461, 465, 586 S.E.2d 780, 782-83 (2003) (quoting *McNeely*, 281 N.C. at 691, 190 S.E.2d at 185).

In the instant case, the order taxing costs includes the general statement that the order was allowed "pursuant to [North Carolina] General Statutes[,] [sections] 45-36.3, 6.1 *et seq.*, [and] 7A-1 *et seq.*[,] and Rule 37(c) of the Rules of Civil Procedure." With respect to the award of $6,684.00, however, the order provides no specific statutory basis for the award for "expenses which were necessary and customary in defense of the [foreclosure] action." There is no provision in section 7A-1 *et seq.* that would support such an award; section 45-36.3, dealing with the cancellation of deeds of trust, and Rule 37(c), providing for sanctions for discovery violations, also are inapplicable to this particular award. Rather, the award of $6,684.00 ap-

pears to have been based upon North Carolina General Statutes, section 6.1 and the notion that plaintiffs were the prevailing parties as a result of Judge Cashwell's order granting summary judgment to plaintiffs on their second claim for relief—*i.e.*, an injunction against the foreclosure of the Deal Deed.

North Carolina General Statutes, section 6.1 establishes the general rule that costs may be allowed to the party in favor of whom judgment has been awarded. *See* N.C. Gen. Stat. § 6.1 (2005); *see also Williams v. Hughes*, 139 N.C. 17, 51 S.E. 790 (1905) (noting the "familiar rule, that costs follow the judgment, and are to be taxed against the defeated party."). As Judge Cashwell lacked jurisdiction to overrule Judge Titus' denial of summary judgment and to award summary judgment to plaintiffs on their second claim for relief, a valid judgment has not been awarded to plaintiffs and plaintiffs cannot be considered the prevailing parties. Thus, there does not appear to be a statutory basis for the award of $6,684.00, and accordingly, this portion of the order taxing costs must be vacated. As such, we need not reach defendants' argument that certain costs assessed against defendants for plaintiffs' defense of the foreclosure action were not authorized by North Carolina General Statutes, section 7A-305(d).

Next, the trial court specifically based its separate awards of $500.00 to the Cails and to Deal on defendant Christina Cerwin's failure to cancel the Deal Deed pursuant to North Carolina General Statutes, section 45-36.3. *See* N.C. Gen. Stat. § 45-36.3(b) (2005) (providing a civil penalty for failing to cancel a deed of trust pursuant to section 45-36.3(a)). In the first summary judgment order, Judge Titus denied defendant Christina Cerwin's motion for summary judgment with respect to plaintiffs' sixth claim for relief—*i.e.*, a civil penalty of up to $1,000.00 for defendants' failure to cancel the Deal Deed securing the Deal Note pursuant to section 45-36.3. In the second summary judgment order, Judge Cashwell reserved judgment on this issue, effectively overruling Judge Titus. As this portion of Judge Cashwell's summary judgment order must be vacated and as Judge Titus ruled that defendants' alleged violation of section 45-36.3 was an issue for the jury, Judge Cashwell erred in awarding a civil penalty to the Cails and Deal for defendants' failure to cancel the Deal Deed. Accordingly, the awards of $500.00 to the Cails and Deal must be vacated.

Similarly, one of the alternate bases for the trial court's order awarding $25,200.00 to plaintiffs was North Carolina General Statutes, section 45-36.3. In their third claim for relief, plaintiffs

sought attorneys' fees for defendants' failure to cancel the Deal Note and Deal Deed pursuant to section 45-36.3. *See* N.C. Gen. Stat. § 45-36.3(b) (2005). Judge Titus denied summary judgment on plaintiffs' third claim for relief and left the issue for the jury, but in the second summary judgment order, Judge Cashwell reserved judgment on this third claim for relief, contradicting Judge Titus' order. As we must vacate this portion of Judge Cashwell's summary judgment order, section 45-36.3 cannot support the court's award of $25,200.00 to plaintiffs.

[4] The only portion of the order taxing costs that is independent of Judge Cashwell's erroneous summary judgment order is the sanction pursuant to Rule 37(c) of the North Carolina Rules of Civil Procedure. Defendants contend that the trial court abused its discretion with respect to Rule 37(c). We disagree.

Pursuant to Rule 37(c) of the Rules of Civil Procedure,

> [i]f a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees.

N.C. Gen. Stat. § 1A-1, Rule 37(c) (2005). The statute provides four exceptions by which the trial court may decline to award expenses pursuant to Rule 37(c): "(i) the request was held objectionable pursuant to Rule 36(a), or (ii) the admission sought was of no substantial importance, or (iii) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (iv) there was other good reason for the failure to admit." *Id.* Our Supreme Court has held that the trial court need not make findings of fact with respect to the four exceptions to Rule 37(c), and where neither party made such a request of the trial judge, Rule 52 provides that it is presumed that the court, on proper evidence, found facts to support its judgment. *See Watkins v. Hellings*, 321 N.C. 78, 82, 361 S.E.2d 568, 571 (1987).

It is well-established that " '[t]he choice of sanctions under Rule 37 is within the trial court's discretion and will not be overturned on appeal absent a showing of abuse of that discretion.' " *Oakes v. Wooten*, 173 N.C. App. 506, 516, 620 S.E.2d 39, 46 (2005) (quoting *Brooks v. Giesey*, 106 N.C. App. 586, 592, 418 S.E.2d 236, 239,

disc. rev. denied, 332 N.C. 664, 424 S.E.2d 904 (1992)). Furthermore, " '[t]he party wishing to avoid court-imposed sanctions for non-compliance with discovery requests bears the burden of showing the non-compliance was justified.' " *Id.* (quoting *Williams v. N.C. Dep't of Env't & Natural Res.*, 166 N.C. App. 86, 92, 601 S.E.2d 231, 235 (2004), *disc. rev. denied*, 359 N.C. 643, 614 S.E.2d 925 (2005)).

In the case *sub judice*, plaintiffs filed a motion on 21 April 2005 to tax costs to defendants. Although the record contains no written response by defendants to plaintiffs' motion, defendants argued during the hearing on the motion that they properly responded to each request for admissions. In their brief to this Court, defendants contend that their access to requested information was limited as a result of Canusa being placed in receivership and Lancaster's imprisonment. However, during the hearing, defendants failed to request that the trial court make findings with respect to the four exceptions enumerated in Rule 37(c). As such, it is presumed that the court, on proper evidence, found facts to support its conclusions and order. *See Watkins*, 321 N.C. at 82, 361 S.E.2d at 571. Further, in his order, Judge Cashwell listed the specific requests for admissions that defendants improperly denied, and noted that plaintiffs ultimately proved those matters. *See Brooks*, 106 N.C. App. at 593, 418 S.E.2d at 239-40. Finally, in his order, Judge Cashwell provided an itemized list of the attorneys' fees attributable to the failure to admit, and concluded that the attorneys' fees were reasonable. *See id.* at 593, 418 S.E.2d at 240. Accordingly, the trial court did not abuse its discretion in taxing defendant Christina Cerwin with costs of $25,200.00 pursuant to Rule 37(c), and defendants assignment of error, therefore, is overruled.

Vacated in part; Dismissed in part; and Affirmed in part.

Judges WYNN and STEELMAN concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER BOYCE LOFTIS

No. COA06-728

(Filed 7 August 2007)

1. Constitutional Law— right to remain silent—comment defendant did not want to make statement after Miranda rights

The trial court did not commit plain error in a drug trafficking case by allowing an officer to testify that after she read defendant his Miranda rights, defendant did not want to make any statements, because even assuming arguendo that the admission of this testimony was error in the present case, it did not amount to plain error when: (1) the State made only one brief reference to defendant's post-arrest silence; (2) the State did not reinforce this improper evidence in its closing argument; (3) the reference to defendant's post-arrest silence was not a direct attack on defendant's version of events, but was merely a passing reference that was likely disregarded by the jury; (4) the State did not offer evidence that defendant invoked his right to remain silent in the face of an accusation, and thus invocation of the right could not have been viewed as a confession of guilt; and (5) absent admission of the officer's testimony, the jury would not have reached a different verdict.

2. Drugs— trafficking—motions to dismiss—sufficiency of evidence—constructive possession

The trial court did not err by denying defendant's motions to dismiss drug trafficking charges because the State sufficiently provided incriminating circumstances to establish that defendant had constructive possession of methamphetamine and precursor chemicals including that (1) defendant was found inside a locked shed with the methamphetamine and precursor chemicals, a jar of unknown liquid containing methamphetamine was on a heater that was still warm to the touch, and a letter was found in the shed that was addressed to defendant containing confidential tax information; and (2) defendant was the only person seen entering and leaving the shed that evening, and there was no evidence that anyone else's belongings were inside the shed.

3. Evidence— involvement of another person—defendant's address at time of arrest

The trial court did not err in a drug trafficking case by excluding evidence of law enforcement's suspicions of the involvement of another person and evidence of defendant's address at the time of his arrest, because: (1) although defendant contends excluding evidence of the other person's prior use of methamphetamine and her prior violation of probation violated his constitutional right to present a defense, this argument is waived based on defendant's failure to make it at trial; (2) even if this assignment of error had been preserved, the evidence of the other person's involvement did not disprove any of the evidence against defendant; (3) the evidence of the other person's probation violation had not yet been adjudicated at the time of defendant's trial; and (4) evidence that the address on the envelope introduced by the State was different from defendant's address at the time of his arrest only proved defendant had moved between January 2004 and April 2004.

4. Constitutional Law— effective assistance of counsel—dismissal of claim without prejudice

Defendant's claim that he received ineffective assistance of counsel is dismissed without prejudice to defendant's right to raise this claim in a post-conviction motion for appropriate relief because there was insufficient information in the record regarding trial counsel's strategy.

Appeal by Defendant from judgments dated 27 September 2005 by Judge Ronald K. Payne in Superior Court, McDowell County. Heard in the Court of Appeals 10 April 2007.

Attorney General Roy Cooper, by Special Counsel to Attorney General Jay J. Chaudhuri, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for Defendant-Appellant.

McGEE, Judge.

Christopher Boyce Loftis (Defendant) was indicted on 17 May 2005 on charges of trafficking in more than 400 grams of methamphetamine by possession; trafficking in more than 400 grams of methamphetamine by manufacture; possession of a precursor chemi-

cal, pseudoephedrine, with intent to manufacture methamphetamine; possession of a precursor chemical, iodine, with intent to manufacture methamphetamine; and possession of a precursor chemical, red phosphorus, with intent to manufacture methamphetamine.

At trial, the State presented evidence that shortly before midnight on 3 April 2004, Max Boyd (Mr. Boyd) noticed that a light was on in a shed on his property. The shed was located near a house where Mr. Boyd's daughter, Elizabeth Boyd Brinkley (Ms. Brinkley) lived. The house was owned by Mr. Boyd. When Mr. Boyd saw movement in the shed, he tried to open the door, but the door was locked from the inside with a chain. Mr. Boyd yelled for the person inside the shed to open the door. A person opened the door and stepped out and Mr. Boyd recognized that person as Defendant. Mr. Boyd told Defendant to leave, and Defendant left. Mr. Boyd then looked inside the shed and saw objects that "looked like something that wasn't supposed to be in there" and immediately used his cell phone to contact law enforcement. Mr. Boyd further testified that on previous occasions he had seen Defendant on his property when Defendant visited one of Mr. Boyd's tenants.

Lieutenant Jackie Turner, Jr. (Lieutenant Turner) of the McDowell County Sheriff's Office testified that he responded to a call at Mr. Boyd's property late on the evening of 3 April 2004. Lieutenant Turner stated that he met with Mr. Boyd, who showed him the shed on his property. Lieutenant Turner looked inside the shed and saw what he believed to be a methamphetamine lab. Lieutenant Turner then developed a log to ensure that an officer remained by the site until agents arrived from the North Carolina State Bureau of Investigation (SBI).

SBI agents searched the shed at approximately noon on 5 April 2004. The agents found many items commonly used in the manufacture of methamphetamine, including iodine, pseudoephedrine, and red phosphorus. They also found two bottles containing a total of 2,090 grams of liquid later determined to contain methamphetamine. The agents also discovered a jar containing an unknown liquid on a heater that was still warm to the touch, and other materials commonly used in the manufacturing of methamphetamine.

Shannon Smith, a narcotics investigator for the McDowell County Sheriff's Office (Officer Smith), testified that she did not conduct a fingerprint examination of the shed because it was difficult to obtain fingerprints from some of the materials. Officer Smith admitted that she could have requested the SBI to perform a fingerprint examina-

tion of the shed and its contents, but did not do so. Officer Smith had previously investigated Mr. Boyd's property, and she believed Mr. Boyd's daughter, Ms. Brinkley, to be a suspect, though Ms. Brinkley was not charged. Officer Smith further testified as follows:

Q. After the crime scene was processed on the 5th, what was your next involvement with this case?

A. Next involvement was, I guess, probably several months later. I was contacted by one of the deputies there, they had [Defendant] in custody. And I came back to the Sheriff's Office in an attempt to do an interview.

Q. And did you read [Defendant] his rights?

A. Yes, I did.

Q. And did [Defendant] indicate to you that he understood each of those rights?

A. Yes, he did.

. . . .

Q. And did [Defendant] make any further statements at that point?

A. No, he did not want to make any statements.

Q. Did you have any other involvement with the case at that point?

A. No, sir.

Officer Smith identified a letter found inside the shed. The envelope was addressed to Defendant at 6276 Buck Creek Road in Marion, North Carolina; not to Mr. Boyd's address, nor to the address where Defendant was arrested. The envelope was postmarked 20 January 2004 and contained a 2003 tax document of Defendant's from the Employment Security Commission.

At the close of the State's evidence, Defendant moved to dismiss all charges, and the trial court denied the motion. Defendant did not present evidence and again moved to dismiss the charges. The trial court again denied Defendant's motion. The jury found Defendant guilty of all charges. The trial court sentenced Defendant to a term of 225 months to 279 months in prison on the two trafficking charges. The trial court suspended the sentences on the remaining charges

and sentenced Defendant to thirty-six months of supervised probation to begin at the expiration of Defendant's prison sentence. Defendant appeals.

I.

[1] Defendant argues the trial court committed plain error by allowing Officer Smith to testify that after she read Defendant his *Miranda* rights, Defendant "did not want to make any statements." Defendant argues the evidence that Defendant invoked his constitutional right to remain silent constituted plain error because it had a probable impact on the jury's finding of guilt. We disagree.

In a criminal proceeding, appellate review of questions not objected to at trial is limited to plain error. N.C.R. App. P. 10(c)(4). In evaluating whether or not "an error by the trial court amounts to 'plain error,' the appellate court must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (citing *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983)).

"We have consistently held that the State may not introduce evidence that a defendant exercised his fifth amendment right to remain silent." *State v. Ladd*, 308 N.C. 272, 283, 302 S.E.2d 164, 171 (1983). However, even assuming *arguendo* that the admission of this testimony was error in the present case, we hold that it did not amount to plain error.

In support of his argument that the admission of this evidence amounted to plain error, Defendant cites *State v. Hoyle*, 325 N.C. 232, 382 S.E.2d 752 (1989), and *State v. Castor*, 285 N.C. 286, 204 S.E.2d 848 (1974). However, these cases are distinguishable.

In *Hoyle*, police advised the defendant of his *Miranda* rights, and the defendant answered some of their questions. *Hoyle*, 325 N.C. at 234, 382 S.E.2d at 753. However, when police asked the defendant what occurred when the victim followed the defendant back to the defendant's truck, the defendant invoked his constitutional right not to answer. *Id.* At trial, the defendant testified that after the victim followed him back to the defendant's truck, the victim attacked him, and after a struggle for a gun, the gun discharged, killing the victim. *Id.* The State attempted to impeach this theory by making three references to the defendant's post-arrest silence. *Id.* at 235-36, 382 S.E.2d at 753-54. The State first referenced the defendant's post-arrest silence during direct examination of a police detective;

the State next referenced the defendant's post-arrest silence during cross-examination of the defendant; and the State also referenced the defendant's silence during its closing argument. *Id.* The defendant timely objected to the State's questions at trial. *Id.*

The Court recognized that because there was no eyewitness to the shooting other than the defendant, the defendant's defense "depended on the jury's acceptance of his version of the event." *Id.* at 237, 382 S.E.2d at 754. Therefore, the Court held that the State could not demonstrate that it was harmless error to allow the State to attack the defendant's version of events by improper evidence, which the State reinforced by jury argument. *Id.*

In the present case, unlike in *Hoyle*, the State made only one brief reference to Defendant's post-arrest silence. Furthermore, the State did not reinforce this improper evidence in its closing argument. Moreover, the reference to Defendant's post-arrest silence was not a direct attack on Defendant's version of events, as was the case in *Hoyle*; it was merely a passing reference that was likely disregarded by the jury.

Defendant also cites *Castor* in his argument that the admission of Officer Smith's testimony constituted plain error. In *Castor*, an SBI agent testified over the defendant's objection that a witness made a statement in the defendant's presence, accusing the defendant of the crime charged, and the defendant did not deny or object to the statement. *Castor*, 285 N.C. at 289, 204 S.E.2d at 851. A jury instruction also allowed the jury to "consider the defendant's silence together with all other facts and circumstances in this case in determining the defendant's guilt or innocence." *Id.*

In *Castor*, the Court held that the erroneous admission of this testimony was prejudicial, noting that if true, the statements "were sufficient to establish that [the] defendant was the person who committed the crime charged in the indictment." *Id.* at 292, 204 S.E.2d at 853. The Court further recognized that "[i]f considered an admission of the truthfulness of these statements, [the] defendant's silence would be the equivalent of a confession of guilt." *Id.* "Under [the] circumstances, it seem[ed] probable the challenged evidence contributed substantially to the conviction of [the] defendant." *Id.* at 292-93, 204 S.E.2d at 853.

Officer Smith's testimony in the case before us was not of the same nature as the testimony in *Castor*. In *Castor*, the defendant

remained silent in the presence of a witness who implicated the defendant in the crime with which the defendant was charged. *Id.* at 289, 204 S.E.2d at 851. Moreover, if the jury had accepted the defendant's silence as an admission, the defendant's silence would have been the equivalent of a confession of guilt. *Id.* at 292, 204 S.E.2d at 853. In the present case, the State did not offer evidence that Defendant invoked his right to remain silent in the face of an accusation. Accordingly, the invocation of Defendant's right to remain silent could not have been viewed as a confession of guilt. We further note that in both *Hoyle* and *Castor*, the defendants made timely objections at trial to the improper evidence. Thus, they were not held to the plain error standard of review. Applying the plain error standard to the present case, we cannot hold that absent the admission of Officer Smith's testimony, "the jury probably would have reached a different verdict." *Walker*, 316 N.C. at 39, 340 S.E.2d at 83. This assignment of error is overruled.

II.

[2] In his next assignment of error, Defendant argues the trial court erred by denying his motions to dismiss. Specifically, Defendant argues the State failed to prove that he had constructive possession of the methamphetamine or precursor chemicals. We disagree.

When a defendant makes a motion to dismiss, "the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980).

> 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; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

Id. at 99, 261 S.E.2d at 117. However, "[i]f 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." *Id.* at 98, 261 S.E.2d at 117.

"[C]onviction of drug trafficking requires proof that the defendant (1) knowingly (2) possessed or transported a given controlled substance, and also that (3) the amount transported was greater than the statutory threshold amount." *State v. Shelman*, 159 N.C. App. 300, 307, 584 S.E.2d 88, 94, *disc. review denied*, 357 N.C. 581, 589 S.E.2d 363 (2003). To prove that a defendant possessed contraband materials, the State must prove beyond a reasonable doubt that the defendant had either actual or constructive possession of the materials. *State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986).

> A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use. Constructive possession, on the other hand, exists when the defendant, while not having actual possession, . . . has the intent and capability to maintain control and dominion over the narcotics. When the defendant does not have exclusive possession of the location where the drugs were found, the State must make a showing of other incriminating circumstances in order to establish constructive possession.

State v. Boyd, 177 N.C. App. 165, 175, 628 S.E.2d 796, 805 (2006) (citations and quotations omitted).

In the present case, the State relied on the doctrine of constructive possession. Defendant argues that he did not have constructive possession of the methamphetamine or the precursor chemicals. Defendant contends that he was only briefly in the shed, and that he never had exclusive possession of the shed. Furthermore, Defendant did not flee when the owner of the shed approached. Defendant did not own the shed which was located only fifty feet from the house of the State's primary suspect, Ms. Brinkley. Lastly, Defendant points out that local law enforcement officers did not collect any fingerprints from the crime scene.

In the present case, the parties agree that Defendant did not have exclusive possession of the premises. Without exclusive possession, the State had to prove the presence of other incriminating circumstances for constructive possession to be inferred. *See Boyd*, 177 N.C. App. at 175, 628 S.E.2d at 805. We hold that the State sufficiently proved other incriminating circumstances to establish that Defendant had constructive possession of methamphetamine and precursor chemicals.

The State presented evidence that Mr. Boyd found Defendant alone in the shed where the methamphetamine and precursor chemicals used in the manufacture of methamphetamine were located, with the door locked from the inside. Defendant left the premises only after being confronted by Mr. Boyd, the owner of the shed. Mr. Boyd testified that he recognized Defendant as a frequent visitor of a former tenant. The State's evidence also showed that SBI agents found the following materials in the shed: two bottles containing a total of 2,090 grams of liquid later determined to contain methamphetamine, along with iodine, pseudoephedrine, red phosphorus, and other materials commonly used in the manufacturing of methamphetamine. Investigators also found a jar of unknown liquid sitting on a heater that was on and warm to the touch. Moreover, investigators found in the shed an envelope addressed to Defendant that contained a 2003 tax document of Defendant's from the Employment Security Commission. Viewed in the light most favorable to the State, this is sufficient evidence of other incriminating circumstances necessary for inferring that Defendant had constructive possession of the methamphetamine and precursor chemicals.

Defendant cites *State v. Alcolatse*, 158 N.C. App. 485, 581 S.E.2d 807 (2003), *State v. McLaurin*, 320 N.C. 143, 357 S.E.2d 636 (1987), and *State v. Chavis*, 270 N.C. 306, 154 S.E.2d 340 (1967), in support of his argument that the State did not prove he had constructive possession of the materials. However, these cases are distinguishable.

In *Acolatse*, this Court reversed the defendant's convictions for possession with intent to sell and deliver cocaine and trafficking in cocaine by possession because the State failed to prove sufficient incriminating circumstances so as to create an inference of constructive possession. *Acolatse*, 158 N.C. App. at 490-91, 581 S.E.2d at 811. In *Acolatse*, the defendant, who had been driving with a revoked license, fled on foot from police officers when they approached. *Id.* at 486, 581 S.E.2d at 808-09. During the chase, a detective saw the defendant make a throwing motion towards some nearby bushes. *Id.* at 487, 581 S.E.2d at 809. The detectives found five bags of cocaine on the roof of a nearby detached garage, which was not located near the bushes. *Id.* The defendant did not reside in, or own, the property where the cocaine was found. *Id.* The defendant had $830.00 on his person. *Id.* This Court held the above evidence to be insufficient to establish the other incriminating circumstances necessary to establish an inference of constructive possession. *Id.* at 490, 581 S.E.2d at 811.

Acolatse differs from the instant case. None of the evidence in *Acolatse* directly connected the defendant to the specific location where the cocaine was found. In contrast, in the present case, Defendant was found inside the locked shed with the methamphetamine and precursor chemicals. Furthermore, a jar of unknown liquid was on a heater that was still warm to the touch. Finally, a letter was found in the shed that was addressed to Defendant and that contained confidential tax information. This evidence showed other incriminating circumstances necessary to infer constructive possession.

In *McLaurin*, the defendant was convicted of possession of drug paraphernalia that police found during a search of the defendant's house. *McLaurin*, 320 N.C. at 144-45, 357 S.E.2d at 637. Our Supreme Court held that the evidence indicating the defendant's control over the premises was "patently nonexclusive[.]" *Id.* at 146, 357 S.E.2d at 638. The Court based this holding on the fact that two other parties had been seen entering and leaving the premises that day. *Id.* Also, children's clothing and adult male clothing had been found in the closets and bureaus, indicating the defendant did not reside there alone. *Id.* The Court held this evidence to be insufficient to establish the other incriminating circumstances necessary to prove constructive possession. *Id.* at 147, 357 S.E.2d at 638-39.

McLaurin differs from the present case in that the State's evidence indicated that Defendant was the only person seen in the shed, and no one else entered the shed after the arrival of police. Unlike in *McLaurin*, Defendant was the only person seen entering and leaving the shed that evening, and there was no evidence that anyone else's belongings were found inside the shed.

In *Chavis*, police saw the defendant wearing a hat. *Chavis*, 270 N.C. at 307, 154 S.E.2d at 341. The defendant and his companion were later stopped by police, and the defendant was no longer wearing a hat, nor were any drugs found on the defendant. *Id.* at 308, 154 S.E.2d at 342. Police later returned to the area where the defendant had been stopped, and they found the hat the defendant had originally been seen wearing. *Id.* Eleven envelopes were found inside the hat containing a total of 27.01 grams of marijuana. *Id.* Our Supreme Court held that although "the evidence raise[d] a strong suspicion as to [the] defendant's guilt," it "[fell] short of being sufficient to support a finding that the marijuana found by the officers in and on a hat in the high grass was in the possession of [the] defendant when he was first observed and followed by the officers." *Id.* at 311, 154 S.E.2d at 344.

Chavis is distinguishable. In *Chavis*, another person was in close enough proximity to the defendant that the evidence did not rule out the possibility that the marijuana belonged to a third party. *Id.* at 310, 154 S.E.2d at 344. In the present case, there was no other person in the shed with Defendant. Defendant was found alone in the shed with the methamphetamine and precursor chemicals. Thus, *Chavis* is inapplicable.

For the above reasons, we hold that the State produced sufficient evidence of other incriminating circumstances to establish Defendant's constructive possession of the methamphetamine and precursor chemicals. We hold the trial court did not err by denying Defendant's motions to dismiss.

III.

[3] Defendant next argues the trial court erred by excluding evidence of law enforcement's suspicions of the involvement of another person, and evidence of Defendant's address at the time of his arrest. We disagree.

Defendant argues that excluding evidence of Ms. Brinkley's prior use of methamphetamine and her prior violation of probation violated Defendant's constitutional right to present a defense. However, N.C.R. App. P. 10(b)(1) 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." "This Court will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991). "It is well settled that an error, even one of constitutional magnitude, that [a] defendant does not bring to the trial court's attention is waived and will not be considered on appeal." *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 (2002), *cert. denied*, *Wiley v. North Carolina*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003).

At trial, Defendant did not argue that exclusion of this evidence violated his constitutional right to present a defense. Thus, this constitutional argument was not properly preserved at trial and is not properly before us.

Nevertheless, even had this assignment of error been properly preserved, the trial court did not err by excluding the evidence. "Few

rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302, 35 L. Ed. 2d 297, 312 (1973). "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense." *Washington v. Texas*, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 1023 (1967).

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2005). "Although a trial court's rulings on relevancy are not discretionary and we do not review them for an abuse of discretion, we give them great deference on appeal." *State v. Grant*, 178 N.C. App. 565, 573, 632 S.E.2d 258, 265 (2006), *disc. review denied*, 361 N.C. 223, 642 S.E.2d 712 (2007).

" 'The admissibility of evidence of the guilt of one other than the defendant is governed now by the general principle of relevancy [stated in Rule 401.]' " *State v. Israel*, 353 N.C. 211, 217, 539 S.E.2d 633, 637 (2000) (quoting *State v. Cotton*, 318 N.C. 663, 667, 351 S.E.2d 277, 280 (1987)).

> "Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. It must point directly to the guilt of the other party. Under Rule 401 such evidence must tend *both* to implicate another *and* be inconsistent with the guilt of the defendant."

Id. (quoting *Cotton*, 318 N.C. at 667, 351 S.E.2d at 279-80).

At trial, Defendant attempted to introduce evidence of Ms. Brinkley's prior use of methamphetamine and of a probation violation, but the trial court excluded this evidence. Defendant cites *Holmes v. South Carolina*, 547 U.S. 319, 164 L. Ed. 2d 503 (2006), in support of his argument that it was error to exclude the aforementioned evidence. However, *Holmes* is distinguishable.

In *Holmes*, the state trial and appellate courts had excluded evidence offered by the defendant indicating a third person committed the crimes. *Id.* at 323-24, 164 L. Ed. 2d at 508. The state courts had excluded the evidence based on a rule that " 'where there is strong evidence of [a defendant's] guilt, especially where there is strong

forensic evidence, the proffered evidence about a third party's alleged guilt [did] not raise a reasonable inference as to the [defendant's] own innocence.' " *Id.* at 324, 164 L. Ed. 2d at 508 (citation omitted). The United States Supreme Court reversed this conviction, holding that the state court rule was " 'arbitrary' in the sense that it [did] not rationally serve the end that the *Gregory* rule and other similar third-party guilt rules were designed to further." *Id.* at 331, 164 L. Ed. 2d at 513.

Unlike in *Holmes*, evidence of Ms. Brinkley's past involvement with methamphetamine was not inconsistent with Defendant's guilt and did not exculpate him in any way. Evidence of Ms. Brinkley's involvement did not disprove any of the evidence against Defendant. The weight of the evidence indicating that Defendant had constructive possession of the shed and its contents is in no way diminished by evidence of Ms. Brinkley's own involvement with methamphetamine.

The North Carolina rule is not "arbitrary" as South Carolina's rule in *Holmes* was held to be. As the Court acknowledged in *Holmes*, proferred evidence " 'may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial.' " *Holmes*, 547 U.S. at 327, 164 L. Ed. 2d at 510-11 (quoting 40A Am. Jur. 2d, Homicide § 286, pp. 136-38 (1999)).

Furthermore, in the present case, the evidence of Ms. Brinkley's probation violation had not yet been adjudicated at the time of Defendant's trial. As such, it was merely an allegation of her involvement with methamphetamine, and was not conclusive. Moreover, as we have already determined, the excluded evidence relating to Ms. Brinkley's prior involvement with methamphetamine was not inconsistent with Defendant's guilt. Therefore, we hold the trial court did not err by excluding this evidence.

Defendant also argues that it was error for the trial court to exclude evidence that he was arrested at 11 Locust Cove Road, a different address than appeared on the envelope introduced by the State. The trial court noted that evidence that the address on the envelope differed from Defendant's address at the time of his arrest only proved Defendant had moved between January 2004 and April 2004. We hold the trial court did not err by excluding this evidence as irrelevant.

IV.

[4] Defendant also argues that to the extent we determine the trial court did not commit plain error by allowing testimony regarding Defendant's post-arrest silence, "this matter should be remanded to the trial court for inquiry into the effectiveness of [trial] counsel's representation."

" '[Ineffective assistance of counsel] claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.' " *State v. Al-Bayyinah*, 359 N.C. 741, 752, 616 S.E.2d 500, 509 (2005) (quoting *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), *cert. denied*, *Fair v. North Carolina*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002) (citations omitted)). In the present case, we do not have sufficient information regarding trial counsel's strategy, and we therefore dismiss this issue without prejudice to Defendant's right to file a motion for appropriate relief. *See Al-Bayyinah*, 359 N.C. at 753, 616 S.E.2d at 509-10 (holding that "[t]rial counsel's strategy and the reasons therefor are not readily apparent from the record, and more information must be developed to determine [the issue]. Therefore, this issue is dismissed without prejudice to [the] defendant's right to raise this claim in a post-conviction motion for appropriate relief.").

No error.

Judges ELMORE and STEPHENS concur.

TINYA CHERNEY, PLAINTIFF v. NORTH CAROLINA ZOOLOGICAL PARK, DEFENDANT

No. COA06-1060

(Filed 7 August 2007)

1. Tort Claims Act— second opinion—writ of mandamus

The Industrial Commission's second decision and order denying plaintiff's claim for personal injuries under the Tort Claims Act was not improper even though plaintiff contends our Supreme Court ruled in her favor in 2005 and allowed her petition

for writ of mandamus in 2006, because: (1) at the time plaintiff submitted her brief to the Court of Appeals on 20 November 2006, plaintiff's writ of mandamus remained pending before our Supreme Court; and (2) on 14 December 2006, our Supreme Court denied plaintiff's petition for writ of mandamus and stated the mandate of its 5 May 2005 per curiam opinion was satisfied by the Commission's issuance of its new decision and order on 28 April 2006.

2. Premises Liability— duty of care—warning of hidden dangers

The Industrial Commission did not fail to apply a premises liability legal standard in an action seeking to recover damages for personal injuries under the Tort Claims Act based upon defendant State Zoo's alleged negligence in monitoring a ficus tree, because: (1) the duty to exercise reasonable care requires that the landowner not unnecessarily expose a lawful visitor to danger and give warning of hidden hazards of which the landowner has express or implied knowledge; and (2) plaintiff admits defendant's personnel at all times adequately cared for, monitored and managed the ficus, and met the applicable standard of care for doing so.

3. Tort Claims Act— premises liability—findings of fact—sufficiency of evidence

In a case under the Tort Claims Act in which the Industrial Commission denied plaintiff's claim for injuries received from a falling ficus tree at the State Zoo, the evidence supported findings by the Commission that cables supporting the tree were checked the day before the accident and no problems were recorded; the Zoo staff lacked sufficient notice that the ficus tree could present a hazard to the public; on the day of the accident the tree looked healthy and free from decay; there were no indications that the tree was diseased or under stress; and the tree had stood for more than ten years under the protocols then in effect.

Judge WYNN concurring in part and dissenting in part.

Appeal by plaintiff from decision and order entered 28 April 2006 by Commissioner Dianne C. Sellers for the North Carolina Industrial Commission. Heard in the Court of Appeals 22 May 2007.

Knott, Clark & Berger, L.L.P., by Michael W. Clark, Kenneth R. Murphy, III, and Joe Thomas Knott, III, for plaintiff-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General William H. Borden, for defendant-appellee.

TYSON, Judge.

Tinya Cherney ("plaintiff") appeals from the North Carolina Industrial Commission's ("the Commission") decision and order entered 28 April 2006, which denied her claim for damages from the North Carolina Zoological Park ("defendant"). We affirm.

I. Background

Plaintiff's claim for damages is before this Court for a second time. On 7 September 1999, plaintiff filed a claim to recover damages for personal injuries against defendant pursuant to the Tort Claims Act, N.C. Gen. Stat. § 143-291, *et seq*. Plaintiff's affidavit alleged:

> That the injury or property damage occurred in the following manner: [Plaintiff] was in the enclosed African Pavilion near the center when a large ficus tree fell hitting a palm tree. Both trees then fell on her pinning her to the floor of the walkway in the African Pavilion. The impact caused vertigo, broke her right femur, cracked three ribs, caused compression fractures to three vertebra (sic) and wrenched her knee. The injury occurred because the ficus tree which was indoors had been permitted to grow too large for its roots or alternatively had not been properly maintained to prevent it from becoming unsafe. The ficus tree was under the exclusive control of [defendant's] personnel and not subject to wind or any other natural force.

On 21 December 1999, defendant filed an answer denying plaintiff's allegations.

On 13 August 2001, Deputy Commissioner, Richard B. Ford, heard arguments and received evidence from both parties. On 30 October 2001, Deputy Commissioner Ford ordered defendant to pay plaintiff $500,000.00 in compensatory damages. Defendant appealed to the Full Commission.

On 29 April 2002, the matter came before the Full Commission for hearing. On 28 July 2003, a majority of the Commission reversed Deputy Commissioner Ford's recommended opinion and award and

denied plaintiff's claim. Commissioner Bernadine S. Ballance dissented from the Commission's decision and order.

Plaintiff appealed to this Court. On 14 September 2004, the matter was initially heard before this Court. On 2 November 2004, a divided panel of this Court affirmed the Commission's decision and order denying plaintiff's claim. *See Cherney v. N.C. Zoological Park*, 166 N.C. App. 684, 603 S.E.2d 842 (2004) (Timmons-Goodson, J., dissenting). Plaintiff appealed to our Supreme Court, and on 5 May 2005, the Court reversed for the reasons stated in Judge Timmon-Goodson's dissenting opinion in a *per curiam* opinion. *See Cherney v. N.C. Zoological Park*, 359 N.C. 419, 613 S.E.2d 498 (2005).

On 12 October 2005, plaintiff filed a motion for entry of award with the Commission. On 28 November 2005, defendant filed a response to plaintiff's motion with the Commission. On 28 April 2006, the Commission entered a second decision and order denying plaintiff's claim. The Commission entered its decision and order without further hearing on the matter or action by either party. Commissioner Ballance again dissented from the Commission's decision and order. Plaintiff appeals.

II. Issues

Plaintiff argues: (1) the Commission's second decision and order giving rise to this appeal should be deemed moot or improper; (2) the Commission erred by failing to apply a premises-liability legal standard to defendant's negligence; and (3) the Commission's findings of fact are not supported by the evidence.

III. Standard of Review

This Court has stated:

> Pursuant to [N.C. Gen. Stat. § 143-291(a)], the Commission has exclusive jurisdiction to hear claims falling under [The Tort Claims] Act.
>
> Decisions of the Commission . . . under the Tort Claims Act can only be appealed to this Court for errors of law . . . under the same terms and conditions as govern appeals in ordinary civil actions, and *the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them*. This is so even if there is evidence which would support findings to the contrary. Therefore, when considering an appeal from the Commission, our Court is limited to two questions: (1) whether

> competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision.

Simmons v. North Carolina DOT, 128 N.C. App. 402, 405-06, 496 S.E.2d 790, 793 (1998) (emphasis supplied) (internal citations and quotation omitted).

IV. The Commission's Second Decision and Order

[1] Plaintiff argues the Commission's second decision and order is improper because our Supreme Court ruled in her favor in 2005 and allowed her Petition for Writ of Mandamus in 2006. We disagree.

On 8 May 2006, plaintiff filed a Petition for Writ of Mandamus with our Supreme Court seeking to end all litigation in this matter and to require defendant to pay the damages awarded to her by Deputy Commissioner Ford on 30 October 2001. At the time plaintiff submitted her brief to this Court on 20 November 2006, plaintiff's Writ of Mandamus remained pending before our Supreme Court.

On 14 December 2006, our Supreme Court denied plaintiff's Petition for Writ of Mandamus and stated, "the mandate of this Court's 5 May 2005 *per curiam* opinion was satisfied by the [Commission's] issuance of its new Decision and Order on 28 April 2006." *Cherney v. N.C. Zoological Park*, 361 N.C. 147, 633 S.E.2d 677 (2006). This assignment of error is overruled.

V. Legal Standard

[2] Plaintiff argues the Commission erred by failing to apply a premises-liability legal standard to plaintiff's negligence claim. Plaintiff asserts the issue was not whether defendant's staff reasonably monitored or otherwise cared for the ficus, but whether defendant's staff failed to correct or warn its visitors of the known hidden hazard posed by the ficus. Plaintiff contends the Commission failed to address defendant's legal duty to warn her of the known hidden danger of the tree. We disagree.

N.C. Gen. Stat. § 143-291(a) states:

> The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North

> Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

Our Supreme Court has stated:

> Under the [Tort Claims] Act, *negligence is determined by the same rules as those applicable to private parties*.
>
> To establish actionable negligence, plaintiff must show that: (1) defendant failed to exercise due care in the performance of some legal duty owed to plaintiff under the circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury.

Bolkhir v. North Carolina State Univ., 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988) (emphasis supplied).

Our Supreme Court eliminated the distinctions between licensees and invitees in premises-liability cases and stated:

> [T]his Court concludes that we should eliminate the distinction between licensees and invitees by requiring a standard of reasonable care toward all lawful visitors. Adoption of a true negligence standard eliminates the complex, confusing, and unpredictable state of premises-liability law and replaces it with a rule which focuses the jury's attention upon the pertinent issue of *whether the landowner acted as a reasonable person would under the circumstances*.
>
> In so holding, we note that *we do not hold that owners and occupiers of land are now insurers of their premises*. Moreover, we do not intend for owners and occupiers of land to undergo unwarranted burdens in maintaining their premises. Rather, *we impose upon them only the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors*.

Nelson v. Freeland, 349 N.C. 615, 631-32, 507 S.E.2d 882, 892 (1998) (Wynn, J.) (emphasis supplied).

Following *Nelson*, this Court stated the duty to exercise reasonable care "requires that the landowner not unnecessarily expose a lawful visitor to danger and give warning of hidden hazards of which the landowner has express or implied knowledge." *Bolick v. Bon Worth, Inc.*, 150 N.C. App. 428, 430, 562 S.E.2d 602, 604, *disc. rev. denied*, 356 N.C. 297, 570 S.E.2d 498 (2002).

Upon remand, the Commission concluded as a matter of law:

> 5. The greater weight of the evidence shows that Ms. Wall's practices and management of her staff in the care of the *ficus benjamina* were reasonable and met or exceeded the standards for monitoring, record keeping, pruning, watering, fertilizing, cabling, syringing and soil mixture in her field. Plaintiff has failed to prove that either of the named employees of defendant, Ron Ferguson and Virginia Wall or the staff at the North Carolina Zoo breached any applicable standard of care. *The greater weight of the evidence shows that the actions of the staff at the North Carolina Zoo in following the standards and practices of Ms. Wall in the care of the ficus benjamina were reasonable and met or exceeded the standards of the field, including the monitoring, record keeping, pruning, watering, fertilizing, cabling, syringing and mixing of the soil.* Therefore, plaintiff has failed to prove negligence and is not entitled to recovery.

(Emphasis supplied).

The Commission also found as fact:

> 18. *The greater weight of the evidence indicates that neither Ms. Wall nor her staff knew or should have known that the ficus tree was likely to fall.* There is no showing that Ms. Wall violated any applicable standard of care in her management of the horticulture department and supervision of the horticulture staff. There is no showing that any member of Ms. Wall's staff violated any applicable standard of care in the completion of their duties regarding the care of the *ficus*.

(Emphasis supplied).

Plaintiff admits "defendant's personnel at all times adequately cared for, monitored and managed the Ficus, and met the applicable 'standard of care' for doing so." Plaintiff only argues the Commission applied the wrong legal standard because it failed to address defendant's legal duty to warn her of the known hidden danger of the ficus. Finding of fact numbered 18 is unchallenged, binding, and clearly shows the Commission properly applied the legal standards from both *Nelson* and *Bolick*. *Id.* This assignment of error is overruled.

VI. Findings of Fact

[3] Plaintiff argues the Commission's findings of fact are not supported and must be set aside because all of the evidence leads

to the conclusion defendant's negligence was the proximate cause of her injuries. Plaintiff asserts the unequivocal and uncontroverted evidence is that defendant had notice of a potentially dangerous condition on its premises and failed to correct or warn its visitors. We disagree.

"[T]he scope of review on appeal is limited to those issues presented by assignment of error in the record on appeal." *Koufman v. Koufman*, 330 N.C. 93, 98, 408 S.E.2d 729, 731 (1991). This Court has stated:

> Where findings of fact are challenged on appeal, *each contested finding of fact must be separately assigned as error*, and the failure to do so results in a waiver of the right to challenge the sufficiency of the evidence to support the finding. *Taylor v. N.C. Dept. of Transportation*, 86 N.C. App. 299, 357 S.E.2d 439 (1987); *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 684, 340 S.E.2d 755, 759-60, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986) (finding that the failure of appellant to "except and assign error separately to each finding or conclusion that he or she contends is not supported by the evidence . . . will result in waiver of the right to challenge the sufficiency of the evidence to support particular findings of fact").

Okwara v. Dillard Dep't Stores, Inc., 136 N.C. App. 587, 591, 525 S.E.2d 481, 484 (2000) (emphasis supplied). "Where no exception is taken to a finding of fact . . . , the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

As noted, "[T]he findings of fact of the Commission shall be conclusive if there is any competent evidence to support them. This is so even if there is evidence which would support findings to the contrary." *Simmons*, 128 N.C. App. at 405, 496 S.E.2d at 793.

Here, plaintiff has separately and specifically assigned error to only two of the Commission's findings of fact and argues they are not supported by any competent evidence:

> 7. The last recorded check on cables on the *ficus* tree were made by experienced staff members on Friday, July 17, 1998. No problems were recorded. Ms. Wall learned from a staff member after the incident involving plaintiff that one of the cables was a little bit loose, but the degree of looseness was so minor as to not war-

> rant recordation, therefore there was not sufficient notice to the staff that the *ficus benjamina* could present a hazard to the public and it was not unreasonable to wait until Monday for the pruning given the circumstances.
>
> . . . .
>
> 11. On July 18, 1998, the multiple stemmed *ficus* tree appeared healthy and free from decay. There were no indications that the tree was diseased or under stress. It did not appear to be hazardous and had stood for more than ten years under the protocols then in effect.

Plaintiff was injured when a ficus tree fell on 18 July 1998 in defendant's indoor African Pavilion. Virginia Wall ("Wall"), defendant's curator of horticulture, testified six "three-eighths-inch aircraft cable[s] . . . bolt[ed] into the concrete" were used to aid the tree in staying upright. It was "protocol" for staff to inspect the cables monthly for slack, tension, deterioration, and rust. The cables were replaced and repaired at times. The monthly checks on the cables were not routinely recorded, unless staff members discovered what appeared to be a problem.

Wall testified she expected to be notified by staff if there "was a large scale problem" or "a problem they perceived as being dangerous." The cables were checked on 17 July 1998, the day before the accident. No problems were noted by defendant's staff. Defendant's records stated, "7/17/98 all cables checked. No problems noted." Wall was informed by a staff member after the accident one of the cables was "a little bit loose." Wall testified:

> I have no record of loose cables other than the incident report, and that was after the fact. In my opinion, reading old logs—if [the staff] felt it was a slack cable, they would have noted that in the daily logs, and they did not. *So it didn't even come up on their radar that it was a problem.*

(Emphasis supplied).

The tree was scheduled for regular "summer pruning" on 20 July 1998. The tree had previously been pruned in January 1998. Wall testified: (1) the top growth on the tree was not an abnormal amount; (2) the amount of top growth "was typical for right before pruning"; and (3) she had no reason to think the tree was going to fall at this particular time.

Competent evidence in the record also shows: (1) on 18 July 1998, the tree appeared healthy and free from decay; (2) the tree did not appear to be a problem and had stood for more than ten years with the maintenance protocols in effect; (3) the cause of the tree's fall is unknown; and (4) the tree falling was "unforeseeable, unpreventable, and extremely rare."

The Commission's findings of fact are supported by competent evidence in the record and are "conclusive" on appeal. *Simmons*, 128 N.C. App. at 405, 496 S.E.2d at 793. These findings of fact support the Commission's conclusions of law denying plaintiff's claims for damages. This assignment of error is overruled.

VII. Conclusion

The Commission's decision and order entered 28 April 2006 is properly before us. Our Supreme Court denied plaintiff's Petition for Writ of Mandamus and stated, "the mandate of this Court's 5 May 2005 *per curiam* opinion was satisfied by the [Commission's] issuance of its new Decision and Order on 28 April 2006." *Cherney*, 361 N.C. at 147, 633 S.E.2d at 677.

The Commission applied the proper premises-liability legal standard to plaintiff's negligence claim, as shown in finding of fact numbered 18 and conclusion of law numbered 5. The findings of fact to which plaintiff assigned error and argued are supported by competent evidence. These findings of fact support the Commission's conclusion of law denying plaintiff's claim for damages. The Commission's decision and order is affirmed.

Affirmed.

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 that portion of the majority's opinion that finds that the Full Commission's second Opinion and Award in this case is not moot, and that this appeal is therefore proper. However, because I find that the Full Commission erred as a matter of law in its application of premises liability to the facts at hand, I would reverse and

remand the Opinion and Award for further consideration. I therefore respectfully dissent.

The majority points to the Full Commission's finding that "[t]he greater weight of the evidence indicates that neither Ms. Wall nor her staff knew or should have known that the ficus tree was likely to fall[,]" and the conclusion that the North Carolina Zoo staff met or exceeded the standards of the field in monitoring and tending to the ficus tree, to conclude that the Full Commission properly applied the standard for premises liability. I disagree.

As recognized by the majority, the Tort Claims Act waives governmental immunity for certain acts of negligence by state employees, with "such negligence . . . determined by the same rules as those applicable to private parties." *Bolkhir v. North Carolina State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988); *see also* N.C. Gen. Stat. § 143-291 (2005). Negligence must be shown by proving that a defendant state employee or agency "failed to exercise due care in the performance of some legal duty owed to plaintiff under the circumstances," as well as that the breach of duty was the proximate cause of the injury. *Bolkhir*, 321 N.C. at 709, 365 S.E.2d at 900.

In a premises liability case, the duty to exercise reasonable care "requires that the landowner not necessarily expose a lawful visitor to danger and give warning of hidden hazards of which the landowner has express or implied knowledge." *Bolick v. Bon Worth, Inc.*, 150 N.C. App. 428, 430, 562 S.E.2d 602, 604, *disc. review denied*, 356 N.C. 297, 570 S.E.2d 498 (2002). Thus, where in a negligence action a plaintiff must show that the defendant had a duty to the plaintiff and that the defendant breached that duty, thereby causing the plaintiff's injuries, *see Lavelle v. Schultz*, 120 N.C. App. 857, 859-60, 463 S.E.2d 567, 569 (1995) (citation omitted), *disc. review denied*, 342 N.C. 656, 467 S.E.2d 715 (1996), a plaintiff in a premises liability action must show that the defendant owed her a duty, and that the defendant breached that duty by unnecessarily exposing her to danger and failing to warn her of "hidden hazards of which the landowner has express or implied knowledge[,]" thereby causing her injuries. *Bolick*, 150 N.C. App. at 430, 562 S.E.2d at 604; *see also Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998), *reh'g denied*, 350 N.C. 108, 533 S.E.2d 467 (1999); *Grayson v. High Point Development Ltd. Partnership*, 175 N.C. App. 786, 788-89, 625 S.E.2d 591, 593, *disc. review denied*, 360 N.C. 533, 633 S.E.2d 681 (2006). The reasonableness of a defendant's exercise of care "must be judged against the

conduct of a reasonably prudent person under the circumstances." *Lorinovich v. K-Mart Corp.*, 134 N.C. App. 158, 161, 516 S.E.2d 643, 646, *cert. denied*, 351 N.C. 107, 541 S.E.2d 148 (1999).

Here, there is no dispute that the North Carolina Zoo owed Ms. Cherney a duty of reasonable care, *see Nelson*, 349 N.C. at 631, 507 S.E.2d at 892 ("[W]e impose upon [owners and occupiers of land] only the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors."), nor that the falling of a ficus tree in the exclusive control of the Zoo caused her injuries. The question of liability in this case instead turns on whether the Zoo breached its duty of reasonable care to Ms. Cherney by exposing her to danger unnecessarily and failing to warn of the hidden hazard of the ficus tree—provided that the Zoo and its employees had either express or implied knowledge that the tree was, in fact, in danger of falling. *See Bolick*, 150 N.C. App. at 430, 562 S.E.2d at 604.

Although the Full Commission found that "[t]he greater weight of the evidence indicates that neither Ms. Wall nor her staff knew or should have known that the ficus tree was likely to fall[,]" the record contains evidence not only to the contrary, but indeed, I believe such a finding is completely inconsistent with the evidence presented to the Full Commission. *See Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) ("[T]he findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary." (citation and quotation omitted)), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999); *Rhodes v. Price Bros., Inc.*, 175 N.C. App. 219, 221, 622 S.E.2d 710, 712 (2005) (findings of fact may be set aside on appeal only "when there is a complete lack of competent evidence to support them" (quotation omitted)).

At the time the ficus tree fell the first time, in 1988, it was between eighteen and twenty feet tall, with a more compact root ball; when it fell on Ms. Cherney, it was approximately thirty-four feet tall. As found by the Full Commission, after it fell the first time, the tree was "replanted, and six, seven-strand 3/8" cables going in four directions were looped around the tree and attached to the planter walls." The purpose of the cables was "to aid the tree in keeping it upright and to assist in monitoring the tree." Additionally, the Full Commission found as fact that the "cables on the tree were thereafter checked monthly for slack, tension and deterioration" by the Zoo staff, as well as "given a daily visual inspection for general health,

appearance, and special problems[.]" Two of the four cables had snapped when the tree fell on Ms. Cherney.

The very fact that the tree was cabled to the planter walls illustrates that the Zoo and its employees had "express or implied knowledge" that the tree might fall; if there had been no danger, then the tree would not have needed to be cabled in such a fashion, nor would the Zoo employees have needed to monitor it so closely. Moreover, the Full Commission itself stated that the cables were "used to aid the tree in keeping it upright," suggesting that there was an implied recognition that the tree might again fall. In light of these actions, as well as the fact that the tree was in a shallow concrete planter, growing bigger by the year, and had previously fallen, the testimony by the Zoo employees that they had no knowledge that the tree might fall is simply not competent evidence. The question is not whether the tree was *likely* to fall, as addressed by the Full Commission in the finding of fact quoted by the majority opinion. Rather, the issue is whether a Zoo visitor such as Ms. Cherney—or one of the tens of thousands of schoolchildren who pass through the African Pavilion each year—was unnecessarily exposed to danger and was not warned of a hidden hazard.

Given that the Zoo staff was aware of the danger of the tree falling, both through the previous incident and its ongoing monitoring and cabling of the tree, I would conclude that the Zoo had a duty to warn Ms. Cherney and other Zoo visitors of the possibility that the tree might fall. The Full Commission made no finding as to any warning sign posted by the Zoo or other indication that the tree was a hidden hazard, and the record contains no reference to such a warning. The Zoo staff could also have moved the tree to a different location, where it would not have injured visitors even if it fell, or could have pruned it back even further to ensure that it was not outgrowing its planter.

Hundreds of thousands of people visit the North Carolina Zoo each year; it is one of our State's most popular and well-maintained attractions. However, in light of the knowledge of Zoo staff as to the possible danger posed to the public of the ficus tree in question, I believe the Zoo employees failed to exercise the care of a reasonably prudent person under the circumstances by failing to warn of the hidden hazard here.

Because the Full Commission made findings contrary to logic and unsupported by competent evidence, I believe the Full Commis-

sion erred as a matter of law in its application of the premises liability negligence standard. I would therefore reverse and remand for additional consideration.

STATE OF NORTH CAROLINA v. JOHNNY DWAYNE HILL

No. COA06-1218

(Filed 7 August 2007)

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

Although defendant appealed the judgment entered in 05 CRS 51915 in a first-degree sexual offense case, he failed to argue that assignment of error in his brief and it is therefore deemed abandoned under N.C. R. App. P. 28(b)(6).

2. Sexual Offenses— first-degree sexual offenses—indictments—amendment—substantial alteration

The trial court erred in a first-degree sexual offense case by refusing to dismiss the indictments in 05 CRS 51918, 05 CRS 51919, 05 CRS 51921, 05 CRS 51922, and 05 CRS 51923, and by allowing the State to amend the indictments, because: (1) first-degree statutory sexual offense is set forth in N.C.G.S. § 14-27.4 and not in N.C.G.S. § 14-27.7A; (2) the indictments' heading accused defendant of violating N.C.G.S. § 14-27.7A, one of the elements set forth in N.C.G.S. § 14-27.7A is that the victim's age is 13, 14, or 15 years old, and the body of the indictment alleges defendant engaged in a sex offense with a minor child under the age of 13 years old; (3) the indictment was a confusing instrument purporting to charge two similar but distinct crimes and effectively charged neither; (4) defendant did not have sufficient notice to enable him to prepare a defense against such an indictment; and (5) a bill of indictment may not be amended in a manner which substantially alters the charge set forth, and the trial court's decision to allow the State to correct the indictments did not cure a mere clerical defect but fundamentally changed the nature of the charge against defendant. Although these five judgments are vacated, the consolidated judgment entered upon the indictments in 05 CRS 51915, 05 CRS 51917, and 05 CRS 51920 remain undisturbed. N.C.G.S. § 15A-23(e).

Judge WYNN concurring in a separate opinion.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendant from judgments entered 13 April 2006 by Judge W. Erwin Spainhour in Davidson County Superior Court. Heard in the Court of Appeals 24 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General Anita LeVeaux, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

CALABRIA, Judge.

Johnny Dwayne Hill ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of first-degree sexual offense. Because we determine that five of the six indictments were fatally defective, we vacate the judgments entered upon those indictments.

At trial, the State presented evidence that defendant frequently visited with his parents in the summer of 1999. Deborah H. ("Deborah") lived in a trailer next to defendant's parents with her two sons, B.S. ("B.S.") and D.S. ("D.S."), ages 15 and 11, respectively. Deborah, a single mother, worked long hours as a waitress and often left the boys home alone.

One day, defendant befriended the boys after helping B.S. change the tire on his mother's car. Defendant, who did remodeling work, suggested to Deborah that he could watch the boys during the day, and she agreed. Defendant took the boys out to eat, rented movies with them, and occasionally stayed overnight, sleeping with the boys on a mattress on the floor. The boys testified that during this time, defendant abused them sexually in a number of ways.

B.S. testified that in August of 1999, when defendant was staying overnight with the boys, defendant pulled down B.S.'s pants and fondled him, and performed fellatio on B.S. until B.S. ejaculated. On another occasion defendant put B.S.'s penis in his mouth. B.S. further testified defendant asked him to perform anal sex on him and he complied.

D.S. corroborated his brother's testimony and stated that defendant had sexually abused him as well. D.S. testified that between

August and November of 1999 he and defendant engaged in a sexual relationship. D.S. stated that defendant took him on a trip to Texas and dyed D.S.'s hair black to alter his looks.

When D.S. was 15 or 16, he started dating S.S. ("S.S.") and confided in her that he had sexual relations with defendant during the summer and fall of 1999. The two discussed reporting the abuse to police, but D.S. said he could not go through with it. During Christmas of 2004, D.S. and S.S. were watching a video of D.S.'s twelfth birthday party and in the video D.S.'s hair was dyed black. D.S. and S.S. began crying. Deborah asked D.S. if something had happened to him, and he told his mother that defendant had sexually abused him. Deborah later asked B.S. the same question and he admitted that he too had been abused by defendant. Deborah then contacted law enforcement officials, and defendant was arrested for sexually abusing the boys.

The Davidson County grand jury returned eight indictments charging defendant with eleven offenses. Two of the indictments related to B.S., and the other indictments concerned D.S. Prior to trial, the State dismissed one of the sex offense charges involving D.S. Defendant moved to dismiss six charges of committing first-degree statutory sex offense, claiming the indictments were fatally defective. The trial court denied defendant's motion and, over defendant's objection, allowed the State to alter the indictments to allege the crime of first-degree sexual offense.

On 13 April 2006, the jury returned verdicts finding defendant guilty of all charges. Judge W. Erwin Spainhour then entered judgments upon those verdicts, sentencing defendant to a minimum of 154 years and a maximum of 324 years in the North Carolina Department of Correction. From six judgments entered upon jury verdicts finding him guilty of first-degree sexual offense, defendant appeals.

[1] On appeal, defendant argues that six of the indictments against him were fatally defective. Although defendant appealed the judgment entered in 05 CRS 51915, he fails to argue that assignment of error in his brief, and it is therefore deemed abandoned. N.C. R. App. P. 28(b)(6) (2006) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

[2] Having abandoned his assignment of error with respect to the judgment in 05 CRS 51915, defendant specifically appeals from judg-

ments entered upon indictments in 05 CRS 51918, 05 CRS 51919, 05 CRS 51921, 05 CRS 51922, and 05 CRS 51923. He argues that the trial court erred by refusing to dismiss those indictments and by allowing the State to amend the indictments. We agree.

> Our Supreme Court has stated that jurisdiction to try an accused for a felony depends upon a valid bill of indictment guaranteed by Article I, Section 22 of the North Carolina Constitution. Our Legislature has required that an indictment or other criminal pleading must contain:
>
> A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

State v. Miller, 159 N.C. App. 608, 611, 583 S.E.2d 620, 622 (2003) (citations and quotation marks omitted), aff'd *per curiam*, 358 N.C. 133, 591 S.E.2d 520 (2004).

"[T]he purposes of an indictment include giving a defendant notice of the charge against him so that he may prepare his defense and be in a position to plead prior jeopardy if he is again brought to trial for the same offense." *State v. Freeman*, 314 N.C. 432, 435, 333 S.E.2d 743, 745 (1985).

The five indictments at issue here all state the charge made by the grand jury in the following language:

> OFFENSE: FIRST DEGREE STATUTORY SEXUAL OFFENSE
>
> OFFENSE IN VIOLATION OF: g.s. 14-27.7A
>
> THE JURORS FOR THE STATE upon their oath present that . . . the defendant named above unlawfully, willfully and feloniously did engage in a sex offense with [D.S.], a child under the age of 13 years.

First-degree statutory sexual offense is set forth in N.C. Gen. Stat. § 14-27.4 (2005), not in N.C. Gen. Stat. § 14-27.7A. North Carolina General Statute § 14-27.7A(a) states as follows:

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

> than the person, except when the defendant is lawfully married to the person.

Id.

It is clear that one of the elements of the crime set forth in N.C. Gen. Stat. § 14-27.7A is that the victim's age is 13, 14, or 15 years old. While the indictments' heading accused defendant of violating N.C. Gen. Stat. § 14-27.7A, the body of the indictment alleges defendant "engage[d] in a sex offense with [D.S.], a child *under* the age of 13 years."

First-degree statutory sexual offense, set forth in N.C. Gen. Stat. § 14-27.4 (2005) is stated as such:

> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]

Id.

If defendant had been properly indicted under this section, he could have been tried and convicted of that offense. However, such was not the case here. Instead, the indictment was a confusing instrument purporting to charge two similar but distinct crimes and effectively charging neither. A defendant facing such an indictment would be forced to guess as to what statutory charge he was facing, and would be prejudiced by such confusion because the two crimes have different and mutually exclusive elements. As such, defendant did not have proper notice sufficient to enable him to prepare a defense against such an indictment.

Here, the State sought to eliminate the confusion by petitioning the court at the close of evidence to amend the indictments to accuse defendant of violating N.C. Gen. Stat. § 14-27.4, the correct statute for the crime of first-degree statutory sexual offense. Over defendant's objection, the trial court allowed the State to correct the indictments.

North Carolina General Statute § 15A-923(e) (2005) states that "[a] bill of indictment may not be amended." *Id.* However, our courts have interpreted "amend" to mean "substantially alter." *State v. Parker*, 146 N.C. App. 715, 718, 555 S.E.2d 609, 611 (2001). "[A] bill of indictment may not be amended in a manner which substantially

alters the charge set forth." *State v. Haywood*, 144 N.C. App. 223, 228, 550 S.E.2d 38, 42 (2001).

As the concurring opinion correctly notes, the facts of this case are virtually identical to those in *State v. Miller*, 159 N.C. App. 608, 583 S.E.2d 620 (2003). In *Miller*, the defendant was convicted of two counts of first-degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4. However, the indictments alleged that defendant had committed the crime of statutory sexual offense in violation of N.C. Gen. Stat. § 14-27.7A. As in the instant case, the indictments in *Miller* presented a confusing mix of the two similar but distinct crimes.

> In the instant case, a careful reading of the indictments upon which defendant's first-degree sexual offense convictions were obtained reveals that not only do they erroneously cite a different statute than the one under which defendant was tried, convicted, and sentenced, the indictments also allege violation of a combination of the elements of the two separate and distinct offenses set forth in N.C. Gen. Stat. § 14-27.4(a)(1) and N.C. Gen. Stat. § 14-27.7A(a), without alleging each element of either offense.

Id. at 612, 583 S.E.2d at 622-23.

As in *Miller*, the five indictments at issue here allege parts of both offenses but fail to state the correct elements of either one. Despite the dissent's assertion to the contrary, the instant case cannot be factually distinguished from *Miller*, which in turn controls the result here. Thus, the trial court's decision to allow the State to correct the indictments did not cure a mere clerical defect, but fundamentally changed the nature of the charge against defendant. As such, we determine the amendment allowed by the trial court amounted to a substantial alteration of the original charge. The dissent notes that the indictments in *Miller* were never amended. However, this distinction is immaterial since we have determined that the alterations allowed by the trial court in this case amounted to a substantial alteration of the original indictments, and as such, the amendments violated N.C. Gen. Stat. § 15A-923(e). We accordingly vacate the judgments entered upon the five defective indictments. In doing so, we leave undisturbed the consolidated judgment entered upon the indictments in 05 CRS 51915, 05 CRS 51917, and 05 CRS 51920, in which the trial court sentenced defendant to a minimum of 269 months and a maximum of 332 months imprisonment in the North Carolina Department of Correction.

Vacated.

Judge WYNN concurs with a separate opinion.

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

WYNN, Judge, concurring.

I concur with the majority, writing only to note that the facts of this case are almost identical to those in *State v. Miller*, 159 N.C. App. 608, 583 S.E.2d 620 (2003), *aff'd per curiam*, 358 N.C. 133, 591 S.E.2d 520 (2004), in which we held the indictments were fatally flawed because they named the wrong statute. *See State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 133-34 (2004) ("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." (internal quotation and citation omitted)).

By the very terms of the indictments here, as in *Miller*, even if facts were included sufficient to support each element of the actual crimes Defendant was accused of committing, the indictments could not also then contain facts supporting each element of the crimes contained in the wrongly cited statute.

The dissent cites to a number of inapposite cases that involved immaterial mistakes in indictments, such as what goods were actually stolen, *see State v. Parker*, 146 N.C. App. 715, 719, 555 S.E.2d 609, 612 (2001); the type of weapon used in the crime, *see State v. Joyce*, 104 N.C. App. 558, 573, 410 S.E.2d 516, 525 (1991), *cert. denied*, 331 N.C. 120, 414 S.E.2d 764 (1992); or the name of the county in which the crime was allegedly committed, *see State v. Hyder*, 100 N.C. App. 270, 273, 396 S.E.2d 86, 88 (1990). Indeed, in each of those cases, this Court noted that a substantial alteration was one which would alter the proof needed for each element of the charge. *Parker*, 146 N.C. App. at 719, 555 S.E.2d at 612; *Joyce*, 104 N.C. App. at 573, 410 S.E.2d at 525; *Hyder*, 100 N.C. App. at 273, 396 S.E.2d at 88.

In the instant case, as in *Miller*, the statute cited in the indictment goes to the very heart of the charges and allegations against Defendant, and such an alteration of the indictment is clearly "substantial." *See Parker*, 146 N.C. App. at 718, 555 S.E.2d at 611; N.C. Gen. Stat. § 15A-923(e) (2005). Changing the amendment to refer to a

different statute, with different elements of the crime charged, unquestionably alters the proof needed for each element. Accordingly, I concur with the majority's holding that it was error to allow the State to amend the indictments and therefore to vacate the judgments entered on the five defective indictments.

TYSON, Judge concurring in part, dissenting in part.

I concur in that portion of the majority's opinion deeming defendant to have abandoned his assignment of error regarding 05 CRS 51915 and that there is no error in the verdicts or the consolidated judgments entered thereon. The majority's opinion also holds the correction to the indictments allowed by the trial court "was a substantial alteration of the original charge" in violation of N.C. Gen. Stat. § 15A-923(e) and vacates the judgments and sentences of five counts of First Degree Sexual Offense entered upon five indictments and jury verdicts. I find no prejudicial error in the trial court's discretionary decision to allow the State's motion to correct the indictments. I respectfully dissent.

I. Issue

Defendant presents one issue on appeal: whether the trial court committed reversible error by denying his motion to dismiss five indictments charging him with committing a first-degree sexual offense and allowing the State to amend those indictments after the close of the State's evidence.

A. Standard of Review

> When ruling on a motion to dismiss, the trial court must decide whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied. Evidence is viewed in the light most favorable to the State, giving the State the benefit of all reasonable inferences.

State v. King, 178 N.C. App. 122, 130-31, 630 S.E.2d 719, 724 (2006) (internal citations and quotations omitted).

Under N.C. Gen. Stat. § 15A-923(e) (2005), "a bill of indictment may not be amended." "[T]he term 'amendment' under N.C.G.S. § 15A-923(e) [means] 'any change in the indictment which would substantially alter the charge set forth in the indictment.' " *State v.*

Snyder, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (quoting *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984)). The trial court's discretionary allowance of correction of an indictment does not constitute reversible error unless the item amended was an essential element of the offense. *State v. May*, 159 N.C. App. 159, 162, 583 S.E.2d 302, 304 (2003).

B. Analysis

The majority's opinion holds "the trial court's decision to allow the State to correct the indictments did not cure a mere clerical defect, but fundamentally changed the nature of the charge against defendant." I disagree.

"The indictment need not cite by number the pertinent statute." *State v. Page*, 32 N.C. App. 478, 481, 232 S.E.2d 460, 462 (held the defendant's argument that the indictment was defective because it failed to identify statutes by number had no merit), *cert. denied*, 292 N.C. 643, 235 S.E.2d 64 (1977). "A change in an indictment does not constitute an amendment where the variance was inadvertent and defendant was neither misled nor surprised as to the nature of the charges." *State v. Campbell*, 133 N.C. App. 531, 535-36, 515 S.E.2d 732, 735, *disc. rev. denied*, 351 N.C. 111, 540 S.E.2d 370 (1999). An indictment must provide "sufficient detail to put the defendant on notice as to the nature of the crime charged and to bar subsequent prosecution for the same offense in violation of the prohibitions against double jeopardy." *State v. Burroughs*, 147 N.C. App. 693, 695-96, 556 S.E.2d 339, 342 (2001).

The North Carolina General Assembly has authorized the use of "short-form" indictments for certain crimes. *State v. Jerrett*, 309 N.C. 239, 259, 307 S.E.2d 339, 350 (1983). Short-form indictments are authorized as a charging instrument for statutory sex offense. N.C. Gen. Stat. § 15-144.2(b) (2005); *State v. Wallace*, 351 N.C. 481, 505, 528 S.E.2d 326, 342, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). Our Supreme Court has held short-form indictments are "sufficient to allege an offense even though not all of the elements of a particular crime are required to be alleged" therein. *Jerrett*, 309 N.C. at 259, 307 S.E.2d at 350.

N.C. Gen. Stat. § 15-144.2(b) (2005) provides the approved "short-form" essential allegations for an indictment charging sex offense:

> If the victim is a person under the age of 13 years, it is sufficient to allege that the defendant unlawfully, willfully, and feloniously

> did engage in a sex offense with a child under the age of 13 years, naming the child, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for a sex offense against a child under the age of 13 years and all lesser included offenses.

The indictments at issue alleged that the victim was under the age of thirteen, named the victim, and averred that defendant "unlawfully, willfully and feloniously did engage in a sex offense . . . ." These indictments clearly met the requirements of N.C. Gen. Stat. § 15-144.2(b) and were therefore "good and sufficient in law as an indictment for a sex offense against a child under the age of 13 years and all lesser included offenses." *Id.*

The majority's opinion relies on *State v. Miller* to support their holding that the State's correction of the indictments amounted to a substantial alteration of and amendment to the original charge. 159 N.C. App. 608, 583 S.E.2d 620 (2003), *aff'd per curiam*, 358 N.C. 133, 591 S.E.2d 520 (2004). "[T]he indictments in [*Miller*] allege[d] that defendant's alleged conduct with [the victims] violated N.C. Gen. Stat. § 14-27.7A, while judgment and commitment was actually entered upon defendant's conviction for violation of N.C. Gen. Stat. § 14-27.4(a)(1)." 159 N.C. App. at 612, 583 S.E.2d at 622.

In *Miller*, this Court:

> "conclude[d] that, *under the very narrow circumstances presented by this case*, the use of "short-form" language authorized under N.C. Gen. Stat. § 15-144.2(b) in the indictments [was] not sufficient to cure the fatal defects found therein. . . . [T]he indictments cite[d] one statute, and defendant was *tried*, *convicted*, *and sentenced* under another statute."

159 N.C. App. at 614, 583 S.E.2d at 623 (emphasis supplied).

Here, the five indictments each contained sufficient information to charge defendant with a statutory first-degree sexual offense. Unlike *Miller* where the indictments at issue were never amended, the indictments at bar were amended to cite the correct statute at the close of the State's evidence following the denial of defendant's motion to dismiss. *Id.* Defendant was tried, convicted, and sentenced under the statute listed on the amended indictments. Defendant was not convicted or sentenced under any other statute. The facts before

us do not fit "the very narrow circumstances presented by [*Miller*]." *Id.* at 614, 583 S.E.2d at 623.

The corrections allowed by the trial court did not "substantially alter" the nature of the charges against defendant. *Snyder*, 343 N.C. at 65, 468 S.E.2d at 224. The trial court's decision to allow the State to correct the indictments cured a mere clerical defect and the correction did not fundamentally change the nature of the charges against defendant. If defendant needed or required additional information on the nature of the specific sexual act with which he stood charged, he could, and should have, moved for a bill of particulars. *See* N.C. Gen. Stat. § 15A-925(a) (2005) ("Upon motion of a defendant under G.S. 15A-952, the court . . . may order the State to file a bill of particulars . . . and to serve a copy upon the defendant."); *State v. Edwards*, 305 N.C. 378, 380, 289 S.E.2d 360, 362 (1982) (An indictment drafted pursuant to N.C. Gen. Stat. § 15-144.2(b) without specifying which sexual act was committed was sufficient to charge the crime of first-degree sexual offense and to inform the defendant of such accusation.).

II. Conclusion

Defendant was given adequate notice of the charges brought against him and the statutorily required essential elements of first-degree sexual offense were alleged in each indictment. Defendant failed to show any prejudicial error in the trial court's order allowing the State's motion to amend to vacate the judgments against him at the close of the State's evidence.

The short-form indictments provided "sufficient detail to put the defendant on notice as to the nature of the crime charged and to bar subsequent prosecution for the same offense in violation of the prohibitions against double jeopardy." *Burroughs*, 147 N.C. App. at 695-96, 556 S.E.2d at 342. The amendment of the statute number in the indictments was not an essential element of the offense and did not prejudice defendant to constitute reversible error. *May*, 159 N.C. App. at 162, 583 S.E.2d at 304. *Miller*, by its own terms is "very narrow," and does not support the majority's conclusion to vacate defendant's convictions under these facts. 159 N.C. at 614, 583 S.E.2d at 623. I find no prejudicial error in defendant's convictions and the judgments entered thereon. I respectfully dissent.

STATE OF NORTH CAROLINA v. DAVID LEE WOOD, DEFENDANT

No. COA06-1391

(Filed 7 August 2007)

1. Criminal Law— motion to sever—possession of firearm by felon—felonious possession of stolen property

The trial court did not abuse its discretion by denying defendant's motion to sever the charge of possession of a firearm by a felon from the charge of possession of stolen property, because: (1) defendant waived his right to severance based on his failure to renew his motion to sever at the close of all evidence as required by N.C.G.S. § 15A-927(a)(2); and (2) defendant's theft and subsequent possession of the firearm as a result of his breaking and entering are so closely related in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the other.

2. Evidence— prior crimes or bad acts—prior conviction—failure to give limiting instruction

The trial court did not abuse its discretion in a felonious possession of stolen property and possession of a firearm by a felon case by admitting defendant's prior conviction of felony breaking and entering into evidence, nor did it commit plain error by failing to give a limiting instruction regarding the prior conviction, because: (1) the Felony Firearms Act under N.C.G.S. § 14-415.1(b) provides that records of prior convictions of any offense shall be admissible in evidence for the purpose of proving a violation of this section; (2) there was no indication that defendant agreed to stipulate to his prior felony conviction, and the State had no choice but to introduce evidence of defendant's conviction in order to prove its case as to the charge of possession of a firearm by a felon; and (3) the lack of any instructions to the jury regarding the use of defendant's prior conviction could not have been so prejudicial that it had a probable impact on the jury's verdict.

3. Confessions and Incriminating Statements— redaction of statement—release from prison

The trial court did not commit plain error in a felonious possession of stolen property and possession of a firearm by a felon case by failing to redact defendant's statement where he mentioned his release from prison, because it was not error to intro-

duce defendant's prior felony conviction or to give a limiting instruction regarding the conviction, and defendant thus cannot show the failure to redact defendant's statement was so prejudicial that it had a probable impact on the jury's verdict.

4. Constitutional Law— effective assistance of counsel—failure to show prejudice

Defendant was not denied his right to the effective assistance of counsel even though his trial counsel failed to stipulate to defendant's prior conviction, to request a limiting instruction, and to object to mention of defendant's release from jail, because: (1) even assuming arguendo that defense counsel was deficient, defendant was not prejudiced by his trial counsel's actions; (2) defendant was found not guilty on the charges of felonious breaking or entering and felonious larceny, the two charges most likely to have been influenced by defendant's prior conviction of felonious breaking and entering; and (3) even had defense counsel taken those actions, there was not a reasonable probability that the result of the trial would have been different given the evidence of defendant's guilt.

5. Constitutional Law— double jeopardy—possession of firearm by felon—substantive offense

Defendant's conviction for possession of a firearm by a felon was not a violation of his right to be free from double jeopardy even though defendant contends it is a recidivist offense and not a substantive crime, because: (1) while N.C.G.S. § 14-415.1 has characteristics of a recidivist statute, a plain reading of the statute shows it creates a new substantive offense; and (2) defendant did not violate a consequence of his original conviction, but rather committed a new substantive offense.

6. Constitutional Law— double jeopardy—possession of firearm by felon—felonious breaking and entering

Defendant's conviction for possession of a firearm by a felon was not a violation of his right to be free from double jeopardy even though defendant contends it is a greater offense of the predicate felony of felonious breaking and entering, because: (1) under N.C.G.S. § 14-415.1, it is the prior conviction that is an element which must be proved by the State; and (2) while proving the prior conviction will necessarily establish that defendant was guilty of committing the prior crime, it does not impose any punishment solely for defendant's commission of the prior crime but

instead requires that the State further prove the additional element of possession of a firearm.

Appeal by defendant from a judgment dated 28 June 2006 by Judge R. Stuart Albright in Randolph County Superior Court. Heard in the Court of Appeals 26 April 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Lars F. Nance, for the State.

Bruce T. Cunningham, Jr. for defendant.

BRYANT, Judge.

David Lee Wood (defendant) appeals from a judgment dated 28 June 2006 and entered consistent with a jury verdict finding him guilty of felonious possession of stolen property and possession of a firearm by a felon. For the reasons stated herein, we find defendant received a fair trial free from error.

Facts and Procedural History

On 22 June 2005, Charles Satterfield returned to his home in Randolph County, North Carolina, to find that a cement block had been thrown through his kitchen window. Mr. Satterfield determined that his house had been broken into and that a lockbox, a .40 caliber Ruger pistol, a magazine for that pistol, and a nylon gun holster were missing. Three latent fingerprints were lifted from a piece of broken glass intact in the frame. The prints were sent to the Guilford County Sheriff's Department for identification and one was later determined to be from defendant's left index finger. To Mr. Satterfield's knowledge, defendant had never before been to Mr. Satterfield's house.

On 24 June 2005, Charles Ward contacted the Randolph County Sheriff's Department concerning a handgun he had recently purchased. Officers visited Mr. Ward and were given a semiautomatic handgun. The serial number of the handgun obtained from Mr. Ward matched the serial number given the Sheriff's Department by Mr. Satterfield for his stolen .40 caliber Ruger pistol.

Defendant was subsequently interviewed by police, and he gave a statement that he had sold a gun to Ward. On 16 July 2005, defendant was arrested and, on 10 October 2005, defendant was indicted for felonious breaking and entering, felonious larceny, felonious possession of stolen property, and possession of a firearm by a felon.

Defendant was tried before a jury on 27 June 2006 at the Criminal Session of Superior Court in Randolph County, the Honorable R. Stuart Albright presiding. On 28 June 2006, the jury returned its verdict finding defendant guilty of felonious possession of stolen property, guilty of possession of a firearm by a felon, not guilty of felonious breaking and entering, and not guilty of felonious larceny. The trial court subsequently sentenced defendant to imprisonment for a term of twenty to twenty-four months. Defendant appeals.

Defendant raises the issues of whether: (I) the trial court erred in denying defendant's motion to sever the charge of possession of a firearm by a felon from the charge of stolen property; (II) the trial court erred in admitting defendant's prior conviction into evidence and failing to give a limiting instruction regarding the prior conviction; (III) the trial court committed plain error in failing to redact defendant's statement; (IV) defendant received ineffective assistance of counsel; (V) the trial court erred in entering judgment on the charge of possession of a firearm by a felon because this offense is a "recidivist offense" and not a substantive crime; and (VI) his conviction for possession of a firearm by a felon is a violation of his right to be free from double jeopardy.

I

[1] Defendant first argues the trial court erred in denying defendant's motion to sever the charge of possession of a firearm by a felon from the charge of stolen property. We disagree.

"A trial court's denial of a motion to sever will not be disturbed on appeal absent an abuse of discretion." *State v. McDonald*, 163 N.C. App. 458, 463, 593 S.E.2d 793, 796, *disc. review denied*, 358 N.C. 548, 599 S.E.2d 910 (2004). Further, "[i]f a defendant's pretrial motion for severance is overruled, he may renew the motion on the same grounds before or at the close of all the evidence. Any right to severance is waived by failure to renew the motion." N.C. Gen. Stat. § 15A-927(a)(2) (2005). Where a defendant has waived any right to severance, on appeal this "Court is limited to reviewing whether the trial court abused its discretion in ordering joinder at the time of the trial court's decision to join." *McDonald*, 163 N.C. App. at 463-64, 593 S.E.2d at 797 (citation omitted). Two or more offenses may be properly joined when "the offenses charged are 'part of the same act or transaction' or are 'so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof

of the others.' " *State v. Lundy*, 135 N.C. App. 13, 16, 519 S.E.2d 73, 77 (1999) (quoting *State v. Fink*, 92 N.C. App. 523, 527, 375 S.E.2d 303, 306 (1989)), *appeal dismissed and disc. review denied*, 351 N.C. 365, 542 S.E.2d 651 (2000); *see also* N.C. Gen. Stat. § 15A-926(a) (2005).

Defendant moved pre-trial to sever the charge of possession of firearm by a felon from the charges of felonious breaking and entering, felonious larceny, and felonious possession of stolen property. However, defendant failed to renew his motion to sever at the close of all of the evidence, as required by N.C.G.S. § 15A-927(a)(2). Defendant has therefore waived his right to severance and the question before this Court is whether joinder of defendant's offenses for trial was an abuse of discretion.

Here, defendant's alleged theft and subsequent possession of the firearm as a result of his alleged breaking and entering are so closely related in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others. Accordingly, the trial court did not abuse its discretion in consolidating the charges against defendant in one trial. This assignment of error is overruled.

II

[2] Defendant next contends the trial court erred in admitting defendant's prior conviction into evidence and failing to give a limiting instruction regarding the prior conviction. We disagree.

Defendant first argues the trial court erred in admitting defendant's prior conviction into evidence. Defendant contends the admission of his prior conviction into evidence where the charges against him were not tried in separate trials caused him undue prejudice. It is well settled that,

> "[o]n appeal, the standard of review of a trial court's decision to exclude or admit evidence is that of an abuse of discretion. An abuse of discretion will be found only when the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision."

State v. Sloan, 180 N.C. App. 527, 532, 638 S.E.2d 36, 40 (2006) (quoting *Brown v. City of Winston-Salem*, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753 (2006)), *appeal dismissed and disc. review denied*, 361 N.C. 367, 644 S.E.2d 560 (2007). Further, under the Felony Firearms Act, "records of prior convictions of any offense . . . shall be admissible in evidence for the purpose of proving a violation of this

section." N.C. Gen. Stat. § 14-415.1(b) (2005). As there is no indication that defendant agreed to stipulate to his prior felony conviction, the State had no choice but to introduce evidence of defendant's conviction in order to prove its case as to the charge of possession of a firearm by a felon. *See State v. Faison*, 128 N.C. App. 745, 747, 497 S.E.2d 111, 112-13 (1998) (holding the trial court did not err in admitting evidence of the defendant's prior felony conviction where the defendant "did not offer to stipulate that he had a prior felony conviction, nor did [the d]efendant argue that his stipulation would render evidence of the name and nature of the prior offense inadmissible pursuant to Rule 403 of the North Carolina Rules of Evidence"). Thus, the trial court did not abuse its discretion in admitting defendant's prior conviction. This assignment of error is overruled.

Defendant also contends the trial court committed plain error when it failed to instruct the jury on the limited use of defendant's prior conviction. Defendant contends the failure of the trial court to instruct the jury on the limited use of defendant's prior conviction was so prejudicial that it had a probable impact on the verdict. We disagree.

Because defendant failed to object to the jury instructions in this case, this assignment of error must be analyzed under the plain error standard of review. *State v. Holden*, 346 N.C. 404, 434-35, 488 S.E.2d 514, 530-31 (1997). Plain error with respect to jury instructions requires the error be "so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected." *Id.* at 435, 488 S.E.2d at 531. Further, "[i]n deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Bell*, 359 N.C. 1, 23, 603 S.E.2d 93, 109 (2004) (citation and quotations omitted), *cert. denied*, 544 U.S. 1052, 161 L. Ed. 2d 1094 (2005).

Defendant's prior conviction admitted at trial was for the offense of felony breaking and entering. In the instant case, the jury returned verdicts of not guilty as to the charges against defendant of felonious breaking and/or entering and felonious larceny and guilty as to the charges of felonious possession of stolen property and possession of a firearm by a felon. A review of the record before this Court shows the State presented sufficient evidence to support the jury's verdict of guilty as to the charges of felonious possession of stolen property and possession of a firearm by a felon, see Issue IV, *infra*, and the lack of

any instructions to the jury regarding the use of defendant's prior conviction could not have been so prejudicial that it had a probable impact on the jury's verdict. This assignment of error is overruled.

III

[3] Defendant next argues the trial court committed plain error in failing to redact from defendant's statement to Detective Julian, mention of his release from prison. Again, as defendant did not object to the admission of the statement at trial, on appeal he must show the trial court committed plain error. *State v. Blair*, 181 N.C. App. 236, 244-46, 638 S.E.2d 914, 920 (2007).

Defendant's statement to Detective Julian was admitted at trial and published to the jury. Defendant's statement reads, in pertinent part:

> Jonathan brought a grill to my mother's house on the night of July the 4th. I sold a pistol to [Charles] Ward that Jonathan [] brought to me. It had been a couple of weeks ago. I got a hundred and thirty dollars [] for the gun. Jonathan said he got the grill out of the back of a truck up the road. I did not know where the gun came from. That is all I have sold [Charles Ward] since I got out of prison.

As in Issue II, *supra*, defendant argues he suffered undue prejudice through the admission of evidence regarding his prior criminal conviction. However, as we have held that it was not error to introduce defendant's prior felony conviction and it was not plain error for the trial court to fail to give a limiting instruction regarding the conviction, defendant cannot show the trial court's failure to redact defendant's statement that he had been in prison was so prejudicial that it had a probable impact on the jury's verdict. This assignment of error is overruled.

IV

[4] Defendant next contends he was denied his right to effective assistance of counsel in violation of the Sixth Amendment because his trial counsel's failure to stipulate to defendant's prior conviction, to request a limiting instruction, and to object to mention of defendant's release from jail were objectively unreasonable and prejudicial to defendant. We disagree

"To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient

and then that counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984)).

> Deficient performance may be established by showing that "counsel's representation fell below an objective standard of reasonableness." 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. (quoting *Wiggins v. Smith*, 539 U.S. 510, 534, 156 L. Ed. 2d 471, 493 (2003)). This Court's review of ineffective assistance of counsel claims "will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citations omitted), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). Based on our review of the record before this Court, we conclude that we may address defendant's claim of ineffective assistance of counsel on the merits.

Even assuming *arguendo* the performance of defendant's trial counsel was deficient for not stipulating to defendant's prior conviction, requesting a limiting instruction regarding the prior conviction and objecting to defendant's unredacted statement, defendant was not prejudiced by his trial counsel's actions. Defendant argues he was prejudiced "because there is a 'reasonable probability' that the errors of [his trial] counsel affected the outcome of the trial, especially in light of the failure to request a jury instruction on the use of the prior conviction." However, defendant was found not guilty on the charges of felonious breaking and/or entering and felonious larceny, the two charges most likely to have been influenced by defendant's prior conviction of felonious breaking and entering.

Furthermore, even had defendant's trial counsel stipulated to defendant's prior conviction, received a limiting instruction regarding the prior conviction and successfully had defendant's statement redacted, there is not a reasonable probability that the result of the trial would have been different. Evidence presented at the trial established that defendant's fingerprint was found at the scene of the crime, that defendant confessed to selling a pistol to Charles Ward,

that Charles Ward was known to deal in stolen goods, and that Charles Ward turned over the stolen handgun at issue in this case to the Randolph County Sheriff's Department. This evidence is sufficient to support the jury's verdict of guilty as to the charges of felonious possession of stolen property and possession of a firearm by a felon. This assignment of error is overruled.

V

[5] Defendant also contends the trial court erred in entering judgment on the charge of possession of a firearm by a felon because this offense is a "recidivist offense" and not a substantive crime. Under N.C. Gen. Stat. § 14-415.1, it is "unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm . . . ." N.C. Gen. Stat. § 14-415.1(a) (2005). Thus, the State need only prove two elements to establish the crime of possession of a firearm by a felon: (1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm. Defendant argues the first element is not actually an element of a substantive offense, but rather a recidivist component and thus possession of a firearm by a felon can only be used as a sentencing enhancement. Defendant's argument is misplaced.

> A recidivist statute's primary purpose is
>
> "to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes."

State v. Kirkpatrick, 345 N.C. 451, 454, 480 S.E.2d 400, 402 (1997) (quoting *Rummel v. Estelle*, 445 U.S. 263, 284, 63 L. Ed. 2d 382, 397 (1980)). Recidivist statutes "increase the severity of the punishment for the crime being prosecuted; they do not punish a previous crime a second time." *State v. Vardiman*, 146 N.C. App. 381, 383, 552 S.E.2d 697, 699 (2001), *appeal dismissed*, 355 N.C. 222, 559 S.E.2d 794, *cert. denied*, 537 U.S. 833, 154 L. Ed. 2d 51 (2002).

Defendant contends that our Legislature is not prohibited from enacting a statute which punishes a person who has previously been convicted of a felony for possessing a gun, but that such a statute

must be considered a condition of the punishment imposed by the judgment for the original conviction and therefore can be punished only in a contempt proceeding and not as a substantive offense. Defendant's contention is not correct. Our Courts have held that

> [t]he Legislature, unless it is limited by constitutional provisions imposed by the State and Federal Constitutions, has the inherent power to define and punish any act as a crime, because it is indisputedly [sic] a part of the police power of the State. The expediency of making any such enactment is a matter of which the Legislature is the proper judge.
>
> It is for the [L]egislature to define a crime and prescribe its punishment, not the courts or the district attorney.
>
> While a criminal statute must be strictly construed, the courts must nevertheless construe it with regard to the evil which it is intended to suppress. The intent of the legislature controls the interpretation of a statute. When 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. Priddy, 115 N.C. App. 547, 549, 445 S.E.2d 610, 612 (1994) (internal citations and quotations omitted).

While N.C. Gen. Stat. § 14-415.1 has characteristics of a recidivist statute, a plain reading of the statute shows it creates a new substantive offense. *See State v. Bishop*, 119 N.C. App. 695, 698, 459 S.E.2d 830, 832, *appeal dismissed and disc. review denied*, 341 N.C. 653, 462 S.E.2d 518 (1995); *State v. McNeill*, 78 N.C. App. 514, 516, 337 S.E.2d 172, 173 (1985), *disc. review denied*, 316 N.C. 383, 342 S.E.2d 904 (1986)); *see also State v. Bowden*, 177 N.C. App. 718, 725, 630 S.E.2d 208, 213 (2006) ("The mere fact that a statute is directed at recidivism does not prevent the statute from establishing a substantive offense."). N.C. Gen. Stat. § 14-415.1 states that "[i]t shall be unlawful" for a convicted felon to possess a firearm. N.C. Gen. Stat. § 14-415.1(a) (2005). The statute creates a substantive offense to which the Sixth Amendment right to a jury trial applies, and not a sentencing requirement aimed at reducing recidivism. When defendant violated N.C. Gen. Stat. § 14-415.1 he did not violate a "consequence of his original conviction" as defendant contends, but rather committed a new substantive offense. This assignment of error is overruled.

VI

[6] Defendant lastly argues his conviction for possession of a firearm by a felon is a violation of his right to be free from double jeopardy because the crime of possession of a firearm by a felon is a greater offense of the predicate felony and, therefore, the "same offense." We disagree.

"It is well settled that '[t]he Double Jeopardy Clause of the North Carolina and United States Constitutions protect against . . . multiple punishments for the same offense.' " *Vardiman*, 146 N.C. App. at 383, 552 S.E.2d at 699 (quoting *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986)). "[W]hether a statute survives a double jeopardy constitutional analysis does not depend on whether the statute is called substantive or status, or whether the statute is comprised of elements or sentencing factors, but what the statute accomplishes in reality." *State v. Carpenter*, 155 N.C. App. 35, 49-50, 573 S.E.2d 668, 677 (2002) (citation and quotations omitted).

Defendant contends that the offense of possession of a firearm by a felon and his predicate felony of felonious breaking and entering from 2001 are the same offense, because proof of his guilt as to possession of a firearm by a felon automatically proves his guilt of the felonious breaking and entering in 2001. However, under N.C. Gen. Stat. § 14-415.1, it is the prior *conviction* that is an element which must be proved by the State. While proving the prior conviction will necessarily establish that defendant was guilty of committing the prior crime, N.C. Gen. Stat. § 14-415.1 does not impose any punishment solely for defendant's commission of the prior crime, but instead requires the State further prove the additional element of possession of a firearm. Thus the prior *conviction* constitutes a part of an entirely new offense. Therefore, defendant's prior conviction of felonious breaking and entering is not an "offense" within the meaning of the Double Jeopardy Clause when construed with his conviction of possession of a firearm by a felon. Defendant was not prosecuted nor punished again for the underlying 2001 conviction for felonious breaking and entering; rather he was convicted and punished for his subsequent act of unlawfully possessing a firearm as a convicted felon. *See State v. Crump*, 178 N.C. App. 717, 719, 632 S.E.2d 233, 236 (2006). This assignment of error is overruled.

No error.

Judges McCULLOUGH and STROUD concur.

BECKY D. PHILLIPS, PLAINTIFF v. JAMES A. PHILLIPS, JR., DEFENDANT

No. COA06-1556

(Filed 7 August 2007)

1. Divorce— alimony—dependent spouse

The trial court did not err in an alimony case by its determination under N.C.G.S. § 50-16.1A(2) that plaintiff was a dependent spouse, because: (1) the trial court's findings include a description of the real property owned by each of the parties as well as their personal savings, thus satisfying the requirement to consider the parties' estates; (2) the findings indicate the standard of living established during the marriage and plaintiff's need for more space in order to maintain the standard of living of the spouse seeking alimony in the manner to which that spouse became accustomed during the last several years prior to separation; and (3) while it is true that plaintiff owned a condominium in fee simple, plaintiff's ownership cannot be weighed without consideration of the past use and intended future use of the condominium.

2. Divorce— alimony—consideration of all relevant factors

The trial court erred in an alimony case by failing to consider all relevant factors in determining the amount, duration, and manner of payment of alimony as required by N.C.G.S. § 50-16.3A(b), and the award of alimony is vacated and remanded for additional findings on all income, including medical benefits and any other benefits that function as income, because the trial court made no findings with respect to plaintiff's medical benefits or potential income from her IRA, although evidence of the sources of income was presented at the hearing.

3. Divorce— alimony—stipulation—technical error

Although the trial court made a technical error in an alimony case by finding that the parties stipulated that there would be no evidence pertaining to marital misconduct or fault, the error does not require reversal, because: (1) although defendant contends plaintiff admitted marital misconduct and fault by failing to respond to defendant's counterclaim, N.C.G.S. § 50-10(a) provides that the material facts in every complaint asking for a divorce shall be deemed to be denied whether the same shall be actually denied by pleading; and (2) while defendant is correct

that the parties did not stipulate on the record that there would be no evidence of marital fault, neither party presented evidence of marital misconduct or fault.

4. Divorce— alimony—notice of hearing

The trial court did not err in an alimony case by allegedly holding the trial without notice even though defendant contends he thought the hearing on 1 May 2006 would be a status conference only because on 23 March 2006 defendant signed a memorandum of judgment/order which stated any potential alimony issue is set for hearing on 1 May 2006.

5. Appeal and Error— preservation of issues—failure to object

Although defendant husband contends the trial court erred in an alimony case by failing to require plaintiff wife to produce bank records, this assignment of error is dismissed, because: (1) N.C. R. App. P. 10(b)(1) requires a party to have presented to the trial court a timely request, objection, or motion stating the specific grounds for the ruling the party desired the court to make in order to preserve a question for appellate review; and (2) defendant failed to make a timely request, objection, or motion at trial asking the court to enforce production of the bank records.

Judge JACKSON concurring in part and dissenting in part.

Appeal by defendant from order entered 16 June 2006 by Judge Beth S. Dixon in Rowan County District Court. Heard in the Court of Appeals 21 May 2007.

Robert L. Inge for plaintiff-appellee.

James A. Phillips, Jr., defendant-appellant, pro se.

MARTIN, Chief Judge.

Defendant appeals from an order filed 16 June 2006 ordering defendant to pay alimony of $700 per month to plaintiff for eleven years.

By judgment entered 9 March 2004, plaintiff and defendant were divorced. On 23 February 2005 the parties entered into a consent order providing for post separation support to be paid to plaintiff for twelve months, after which either party was given the right to calendar the issue of permanent alimony for hearing.

By agreement, the issue of alimony was set for hearing on 1 May 2006. After the hearing, the trial court determined that plaintiff was a dependent spouse substantially in need of maintenance and support, primarily so that she may obtain a suitable residence. The findings of fact noted that plaintiff owned a 930-square-foot condominium which had been and continues to be her mother's primary residence and which plaintiff's mother gifted to her for estate planning purposes. The court further found that plaintiff was living with her mother in the condominium at the time of the hearing and that such living arrangement did not allow plaintiff to keep her organ or her piano at her residence, and instead plaintiff was renting a storage unit for those items, as well as some of her other personal belongings.

With regard to the standard of living of the parties during the marriage, the court found that the marital home had been over 2,000 square feet and in need of repairs, that the parties had lived "comfortably but modestly," and that they "enjoyed some luxuries." Additionally, the court found that, in 2005, plaintiff's income was $29,840, and defendant's income was $74,704, and that defendant's future earning capacity was "substantial" while plaintiff's earning capacity was not as substantial. The court also made findings regarding property owned by the parties and their respective savings. Upon these findings, the court entered an order awarding alimony to plaintiff. Defendant appeals.

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[1] Defendant first challenges the trial court's determination that plaintiff is a dependent spouse, asserting that the trial court failed to make findings of fact required under N.C.G.S. § 50-16.1A(2) and *Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980).

The trial court found: "Plaintiff is a dependent spouse and is substantially in need of maintenance and support from the defendant as she is unable to currently afford a suitable residence." Our General Statutes state: " 'Dependent spouse' means a spouse, whether husband or wife, who is . . . substantially in need of maintenance and support from the other spouse." N.C. Gen. Stat. § 50-16.1A(2) (2005). Our Supreme Court has further interpreted the meaning of "substantially in need" as "requir[ing] only that the spouse seeking alimony establish that he or she would be unable to maintain his or her accustomed standard of living (established prior to separation) without financial contribution from the other." *Williams*, 299 N.C. at 181-82, 261 S.E.2d at 855. In *Williams*, the Court supplied additional guidelines for

determining when a spouse is "substantially in need of maintenance and support," as follows:

> A. The trial court must determine the standard of living, socially and economically, to which the parties *as a family unit* had become accustomed during the several years prior to their separation.
>
> B. It must also determine the present earnings and prospective earning capacity and any other "condition" (such as health and child custody) of each spouse at the time of hearing.
>
> C. After making these determinations, the trial court must then determine whether the spouse seeking alimony has a demonstrated need for financial contribution from the other spouse in order to maintain the standard of living of the spouse seeking alimony in the manner to which that spouse became accustomed during the last several years prior to separation. This would entail considering what reasonable expenses the party seeking alimony has, bearing in mind the family unit's accustomed standard of living.
>
> D. The financial worth or "estate" of both spouses must also be considered by the trial court in determining which spouse is the dependent spouse. . . .

Id. at 183, 261 S.E.2d at 856. Defendant argues that the trial court in the present case failed to make findings with respect to the financial worth or estate of the parties. However, the trial court's findings include a description of the real property owned by each of the parties as well as their personal savings, satisfying the requirement to consider the parties' estates.

Further, defendant contends that the court improperly considered plaintiff's ownership of the condominium, where the court made the finding "plaintiff does technically own this [condominium], however it is her mother's residence and her mother will reside there for the remainder of her life" because technical ownership is not a legal concept. Thus, defendant argues, the court failed to properly weigh this asset among the statutory factors for determining substantial need. Defendant's position fails to appreciate the meaning of the finding. Although we agree that the finding of technical ownership has no legal significance, the meaning of the finding remains intact. The court properly found that ownership of the condominium lies with

plaintiff. In further explanation of the nature of the use of the condominium (despite plaintiff's ownership), the court specifically noted that the condominium "is [plaintiff's] mother's residence and her mother will reside there for the remainder of her life." This portion of the finding indicates the standard of living established during the marriage and plaintiff's need for more space "in order to maintain the standard of living of the spouse seeking alimony in the manner to which that spouse became accustomed during the last several years prior to separation." *Id.* at 183, 261 S.E.2d at 856. When coupled with the court's finding that plaintiff lacked adequate space in the condominium to store her organ, piano, and other belongings previously located in the parties' residence, the court's finding regarding ownership of the condominium clearly corresponds to the factors enumerated in *Williams*. The dissent takes issue with the court's finding because plaintiff's ownership of the condominium is fee simple without any reservation of a life estate for her mother or any other agreement accompanying the deed evidencing plaintiff's mother's legal right to remain in the condominium. Despite the absence of such evidence, it is perfectly obvious from the finding that plaintiff's mother deeded the condominium to plaintiff as part of an estate plan. While it is true, as the dissent notes, that plaintiff owns the condominium in fee simple, plaintiff's ownership of the condominium cannot be weighed without consideration of the past use and intended future use of the condominium. Accordingly, we conclude that the trial court's findings were adequate to meet the requirements of N.C.G.S. § 50-16.1A(2) and *Williams*.

[2] By defendant's next argument, he contends the trial court violated N.C.G.S. § 50-16.3A(b), requiring the court to "consider all relevant factors" "[i]n determining the amount, duration, and manner of payment of alimony" and *Lamb v. Lamb*, 103 N.C. App. 541, 545, 406 S.E.2d 622, 624 (1991), requiring the court's findings to be "sufficiently specific to indicate that the trial judge properly considered each of the factors." *Id.* Defendant asserts the trial court failed to consider the "amount and sources of earned and unearned income . . . including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security or others" and the "relative assets and liabilities of the spouses and the relative debt service requirements of the spouses." N.C. Gen. Stat. § 50-16.3A(b)(4), (10) (2005). To support this argument, defendant notes that the court failed to make findings regarding plaintiff's health insurance benefits and retirement benefits. Defendant also notes that no monetary figure was given for the assets, liabilities,

and debt requirements of the spouses. We address this latter contention first.

N.C.G.S. § 50-16.3A(b)(10) does not require a recitation of the value of each of the assets, liabilities, and debts of the parties, but rather it calls for an assessment of the "relative assets and liabilities . . . and the relative debt service requirements of the spouses." N.C. Gen. Stat. § 50-16.3A(b)(10) (2005). The trial court's findings that plaintiff owned a condominium and had approximately $20,000 in assets and was paying $196 per month for storage and that defendant owned 50% of the building which houses his law firm, owned the marital home with an equity line of credit, had approximately $18,000 in assets, and owed $300 per month in buyout payment to a former law partner were "sufficiently specific to indicate that the trial judge properly considered each of the factors." *Lamb*, 103 N.C. App. at 545, 406 S.E.2d at 624.

With regard to defendant's contention that the trial court erred in failing to make findings regarding plaintiff's health insurance benefits, we agree. N.C.G.S. § 50-16.3A(b)(4) requires the court to consider the amount and sources of both spouses' income "including . . . benefits such as medical, retirement, insurance, social security or others." N.C. Gen. Stat. § 50-16.3A(b)(4) (2005). The court made no findings with respect to plaintiff's medical benefits or potential income from her IRA, although evidence of the sources of income was presented at the hearing. Without such findings, we cannot be sure "that the trial judge properly considered . . . the factor[]." *Lamb*, 103 N.C. App. at 545, 406 S.E.2d at 624. Therefore, we vacate the award of alimony and remand for additional findings on all income, including medical benefits and any other benefits that function as income, of which evidence was presented at the hearing.

[3] Defendant's third argument challenges the trial court's finding that "the parties . . . stipulated that there would be no evidence pertaining to marital misconduct/fault" because there was no such stipulation and contends that the court erred in failing to recognize plaintiff's admission of fault, barring her from claiming alimony. Defendant argues that plaintiff admitted marital misconduct and fault by not responding to defendant's counterclaim, relying on Rule 8(d) of the North Carolina Rules of Civil Procedure, which states "[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." N.C. Gen. Stat. § 1A-1, Rule 8(d) (2005). Rule 7(a) categorizes a counterclaim as a responsive pleading, where

it states "[t]here shall be . . . a reply to a counterclaim denominated as such." N.C. Gen. Stat. § 1A-1, Rule 7(a) (2005). Defendant concludes that under the Rules of Civil Procedure plaintiff's failure to reply to his counterclaim amounts to an admission of his allegations. However, defendant overlooks N.C.G.S. § 50-10(a), which states "the material facts in every complaint asking for a *divorce* . . . shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not." N.C. Gen. Stat. § 50-10(a) (2005) (emphasis added). This Court in *Skamarak v. Skamarak*, 81 N.C. App. 125, 126-27, 343 S.E.2d 559, 561 (1986), applying § 50-10(a), deemed all allegations in defendant's counterclaim denied, where plaintiff filed no reply to the counterclaim. *Id.* While defendant is correct that the parties did not stipulate on the record that there would be no evidence of marital fault, nonetheless, neither party presented evidence of marital misconduct or fault. Thus, the court's finding of a stipulation is a technical error which does not affect the outcome of the order and, therefore, does not require reversal. *Home Ins. Co. v. Ingold Tire Co.*, 286 N.C. 282, 290, 210 S.E.2d 414, 420 (1974) ("[W]e decline to hold a technical oversight constitutes reversible error when its correction would not produce a different result.").

[4] Defendant next argues that the trial court committed reversible error and denied defendant the right to due process by holding an alimony trial without notice. Defendant asserts that he believed the hearing on 1 May 2006 would be a "status conference" only. This argument is without merit because on 23 March 2006 defendant signed a memorandum of judgment/order which stated "any potential alimony issue is set for hearing on May 1, 2006." Accordingly, defendant received adequate notice of the alimony hearing.

[5] Defendant's final argument is that the trial court committed reversible error by failing to require plaintiff to produce bank records. "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 . . . ." N.C. R. App. P. 10(b)(1) (2006). Defendant did not make a timely request, objection, or motion at trial asking the court to enforce production of the bank records. Therefore, defendant did not preserve this assignment of error for review.

Vacated and remanded for additional findings.

Judge STEPHENS concurs.

Judge JACKSON concurs in part and dissents in part with separate opinion.

JACKSON, Judge concurring in part and dissenting in part.

I concur fully with the majority opinion with the exception of the majority's conclusion regarding plaintiff's ownership of the condominium. Because I believe that the trial court failed to properly consider plaintiff's ownership of the condominium, I must respectfully dissent from the majority's conclusion that the trial court's findings satisfy the requirements set forth in section 50-16.1A(2) of the North Carolina General Statutes and our Supreme Court's opinion in *Williams v. Williams*, 299 N.C. 174, 183, 261 S.E.2d 849, 856 (1985).

In the instant case, the trial court found that "[p]laintiff is currently living with her 83 year old mother in a 930[-square foot] condo. Plaintiff's mother purchased the home in 1982 and deeded it to plaintiff in 1993 for estate planning purposes." The trial court further found that although "[p]laintiff does technically own this home, . . . it is her mother's residence and her mother will reside there for the remainder of her life." The majority opinion, in turn, finds no material fault with this finding.

Our courts have demonstrated a strong reluctance to impose restrictions upon title absent clear language to the contrary in the deed. *See, e.g.*, *Station Assocs., Inc. v. Dare County*, 350 N.C. 367, 370, 513 S.E.2d 789, 792 (" 'The law does not favor a construction of the language in a deed which will constitute a condition subsequent unless the intention of the parties to create such a restriction upon the title is clearly manifested.' " (quoting *Washington City Bd. of Educ. v. Edgerton*, 244 N.C. 576, 578, 94 S.E.2d 661, 664 (1956))), *reh'g denied*, 350 N.C. 600, 537 S.E.2d 494 (1999). Here, there is no language in the general warranty deed limiting plaintiff's use of the subject property in favor of her mother. It is clear that plaintiff and her mother intended that the resulting conveyance would result in an estate held in fee simple. In fact, the deed itself imposes the affirmative obligation upon plaintiff to

> expressly assume[] and agree[] to be bound by and comply with all of the covenants, restrictions, terms, provisions and conditions as set forth in the Declaration and the By-Laws and any rules and regulations made pursuant thereto including, but not limited to, the obligation to make payment of assessments for the

> maintenance and operation of the condominium project which may be levied against such unit.

No right is given to nor obligation imposed upon plaintiff's mother in the deed. She merely grants all of her interest in the condominium to plaintiff in "fee simple" according to the express terms of the deed.

Although plaintiff's mother continues to reside in the condominium and, as the trial court found, plaintiff and her mother intend that she reside there for the remainder of her life, the record is devoid of any indication that plaintiff's mother reserved a life estate in the property or that plaintiff has conveyed any legally cognizable interest in the property to her mother. It is undisputed that plaintiff holds the property in fee simple, but the trial court diminished the significance of this legal interest by referring to plaintiff's interest in the property as mere "technical" ownership—a concept the majority correctly notes "is not a legal concept." However, because she holds title to the property in fee simple, plaintiff has absolute dominion over the property and may utilize the property as she chooses. As our Supreme Court noted over a century ago,

> [t]he right of property is that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. It consists in the free use, enjoyment and disposal of all a person's acquisitions, without any control or diminution save only by the laws of the land.

Vann v. Edwards, 135 N.C. 661, 665, 47 S.E. 784, 786 (1904) (internal quotation marks and citation omitted). Although, the condominium may be, as the trial court found, the "mother's residence," it remains her residence only so long as plaintiff permits. Plaintiff's mother's ability and "right" to reside in the condo is wholly subject to the whim and caprice of plaintiff. *Cf. Nixon v. United States*, 978 F.2d 1269, 1286 (D.C. Cir. 1992) ("[T]he right to exclude others is perhaps the quintessential property right. Without this right, one's interest in property becomes very tenuous since it is then subject to the whim of others . . . ." (internal citations omitted)).

I believe that the trial court erroneously failed to consider the significance of plaintiff's fee simple interest in the condominium and, thus, did not properly determine the parties' financial worth as required by our Supreme Court's opinion in *Williams*. *See Williams*, 299 N.C. at 183, 261 S.E.2d at 856. Therefore, I would remand the case for proper consideration of the true nature of

plaintiff's ownership of the condominium and entry of corresponding findings of fact. Accordingly, I respectfully dissent as to this portion of the majority opinion.

STATE OF NORTH CAROLINA v. EDGAR SIMON

No. COA06-1483

(Filed 7 August 2007)

1. Contempt— indirect criminal contempt—violation of formal written order not required

The trial court did not err by holding defendant in indirect criminal contempt of court even though defendant contends he did not violate a formal written order when he visited the office of the trial court administrator in violation of the trial court's directive to stay out of the judges' office area, because: (1) N.C.G.S. § 5A-11(a)(3) does not limit criminal contempt to violation of a formal written order that has been entered and filed with the clerk of court; and (2) although defendant cites a case for his position to the contrary, the defendant in that case was held in civil contempt which is restricted by N.C.G.S. § 5A-21(a) to the failure to comply with an order of a court.

2. Contempt— indirect criminal contempt—sufficiency of evidence

The trial court did not err by holding defendant in indirect criminal contempt of court even though defendant contends there was insufficient evidence to support the finding, because: (1) defendant concedes that Judge Albright's admonition to defendant on June 23 directed defendant to comply with Judge Spivey's previous order, and thus the practical effect of the show cause order is the same as if it had noticed Judge Spivey's order when it incorporated Judge Spivey's instructions in its directive to defendant; (2) defendant admitted at trial and on appeal that on 26 June 2006 he entered the courthouse area marked "Judges Office" to hand deliver a document to the trial court administrator; (3) there was sufficient evidence that defendant knew he was to stay out of the judges' office area where the trial court administrator's office was located, particularly since he admitted having been warned that the area was restricted; and (4) the case management plan says nothing about hand-delivering motions, and

defendant offers no explanation for his failure to simply leave with the Clerk of Court his emergency motion addressed to the trial court administrator.

3. Contempt— indirect criminal contempt—burden of proof

The trial court did not err in an indirect criminal contempt case by allegedly placing the burden on defendant to prove that he was not in contempt of court rather than requiring the State to prove beyond a reasonable doubt that defendant was in contempt, because: (1) although defendant is correct that the State has the burden to prove the facts that form the basis of the contempt charge, in the instant case defendant admitted to the underlying facts that on 26 June 2006 he entered the judges' office area of the courthouse, that he had been directed by Judge Albright to comply with Judge Spivey's clear instruction not to go to the judges' offices, and that Judge Albright had told him to stay out of the judges' offices; (2) there was no issue of fact to be decided, and thus no burden of proof was placed on defendant; (3) the only issue before the trial court was a question of law involving whether defendant's admitted behavior constituted indirect criminal contempt; and (4) the trial court properly required proof beyond a reasonable doubt of defendant's contempt of court, and its order states the facts were found beyond a reasonable doubt.

Appeal by defendant from judgment entered 9 August 2006 by Judge C. Philip Ginn in Forsyth County Superior Court. Heard in the Court of Appeals 6 June 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Grady L. Balentine, Jr. , for the State.

Don Willey, for defendant-appellant.

SMITH, Judge.

Edgar Simon (defendant) appeals from judgment entered upon the trial court's order holding him in indirect criminal contempt of court. We affirm.

The pertinent facts may be summarized as follows: Defendant was previously involved in a civil action designated a special proceeding in Forsyth County, North Carolina, the details of which are not at issue in the present appeal. *See* N.C. Gen. Stat. § 1-3; and

§ 1A-1, Rule 2 (2005). On 11 May 2006 a hearing was held in the special proceeding before Forsyth County Superior Court Judge Ronald E. Spivey. During this hearing, Judge Spivey instructed defendant as follows:

> JUDGE SPIVEY: . . . [T]he Court will find that during the pendency of this action . . . the respondent has been a frequent caller to the judge's office. The staff reports to me, as I stepped out to prepare this judgment, that at times [he has made] as many as 20 phone calls a week in addition to letters, faxes, and personal visits to the judge's office.
>
> The respondent has also been discovered to be in secure areas of the courthouse, behind courtroom 5A of criminal court where prisoners are transported and when asked to leave, he was grudgingly compliant and questioned the authority of our staff to ask him to leave a secured area.
>
> . . . .
>
> Based on these facts, the Court would direct that the respondent not call the judge's office about this case any further. . . . Any additional filings may be made with the clerk's office or whatever appropriate office and he should not fax or come to the judge's office to speak to any staff about this case.

On 20 June 2006 defendant faxed an "Affidavit of Personal Bias" in the special proceeding to Senior Resident Superior Court Judge of Forsyth County Judson D. Deramus, Jr., wherein he complained that Judge Spivey had "strongly admonish[ed him] to not call, send faxes or letters to court staff and to not visit the judges office of the courthouse." On 23 June 2006, defendant appeared before Emergency Superior Court Judge W. Douglas Albright, in the special proceeding, who reviewed defendant's letter to Judge Deramus, and reiterated Judge Spivey's instructions to defendant:

> JUDGE ALBRIGHT: . . . There's a file in here that Judge Spivey admonished you not to call or send faxes. . . . [H]e admonished you. That's the same way to say he ordered you—
>
> MR. SIMON: He did.
>
> THE COURT: —not to call, not to send faxes, not to send letters to the court staff, and not to visit the judges' office. . . . [D]on't put yourself in a position where the Court's going to have to take action[.]

On 26 June 2006 defendant went to the judges' office area on the fifth floor of the Forsyth County Courthouse, to hand-deliver an emergency motion for a temporary restraining order in the special proceeding to the trial court administrator. In order to do this, defendant entered the courthouse area set aside for the judges' chambers and separated from the rest of the courthouse by a door marked "Judges Offices." On the same day, Judge William Z. Wood, Jr., of the Forsyth Superior Court issued a Show Cause Order in the case *sub judice* stating in pertinent part:

> . . . [T]he above named individual was ordered on June 23, 2006 by the Honorable Judge W. Douglas Albright, to stay away from the Forsyth County trial administrator's office. This office is located on the fifth floor of the Forsyth County Hall of Justice building in Winston-Salem, N.C. On June 26, 2006 the above named defendant did appear in the Forsyth County [trial] administrator's office. This appearance is in direct violation of Judge Albright's previous order.

A hearing was conducted on the Show Cause Order before Judge C. Philip Ginn in Forsyth County Superior Court on 9 August 2006. On that date, Judge Ginn entered an order finding defendant in indirect criminal contempt of court. In a Judgment Suspending Sentence of even date, defendant received a suspended thirty day sentence and was placed on supervised probation. From this judgment and commitment, defendant appeals.

Standard of Review

Defendant appeals from judgment entered upon an order holding him in criminal contempt. A contempt hearing is a non-jury proceeding. "The standard of appellate review for a decision rendered in a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. 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 (2001) (citations omitted). "The trial court's conclusions of law drawn from the findings of fact are reviewable de novo." *Curran v. Barefoot*, 183 N.C. App. 331, 335, 645 S.E.2d 187, ––– (2007) (citing *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980)).

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[1] Defendant first argues that the trial court erred in finding him in criminal contempt of court, on the grounds that "[n]either Judge Albright's June 23, 2006 oral directive for the defendant to comply with Judge Spivey's prior order nor Judge Spivey's May 11, 2006 order were ever reduced to writing, signed by the judge nor filed with the clerk[.]" Defendant asserts that one cannot be held in criminal contempt of court unless he violates a formal written order. We disagree.

"At the outset we note that contempt in this jurisdiction may be of two kinds, civil or criminal[.] . . . Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice." *O'Briant v. O'Briant*, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985) (citing *Blue Jeans Corp. v. Clothing Workers*, 275 N.C. 503, 508-09, 169 S.E.2d 867, 869 (1969)). "Accordingly, 'criminal [contempt] proceedings are those brought to preserve the power and to vindicate the dignity of the court and to punish for disobedience of its processes or orders.' " *State v. Randell*, 152 N.C. App. 469, 473, 567 S.E.2d 814, 817 (2002) (quoting *State v. Reaves*, 142 N.C. App. 629, 632-33, 544 S.E.2d 253, 256 (2001)).

Direct criminal contempt is "committed within the sight or hearing of a presiding judicial official[,]" N.C. Gen. Stat. § 5A-13(a)(1) (2005), while indirect criminal contempt "arises from matters not occurring in or near the presence of the court, but which tend to obstruct or defeat the administration of justice." *Atassi v. Atassi*, 122 N.C. App. 356, 361, 470 S.E.2d 59, 62 (1996). N.C. Gen. Stat. § 5A-13(b) (2005). Defendant herein was alleged to be in indirect criminal contempt of court, for visiting the office of the trial court administrator in violation of the trial court's directive to stay out of the judges' office area.

Under N.C. Gen. Stat. § 5A-11(a)(3) (2005), criminal contempt includes "[w]illful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution." The statute does not limit criminal contempt to violation of a formal written order that has been entered and filed with the clerk of court. This is consistent with the role of criminal contempt proceedings in protecting the authority and dignity of the court. The range of actions tending to undermine respect for the court or impair the proper administration of justice will include many circumstances that are not the subject of formally filed orders. For example, a trial court may employ criminal contempt proceedings in response to a loud or disrespectful attorney, witness, or spectator.

We conclude that a finding of criminal contempt, direct or indirect, does not require that the relevant "process, order, directive, or instruction" be a formal written order. Nor have our appellate opinions ever imposed such a requirement. *See*, *e.g.*, *State v. Pierce*, 134 N.C. App. 148, 152, 516 S.E.2d 916, 919 (1999) (juror who researched certain issues in the case found in contempt of court because it was "undisputed that Judge Cornelius directed the jury not to discuss the case with anyone outside the courtroom and not to conduct their own investigations"); *State v. Wall*, 49 N.C. App. 678, 272 S.E.2d 152 (1980) (defendant held in criminal contempt of court for urging a witness to disobey a subpoena that would be issued in the future).

In support of his position to the contrary, defendant cites only *Onslow County v. Moore*, 129 N.C. App. 376, 499 S.E.2d 780 (1998). However, the defendant in *Onslow County* was held in civil contempt. Unlike criminal contempt, the definition of civil contempt is restricted by N.C. Gen. Stat. § 5A-21(a) (2005) to the failure to "comply with an order of a court[.]" (emphasis added).

We believe it to be the better practice for a trial court to put an instruction or directive in writing, especially if the order is to remain effective after the completion of the proceeding or matter then before the court. However, we conclude that G.S. § 5A-11(a)(3) does not require that a finding of criminal contempt be predicated upon the failure to obey a written order. This assignment of error is overruled.

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[2] Defendant next argues there was insufficient evidence to support the trial court's finding him in contempt of court. He contends that (1) "there is not competent evidence of record . . . that the defendant violated any provision of the orders of Judges Albright or Spivey"; (2) "there is insufficient evidence . . . [that] defendant knowingly and willfully violated the oral orders or admonishments"; and (3) "his conduct in delivering an emergency motion to the trial court administrator on June 26, 2006 was not done after clear warning that such conduct was improper[.]" We disagree.

Preliminarily, we note that the show cause order alleges defendant's violation of Judge Albright's order of 23 June 2006, and does not reference Judge Spivey's order of 11 May 2006, or provide notice that defendant was in contempt of Judge Spivey's order. Thus, the trial court's subject matter jurisdiction was limited to consideration of whether defendant was in contempt of Judge Albright's instructions.

However, defendant concedes that "Judge Albright's admonition to the defendant on June 23 directed the defendant to comply with Judge Spivey's previous order. Judge Albright's directive required the defendant to comply with the prior order[.]" Thus, the practical effect of the show cause order is the same as if it had noticed Judge Spivey's order, because Judge Albright incorporated Judge Spivey's instructions in his directive to defendant.

Judge Spivey's instructions to the defendant on 11 May 2006 included in relevant part the following:

> . . . [T]he Court will find that . . . the respondent has been a frequent caller to the judges' office . . . in addition to letters, faxes, and personal visits to the judge's office. The respondent has also been discovered to be in secure areas of the courthouse[.] . . .
>
> Based on these facts, the Court would direct that the respondent not call the judge's office about this case any further. . . . Any additional filings may be made with the clerk's office or whatever appropriate office and he should not fax or come to the judge's office to speak to any staff about this case.

Judge Spivey's directive was repeated by Judge Albright at the hearing conducted 23 June 2006, wherein Judge Albright stated in pertinent part that defendant was "not to call, not to send faxes, not to send letters to the court staff, and not to visit the judges' office."[1]

Defendant admitted at trial and on appeal that on 26 June 2006 he entered the courthouse area marked "Judges Office" to hand deliver a document to the trial court administrator. We conclude that the trial court's determination, that this violated Judge Albright's order, was supported by competent evidence. We reject defendant's arguments to the contrary.

Defendant argues that he had no clear warning that he was prohibited from delivering a document to the trial court administrator, even though the trial court administrator's office was in the judges' office area of the courthouse. This assertion is belied by the defendant's own letter to Judge Deramus on 20 June 2006, wherein he wrote in relevant part that:

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1. The quoted statements are found in the fragment of transcript on page 28 of the record. We assume this is from the hearing before Judge Albright, because it is dated 23 June 2006, the date defendant was before Judge Albright. However, we remind defendant of his duty to prepare the appellate record properly, in order to eliminate potential ambiguities.

> I, Edgar A. Simon, Jr., am the defendant in the above referenced case. . . . For an extended period of time, I was permitted to enter the 5th floor area of the courthouse where the Trial Court Administrator was located[.] . . . I entered that area approximately one month ago, unaware that <u>the area had been designated as off-limits to other than court staff, since my last visit</u>. . . . [When] a clerk approached me[.] . . . I asked her where I should go to file my calendar request, now that this area was restricted[.] . . . [O]n May 11, 2006, <u>Judge Ronald E. Spivey . . . strongly admonish[ed] me to not call, send faxes or letters to court staff and to not visit the judges office of the courthouse.</u> . . .

(emphasis added). Defendant asserts that the "single act of contempt" referenced in the Show Cause Order—defendant's visit to the trial administrator's office to personally deliver a document—did not violate Judge Albright's order. However, defendant's letter states that Judge Spivey told him not to "visit the judges office of the courthouse," and defendant admitted at the contempt hearing that Judge Albright told him "you are not to go to the judges' office, [or] visit the judges' office." It is undisputed that the trial court administrator's office was in the same part of the courthouse as the judges' offices, and that on 26 June 2006 defendant was in the courthouse area marked "Judges Office" to hand-deliver a document to the trial court administrator. We conclude that there was sufficient evidence that defendant knew he was to stay out of the judges' office area where the trial court administrator's office was located, particularly since he admitted having been warned that the area was "restricted."

Defendant also argues that, notwithstanding his 26 June 2006 entry into the judges' office section of the courthouse, he should not have been held in contempt because his purpose for being there was to leave an emergency motion for the trial court administrator. Defendant justifies his actions on the basis that Judge Spivey had told him that "additional filings may be made with the clerk's office or whatever appropriate office[.]" Defendant directs our attention to the Case Management Plan for Forsyth County, which provides that emergency motions should be "<u>addressed</u> to the Trial Court Administrator for calendaring." (emphasis added). On this basis, defendant contends that it was proper for him to personally deliver his motion. However, the case management plan says nothing about hand-delivering motions, and defendant offers no explanation for his failure simply to leave with the Clerk of Court his emergency

motion addressed to the trial court administrator. This assignment of error is overruled.

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[3] Finally, defendant argues that the trial court erred by placing on him the burden of proving that he was not in contempt of court, rather than requiring the State to prove beyond a reasonable doubt that defendant was in contempt. We conclude that the trial court did not shift the burden of proof to defendant.

Defendant is correct that in a criminal contempt proceeding, as in any other criminal proceeding, the State has the ultimate burden of proof beyond a reasonable doubt of all elements of the offense. "On a hearing for criminal contempt, the State must prove all of the requisite elements under the applicable statute, beyond a reasonable doubt." *State v. Key*, 182 N.C. App. 624, 628, 643 S.E.2d 444, 448 (2007). However, " '[s]tipulations duly made during the course of a trial constitute judicial admissions binding on the parties and dispensing with the necessity of proof[.]' " *City of Brevard v. Ritter*, 285 N.C. 576, 580-81, 206 S.E.2d 151, 154 (1974) (where defendant admits actions in violation of order the burden shifts to defendant "to show compliance in order to purge himself of the contempt citation") (quoting [28] STRONG, N.C. INDEX [4TH], TRIAL, § [139] STIPULATIONS).

Defendant's assertion that he was subjected to an improper burden of proof is based on his quotation, out of context, of a few fragments of the transcript. Defendant directs our attention to the following exchange occurring before the hearing:

> THE COURT: Is this not a show-cause hearing? Was this not one where you were ordered to come in and show cause?
>
> MS. MASSEY (Defense Counsel): Yes sir.
>
> TRIAL COURT: Well, that puts the burden on you to present evidence.

Thereafter, the court recessed for several hours before conducting the hearing. At the beginning of the hearing, the following dialog took place:

> TRIAL COURT: . . . Ms. Massey, you're representing Mr. Simon, is that correct, in this matter after having been appointed by the Court?
>
> MS. MASSEY: Yes, Your Honor.

> TRIAL COURT: Does he admit or deny the allegations in the show-cause order?
>
> MS. MASSEY: Judge, as I have indicated to the Court and (the prosecutor) earlier, he <u>admits the actions but denies that it is contempt.</u>
>
> TRIAL COURT: All right. Then let him show cause why it is not contempt.

(emphasis added). Defendant is correct that the State has the burden to prove the <u>facts</u> that form the basis of the contempt charge. N.C. Gen. Stat. § 5A-15(f) (2005) ("If the person is found to be in contempt, the judge must make findings of fact and enter judgment. The facts must be established beyond a reasonable doubt."). However, in the instant case, defendant <u>admitted</u> to the underlying facts that (1) on 26 June 2006 he entered the judges' office area of the courthouse; (2) that he had been directed by Judge Albright to comply with Judge Spivey's clear instruction <u>not</u> to go to the judges' office; and (3) that Judge Albright had told him to stay out of the judges' offices.

Accordingly, there was no issue of fact to be decided, and thus no burden of proof placed on defendant. The only issue before the trial court was a question of <u>law</u>—whether defendant's admitted behavior constituted indirect criminal contempt. Reading the language cited by defendant in the context of the entire hearing, it is clear that the trial court properly required proof beyond a reasonable doubt of defendant's contempt of court. Additionally, the trial court's order clearly states that the facts were found "beyond a reasonable doubt" which is the proper standard. This assignment of error is overruled.

For the reasons discussed above, we conclude that the trial court did not err and that its order should be

Affirmed.

Judges McGEE and STEPHENS concur.

STATE OF NORTH CAROLINA v. CARL WAYNE MOORE, SR.

No. COA06-1405

(Filed 7 August 2007)

1. Appeal and Error— preservation of issues—failure to raise issue in written motion for appropriate relief

Although defendant contends that the prosecution discouraged a witness from testifying in a double armed robbery case and thereby violated defendant's constitutional right to offer testimony of a witness in his defense, defendant failed to preserve this argument for appellate review, because: (1) defendant did not raise a Sixth Amendment argument in his written motion for appropriate relief; (2) the prosecutor even noted during the hearing that defendant's motion was couched in terms of newly discovered evidence and not in terms of a constitutional violation; (3) by making his Sixth Amendment argument during the hearing, defense counsel essentially was attempting to amend his motion to include the constitutional argument; (4) defendant could have made an amendment to his motion prior to the hearing under N.C.G.S. § 15A-1415(g) or he could have made such an amendment during the hearing if he had done so in writing, but he failed to do either; and (5) defendant's argument concerning the alleged Sixth Amendment violation could not be considered a new motion for appropriate relief made under Article 89 since it was not in writing and it was not made within ten days after entry of judgment.

2. Appeal and Error— preservation of issues—motion for appropriate relief—failure to raise issue at trial

Although defendant contends in a motion for appropriate relief that his due process rights were violated when the State failed to correct alleged false and misleading testimony from a witness that he had been offered no deals in exchange for his testimony, this assignment of error is dismissed, because: (1) defendant failed to make this constitutional argument at any point at the trial level, either during the presentation of evidence, during the hearing on a codefendant's motion to dismiss, or during the hearing on his motion for appropriate relief; (2) defense counsel conceded during oral arguments that this constitutional argument was not raised before the trial court; and (3) constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.

Review by writ of *certiorari* from judgment entered 9 April 1998 and the order entered 19 December 2001 by Judge Jerry R. Tillet in Beaufort County Superior Court. Heard in the Court of Appeals 23 May 2007.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General R. Marcus Lodge, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

JACKSON, Judge.

Carl Wayne Moore, Sr. ("defendant") petitioned this Court for a writ of *certiorari* to review his 9 April 1998 conviction and the 19 December 2001 order denying his motion for appropriate relief. This Court granted defendant's petition on 28 January 2005. For the following reasons, we find that defendant has failed to preserve his arguments for appellate review, and accordingly, we dismiss defendant's appeal.

In April 1997, Jason Denbin ("Denbin") committed two robberies in Beaufort County, North Carolina. Denbin first robbed the Sunset Bar ("the bar"), and then, Denbin and his girlfriend, Dusty Clark ("Clark"), robbed Stephen Waters ("Waters") at Waters' residence. The instant appeal arises out of the role defendant allegedly played in those robberies.

On 20 April 1997, Denbin entered the bar and pointed a gun at the bartender, Virginia Garrison ("Garrison"), telling her that he knew about the money bags kept in a cabinet under the cash register. Garrison gave him the money bags as well as money from the cash register. Denbin admitted that he was the man who committed the robbery, and stated that Clark accompanied him and stayed in the car while he was in the bar. Denbin testified that he was having financial problems and talked to defendant, Clark, and Clark's mother, Rebecca Whitley ("Whitley"), about his need for money. He further testified that the four of them discussed ways that Denbin could obtain money by robbery, and that defendant told them about the bar and Waters' house. According to Denbin, defendant, a former owner of the bar, informed Denbin: (1) that defendant had taught the subsequent owner how to keep cash in the money bags; (2) that the money was located in bags under the register; (3) how much money likely was contained in the bags; (4) that the only person that would be in the bar after hours would be the bartender cleaning up; (5) that the

bartender's name was Ginny; and (6) that Ginny had a newborn child and would not offer any resistance. Denbin also testified that: (1) he and defendant drove to defendant's brother's house to retrieve a handgun; (2) defendant purchased ammunition at Wal-Mart; and (3) defendant gave the gun to Denbin. He testified that after he and Clark committed the robbery, they returned to Whitley's house and divided the money among the four of them. Finally, Denbin testified that: (1) he and defendant drove to a nearby stream; (2) defendant threw the empty money bags into the stream; and (3) Denbin returned the handgun to defendant.

With respect to the Waters' robbery, the evidence tended to show that defendant, along with his brother, had done repair work at Waters' residence. While defendant and his brother were working at the house, they could go inside to use the restroom. Waters, who kept a safe in his bedroom, testified that he once saw defendant inside the house while he was home for lunch. Denbin, in turn, testified that defendant provided him with details on the layout of the house and the location of the safe. Denbin also testified that he obtained a gun from defendant again and that on 27 April 1997, Whitley drove Denbin and Clark to Waters' house. At approximately 9:30 p.m. that evening, Clark knocked on Waters' front door. She told Waters that she had car trouble and needed water for her radiator. When Waters opened the door and invited her in, he saw Denbin standing in front of him, holding a gun. Waters went to his bedroom to get his wallet, and while handing it to Clark, she hit him across the head with a baseball bat, seriously injuring him. Denbin then told Waters that he knew about and wanted the safe, and after Waters showed Denbin the safe, Denbin and Clark left with Waters' safe and wallet. Finally, Denbin testified that the day after the robbery, he and Clark burned the papers found in the safe and tossed it off a bridge into a river; Denbin ultimately kept the money taken from the safe and wallet.

When Denbin and Clark were arrested in May 1997, they gave statements to police implicating both defendant and Whitley as having been involved in the planning and execution of the robberies. All four were charged with robbery with a dangerous weapon in each of the robberies. Ultimately, Denbin and Clark pled guilty to the charges, and Whitley and defendant pled not guilty and proceeded to trial jointly.

Although Clark initially implicated both Whitley and defendant in her statements to police, she later changed her story at a meeting with the prosecutor. In that meeting, Clark denied that Whitley was

involved and stated that, contrary to Denbin's testimony, there was no meeting of the original four defendants. She stated that Denbin had told her of defendant's involvement in the planning and execution of the robberies. She testified that she was not present when defendant allegedly described the bar; rather, Clark stated that Denbin had told her that defendant gave him that information. Clark essentially claimed to have no personal knowledge of defendant's involvement. Because Clark's statements at the meeting with the prosecutor did not align with the statement she had given the police upon arrest, the prosecutor decided not to call her as a witness and revoked his offer to consolidate the charges upon a guilty plea. At Whitley's trial, which was joined with defendant's, Whitley called Clark to testify, but Clark, on the advice of her attorney, invoked the Fifth Amendment.

On 9 April 1998, a jury found both defendant and Whitley guilty of the two armed robberies, and the trial court sentenced defendant to consecutive terms of 140 to 177 months imprisonment and 145 to 183 months imprisonment.

On 17 April 1998, defendant filed a motion for appropriate relief, seeking a new trial based upon newly discovered evidence. On 28 April 1998, Whitley also filed a motion for appropriate relief seeking a new trial, alleging that: (1) she "was deprived of her Sixth Amendment right to present a necessary witness [*i.e.*, Clark], said constitutional violation occurred as a result of the [prosecutor] threatening [Clark], said threat directly contingent upon [Clark] testifying on behalf of the defense"; and (2) "[b]ut for the improper threat and due process violation . . . , a different verdict would have likely been rendered on one, if not both charges." At the hearing on the motions, Clark testified, *inter alia*, that she invoked the Fifth Amendment when called by Whitley because she was afraid that the prosecutor would indict her for additional crimes if she testified for the defense. On 15 August 2000, the trial court granted Whitley's motion, and on 19 December 2001, the trial court denied defendant's motion. Thereafter, on 10 January 2005, defendant petitioned this Court for a writ of *certiorari*, which this Court granted on 28 January 2005.

[1] In his first argument on appeal,[1] defendant contends that the prosecution discouraged Clark from testifying and thereby violated

1. Defendant contends in part that his trial counsel's failure to allege a constitutional violation in the written motion for appropriate relief constituted ineffective assistance of counsel. Defendant, however, has failed to argue ineffective assistance of counsel in his brief, and accordingly, this assignment of error is deemed abandoned. *See* N.C. R. App. P. 28(b)(6) (2006).

defendant's constitutional right to offer the testimony of a witness in his defense. Defendant, however, has failed to preserve this argument for appellate review.

In his written motion for appropriate relief, defendant requested "that the Court grant him a new trial based on newly discovered evidence, or in the alternative, grant him a new sentencing hearing" on the grounds that his sentence was "grossly disproportionate when compared to the sentences of the principals, Jason Denbin and Dusty Clark." At the hearing on defendant's motion, defense counsel attempted to expand upon his original bases for the motion for appropriate relief by riding on the coattails of Whitley's counsel's Sixth Amendment argument. Defendant's attorney stated, "Judge, I'm not going to rehash all of what [counsel for Whitley] has said. But I would like to very briefly touch on the Sixth Amendment issue . . . ." Defense counsel then proceeded to engage the trial court in argument with respect to the alleged Sixth Amendment violation as applied to defendant. In conclusion of law number 2, however, the trial court stated that defendant had failed to preserve this constitutional argument:

> While defendant's motion did not allege a constitutional violation, even if this Court were to consider such a claim as to the defendant Moore, this Court finds that neither the defendant's Sixth Amendment right under the United States Constitution to present witnesses in his defense nor his Fourteenth Amendment due process rights was [sic] violated.

North Carolina General Statutes, section 15A-1401 provides that relief from errors committed in criminal proceedings may be sought by, *inter alia*, a "[m]otion for appropriate relief, as provided in Article 89." N.C. Gen. Stat. § 15A-1401(1) (2005). Article 89, in turn, governs the procedure by which motions for appropriate relief must be made. *See* N.C. Gen. Stat. § 15A-1412 (2005) ("The provision in this Article for *the right to seek relief by motion for appropriate relief is procedural* and is not determinative of the question of whether the moving party is entitled to the relief sought or to other appropriate relief." (emphasis added)). As noted in the commentary to section 15A-1412,

> [a] casual reading might create the false impression that providing the procedural device for litigating the question in some way implies that there is a right to relief simply by reason of the error's assertion. Of course, that is not true and the question of

> whether there was some error, and if so, whether it warrants the relief sought, are questions to be determined on the merits, *utilizing the procedural device provided here.*

N.C. Gen. Stat. § 15A-1412 cmt. (2005) (emphasis added). A motion for appropriate relief is "North Carolina's procedural mechanism for state post-conviction relief," *Jones v. Cooper*, 311 F.3d 306, 309 (4th Cir. 2002), *cert. denied*, 539 U.S. 946, 156 L. Ed. 2d 634 (2003), and therefore, a defendant seeking relief by a motion for appropriate relief must follow the procedures provided in Article 89.

In the instant case, defendant filed his motion for appropriate relief on 17 April 1998, less than ten days after the trial court entered judgment. Pursuant to section 15A-1414, defendant had the right to "seek appropriate relief for *any error* committed during or prior to the trial." N.C. Gen. Stat. § 15A-1414(a) (2005) (emphasis added). Although certain errors must be asserted during the initial ten-day time-frame, *see* N.C. Gen. Stat. § 15A-1414(b) (2005), defendant's Sixth Amendment argument is covered by section 15A-1415, and defendant was permitted to raise this argument at any time after the verdict. *See* N.C. Gen. Stat. § 15A-1415(a), (b) (2005).

However, defendant did not raise a Sixth Amendment argument in his written motion for appropriate relief, notwithstanding the fact that Whitley expressly argued a Sixth Amendment violation in her written motion for appropriate relief. The prosecutor even noted during the hearing that "Defendant Moore's motion is couched in terms of newly discovered evidence, not in terms of a constitutional violation." By making his Sixth Amendment argument during the hearing, defense counsel essentially was attempting to amend his motion to include the constitutional argument. Defendant could have made such an amendment prior to the hearing pursuant to section 15A-1415(g):

> [t]he defendant may file amendments to a motion for appropriate relief at least 30 days prior to the commencement of a hearing on the merits of the claims asserted in the motion or at any time before the date for the hearing has been set, whichever is later. Where the defendant has filed an amendment to a motion for appropriate relief, the State shall, upon request, be granted a continuance of 30 days before the date of hearing.

N.C. Gen. Stat. § 15A-1415(g) (2005). Defendant even could have made such an amendment during the hearing:

> [a]fter such hearing has begun, the defendant may file amendments only to conform the motion to evidence adduced at the hearing, or to raise claims based on such evidence.

Id. Although defendant arguably was attempting to amend his motion for appropriate relief "to conform the motion to evidence adduced at the hearing, or to raise claims based on such evidence," defendant failed to file any amendment, either before or after the hearing in accordance with section 15A-1415(g). Such amendments must be filed in writing. *See* N.C. Gen. Stat. § 15A-1420(a)(3) (2005) ("A written motion for appropriate relief must be filed in the manner provided in [North Carolina General Statutes, section] 15A-951(c)."); *see, e.g.*, *Bowie v. Polk*, No. 5:03-CV-137-MU, 2006 U.S. Dist. LEXIS 74839, at *39-40 (W.D.N.C. Sept. 29, 2006) (holding that an amendment must be filed in accordance with section 15A-951(c) and that "new claims . . . raised in a post-MAR hearing brief of law or proposed Order" are not sufficient to satisfy the rules governing amendments to motions for appropriate relief).

As one court recently noted,

> [u]nder North Carolina law, new claims must be raised by way of amendments to the MAR. Furthermore, after a hearing on the merits of an MAR has begun, "the defendant may file amendments only to conform the motion to evidence adduced at the hearing, or to raise claims based on such evidence."

Strickland v. Lee, 471 F. Supp. 2d 557, 582 n.20 (W.D.N.C. 2007) (quoting N.C. Gen. Stat. § 1415(g)). Here, as in *Strickland*, "[t]here is no evidence in the record that after his post-conviction hearing, [defendant] moved to amend his MAR either to conform it to evidence adduced at the hearing or to raise claims based on such evidence." *Id.* Therefore, defendant failed to present his Sixth Amendment argument in accordance with the rules governing motions for appropriate relief.

Additionally, defendant's argument concerning the alleged Sixth Amendment violation cannot be considered a new motion for appropriate relief made in accordance with the provisions of Article 89. Pursuant to section 15A-1420, a motion for appropriate relief must be in writing and timely filed unless it is made "(1) [i]n open court; (2) [b]efore the judge who presided at trial; (3) [b]efore the end of the session if made in superior court; and (4) [w]ithin 10 days after entry of judgment." N.C. Gen. Stat. § 15A-1420(a)(1) (2005). As defendant's argument concerning the alleged Sixth Amendment violation was not

made within ten days after entry of judgment, defendant was required to make his motion in writing and timely file the motion with the trial court. As noted *supra*, there is no evidence in the record that defendant filed a written motion for appropriate relief based upon an alleged Sixth Amendment violation.

Defendant failed to properly present his Sixth Amendment argument to the trial court, either as an amendment to his written motion for appropriate relief or as a new motion for appropriate relief. Accordingly, defendant has failed to preserve this argument for appellate review. *See* N.C. R. App. P. 10(b)(1) (2006).

[2] In his second argument,[2] defendant argues that his due process rights were violated when the State failed to correct false and misleading testimony from Denbin. Specifically, Denbin testified, both on direct and cross-examination, that he had been offered no deals in exchange for his testimony. Although he acknowledged on cross-examination that the prosecutor had discussed the possibility of consolidating his offenses for judgment, he testified that he had not signed any written agreement, and he firmly denied that he had been made any specific promises. On appeal, defendant claims that there, in fact, was an oral plea agreement between the prosecutor and Denbin, which provided that the charges of armed robbery would be consolidated. Defendant thus contends that the prosecutor, in violation of *Napue v. Illinois*, 360 U.S. 264, 3 L. Ed. 2d 1217 (1959), failed to correct Denbin's testimony concerning his plea discussions with the prosecutor.

In *Napue*, the United States Supreme Court held that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected . . . ." *Napue*, 360 U.S. at 269, 3 L. Ed. 2d at 1221 (internal citations omitted). Although defendant argues that his constitutional right to due process was violated pursuant to the principles enunciated by the Supreme Court in *Napue*, defendant has not referenced any instance in the record where he made this constitutional argument before the trial court. Indeed, it appears that defendant failed to make this constitutional argument at any point at the trial level, neither during the presentation of the evi-

2. Defendant contends in part that his counsel's failure to insist that the prosecutor correct Denbin's testimony constituted ineffective assistance of counsel. Again, defendant has failed to argue ineffective assistance of counsel in his brief, and therefore, this assignment of error is deemed abandoned. *See* N.C. R. App. P. 28(b)(6) (2006).

dence, during the hearing on Whitley's motion to dismiss, nor during the hearing on his motion for appropriate relief. In fact, defense counsel conceded during oral arguments before this Court that this constitutional argument was not raised before the trial court. It is well-established that "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001). Accordingly, defendant has failed to preserve this issue for appeal.

Defendant's remaining assignment of error not argued in his brief on appeal is deemed abandoned. *See* N.C. R. App. P. 28(b)(6) (2006).

Dismissed.

Chief Judge MARTIN and Judge McGEE concur.

DEBORAH DODSON, PLAINTIFF-APPELLEE v. DAVID DODSON, DEFENDANT-APPELLANT

No. COA06-969

(Filed 7 August 2007)

Divorce— alimony—modification of alimony—conclusions of law—findings of fact

The trial court did not abuse its discretion in the amount it reduced defendant's alimony obligation because: (1) defendant did not assign error to any of the trial court's conclusions of law, and therefore waived his right to challenge the conclusions; and (2) the findings of fact are deemed to be supported by competent evidence when the transcript was incomplete, appellant has the duty to see the record is properly prepared and transmitted, and an appellate court is not required to and should not assume error by the trial judge when none appears on the record before the appellate court.

Judge TYSON dissenting in a separate opinion.

Appeal by defendant from order entered 12 August 2005 by Judge Donna Stroud in Wake County District Court. Heard in the Court of Appeals 8 May 2007.

No brief filed for plaintiff-appellee.

Shanahan Law Group, by Brandon S. Neuman and Kieran J. Shanahan, for defendant-appellant.

CALABRIA, Judge.

David Dodson ("defendant") appeals from an order modifying alimony. We affirm.

Deborah Dodson ("plaintiff") and defendant (collectively, "the parties") were married on 8 October 1977 and separated on 28 January 2002. Prior to the parties' divorce on 30 April 2004, plaintiff filed a complaint for post separation support, alimony, and attorney's fees and the parties entered into an arbitration agreement regarding alimony, equitable distribution, and attorney's fees. At the time of the arbitration hearing on 10 May 2004, two of the parties' three children had reached the age of majority, and two of them lived with the plaintiff. One of the children living with the plaintiff was home-schooled at the age of 18 and the other was the parties' minor child with severe medical conditions requiring supervision.

Since the plaintiff was unemployed, the arbitrator imputed the plaintiff's income at the rate of $6.00 per hour for 30 hours a week and determined the plaintiff's reasonable and necessary living expenses were approximately $2,330.00 per month. The arbitrator further determined the defendant had the ability to pay alimony in the amount of $2,200.00 per month based on his salary and monthly expenses. On 4 June 2004, the arbitrator ordered the defendant to pay alimony in the amount of $2,200.00 per month for 10 years as well as attorney's fees in the amount of $5,739.99. On 16 July 2004, the trial court confirmed the arbitrator's decision regarding the amount and the duration of the alimony and awarded attorney's fees.

On 17 August 2004, defendant filed motions for tax exemptions and a modification of the alimony award and alleged a change in circumstances. The circumstances included, *inter alia*, the children were no longer minors, the plaintiff's monthly income was actually higher and defendant's income was substantially lower than the amounts the arbitrator had determined.

On 12 August 2005, the trial court denied the motion requesting dependency tax exemptions for the 2003 and 2004 tax years because all three children had reached the age of majority and the defendant's child support obligation had terminated. On that same date, the trial

court granted defendant's motion for modification of alimony due to his reduction in income. His monthly alimony payments were modified to $1,826.00 per month.

On 22 August 2005, defendant filed a motion to reconsider the 12 August 2005 order modifying alimony. The trial court denied most of defendant's requests by orders on 10 February 2006, and preserved the previous alimony order of $1,826.00 per month. From the 12 August 2005 order, defendant appeals.

On appeal, defendant brings forth several arguments relating to the alimony award. "Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion." *See e.g.*, *Bookholt v. Bookholt*, 136 N.C. App. 247, 249-50, 523 S.E.2d 729, 731 (1999) (citing *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982)). "An abuse of discretion occurs when the ruling is manifestly unsupported by reason or is 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) (internal quotations omitted).

The review of the trial court's findings of fact are limited to "whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573 (1990) (quoting *Adkins v. Adkins*, 82 N.C. App. 289, 292, 346 S.E.2d 220, 222 (1986)). "[T]he trial court's conclusions of law are reviewed *de novo* by this Court." *State v. Ripley*, 360 N.C. 333, 339, 626 S.E.2d 289, 293 (2006).

The defendant must assign error to each conclusion he believes is not supported by the evidence, or the conclusions will be deemed binding on appeal. N.C. R. App. P. 10 (2006); *see also Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 112, 516 S.E.2d 647, 649 (1999). Failure to assign error to such conclusions of law "constitutes an acceptance of the conclusion and a waiver of the right to challenge said conclusion as unsupported by the facts." *Fran's Pecans* at 112, 516 S.E.2d at 649; *see also In re J.A.A.*, 175 N.C. App. 66, 74, 623 S.E.2d 45, 50 (2005).

In the case *sub judice*, the defendant does not assign error to any of the trial court's conclusions of law and therefore waived his right to challenge the conclusions. Hence, the conclusions of law are binding and the trial court's order should be affirmed. Furthermore, it is

difficult for this Court to determine if the findings of fact were supported by competent evidence because the transcript is incomplete. Specifically, only 36 of over 100 pages of the transcript were included in the record. Under N.C. R. App. P. 9(c)(2) (2007), a partial transcript is allowed "provided that when the verbatim transcript is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all errors assigned." *Id.* "It is the duty of the appellant to see that the record is properly prepared and transmitted." *Tucker v. Telephone Co.*, 50 N.C. App. 112, 118, 272 S.E.2d 911, 915 (1980) (quoting *Hill v. Hill*, 13 N.C. App. 641, 642, 186 S.E.2d 665, 666 (1972)). Further, the appellant has the duty to ensure that the record is complete. *Faulkenberry v. Faulkenberry*, 169 N.C. App. 428, 430, 610 S.E.2d 237, 239 (2005) (citing *Pharr v. Worley*, 125 N.C. App. 136, 139, 479 S.E.2d 32, 34 (1997)).

Here, the incomplete transcript in the record is inadequate under N.C. R. App. P. 9(c)(2) and prevents this Court from determining the context of some of the responses in the selected transcript. Although the sections of the transcript that were provided properly address some of the assignments of error, without access to all the evidence presented to the trial court, it is impossible for this Court to understand all the errors assigned by the defendant.

Absent a complete transcript, it is impossible for this Court to determine whether or not the challenged findings of fact are supported by the evidence, therefore, we assume that the findings are in fact supported. "An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court." *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968). Based on the exclusions of the transcript, we cannot review the defendant's assignments of error that allege the trial court erred in making findings of fact that were not supported by competent evidence. *See Pharr* at 139, 479 S.E.2d at 34 (concluding that the appellant failed to include relevant portions of the transcript and therefore, this Court would not speculate as to error by the trial court). Accordingly, the trial court's findings of facts are deemed to be supported by competent evidence. This assignment of error is overruled.

Affirmed.

Judge WYNN concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge dissenting.

The majority's opinion affirms the trial court's order and holds: (1) defendant failed to assign error to any of the trial court's conclusions of law and those conclusions are binding on appeal and (2) defendant's assignments of error cannot be reviewed due to an incomplete transcript. I disagree and respectfully dissent.

I. Standard of Review

Normally, "[d]ecisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion." *Bookholt v. Bookholt*, 136 N.C. App. 247, 249-50, 523 S.E.2d 729, 731 (1999) (citing *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982)). "However, if there is no competent evidence to support a finding of fact, an exception to the finding must be sustained and a judgment or order predicated upon such erroneous findings must be reversed." *Bridges v. Bridges*, 85 N.C. App. 524, 526, 355 S.E.2d 230, 231 (1987) (citing *Morse v. Curtis*, 276 N.C. 371, 172 S.E.2d 495 (1970)).

Also, defendant's requests for admissions by plaintiff were "deemed admitted" by court order entered 11 February 2005 and are binding upon the trial court and here. Our Supreme Court has stated:

> [A] judicial or solemn admission . . . is a formal concession made by a party (usually through counsel) in the course of litigation for the purpose of withdrawing a particular fact from the realm of dispute . . . . *Such an admission is not evidence, but rather removes the admitted fact from the field of evidence by formally conceding its existence. It is binding in every sense.*

Woods v. Smith, 297 N.C. 363, 374, 255 S.E.2d 174, 181 (1979) (internal quotation omitted) (emphasis supplied).

II. Analysis

A. Calculation Errors

Defendant contends the trial court: (1) ignored undisputed and admitted evidence of plaintiff's income and (2) failed to credit rental income plaintiff is receiving from their emancipated adult children. Conclusion of law numbered 2 states, "there has been a substantial

change in material circumstances relating to the financial conditions and circumstances of the parties since the Prior Order was entered . . . July 16, 2004, which justifies modification of the Defendant's alimony obligation." As stated by the majority's opinion, defendant does not challenge this conclusion of law, which concluded defendant's motion had merit. Defendant challenges whether the trial court erred in calculating the amount to modify alimony.

Admitted and uncontradicted evidence shows: (1) plaintiff's income has increased from an imputed net income of $600.00 to an actual net income of $1,725.28 per month; (2) plaintiff's living expenses at the time of the prior order totaled $2,330.00 per month; (3) at the time of the prior order, plaintiff lived with her minor son and adult daughter and was allocated one-half $219.50 per month of the mortgage payment on the former marital home; (4) plaintiff moved from North Carolina to South Carolina for work and was responsible for rental payments on her home of $850.00 per month; (5) plaintiff now lives with her adult son and adult daughter in a three bedroom home; (6) plaintiff receives rental contributions for rental and household expenses from both her adult son and adult daughter; (7) the prior order projected defendant's gross income for 2004 to be between $65,000.00 and $70,000.00; (8) defendant's 2004 income was $50,844.00; (9) defendant's projected 2005 net income based on his 15 April 2005 pay stub is $3,841.00 per month; (10) the 15 April 2005 pay stub amount reflected an atypical and non-recurring gross incentive bonus received on 18 March 2005 in the amount of $1,988.00; and (11) defendant's reasonable and necessary living expenses are $2,300.00 per month.

The prior order calculated defendant's monthly alimony payment to be $2,200.00 based upon plaintiff's reasonable and necessary living expenses of $2,330.00 minus her imputed net income of $600.00 to determine a shortfall of $1,730.00 per month. This determined shortfall was then adjusted to reflect income taxes and recalculated to be $2,200.00.

Based upon the admitted facts and taking plaintiff's reasonable and necessary expenses as unchanged and subtracting her current net income, equates to a shortfall of $604.72 per month. Based on the same income tax rate used in the prior order, defendant's alimony payment should be modified to $769.00 per month. The trial court's determination that defendant's monthly alimony payments should be reduced from $2,200.00 per month to $1,826.00 per month is not based on the admitted and binding evidence in the record to support the

trial court's finding of fact. Without competent evidence "an exception to the finding must be sustained and a judgment or order predicated upon such erroneous findings must be reversed." *Bridges*, 85 N.C. App. at 526, 355 S.E.2d at 231 (citation omitted). Using the same analysis and calculations as in the prior order sought to be modified, defendant's reduced obligation still remains more than $1,000.00 per month higher than plaintiff's admissions allow.

B. Transcript

Under Rule 9(c)(2) of the North Carolina Rules of Appellate Procedure, a partial transcript is allowed "provided that when the verbatim transcript is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all errors assigned." N.C.R. App P. 9(c)(2) (2007). The partial transcript in the record and briefs contain all necessary testimonial evidence needed to understand and rule upon the errors assigned.

III. Conclusion

Plaintiff admitted all facts in defendant's request for admissions and these admitted facts were entered by order of the court. These admissions were no longer in "the realm of dispute" and are "binding in every sense." *Woods*, 297 N.C. at 374, 255 S.E.2d at 181. The trial court miscalculated the required reduction of defendant's alimony payments from $2,200.00 to $1,826.00 per month. I vote to remand to the trial court for correction of defendant's income and a determination of plaintiff's reasonable and necessary living expenses taking into account rental amounts she receives from her emancipated adult children who are living with her. I respectfully dissent.

STATE OF NORTH CAROLINA v. CHRISTOPHER DON STYLES

No. COA06-684

(Filed 7 August 2007)

1. Search and Seizure— stop of vehicle—traffic violation—motion to suppress evidence—probable cause

The trial court did not err in a possession of schedule II controlled substances, drug paraphernalia, and marijuana case by denying defendant's motion to suppress the stop of his vehicle

and the evidence procured as a result of the subsequent search of the vehicle, because: (1) although the trial court's mention of an investigatory stop was erroneous since the officer's stop of defendant was based upon a readily observed traffic violation, the officer was required to have probable cause instead of reasonable suspicion to stop defendant; and (2) the officer had probable cause to stop defendant's vehicle based on defendant's violation of N.C.G.S. § 20-154(a) when he changed lanes without signaling.

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

Assignments of error listed in the record but not argued in defendant's brief are deemed abandoned under N.C. R. App. P. 28(b)(6).

Judge STEPHENS dissenting.

Appeal by defendant from judgment entered 3 November 2005 by Judge C. Preston Cornelius in Swain County Superior Court. Heard in the Court of Appeals 23 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General Rudy Renfer, and Assistant Attorney General William B. Crumpler, for the State.

Charlotte Gail Blake for defendant-appellant.

STEELMAN, Judge.

The arresting Officer had probable cause to stop defendant's vehicle, and thus the trial court properly denied defendant's motion to suppress the stop and the evidence procured as a result of the subsequent search of the vehicle.

On 28 February 2004, Officer Greg Jones of the Bryson City Police Department was on duty around 1:00 in the morning traveling on Main Street, a three lane road. There were two lanes in Officer Jones' direction of travel and one lane in the opposite direction. Directly in front of Officer Jones' patrol vehicle and proceeding in the same direction as Officer Jones was a vehicle operated by Christopher Don Styles ("defendant"). Defendant changed lanes without signaling. Officer Jones stopped defendant's vehicle, approached the driver's side door, and made verbal contact with defendant. Officer Jones immediately detected an odor of marijuana about defendant's person. Defendant declined to consent to a search of his vehicle. Officer Jones then

deployed a drug dog which was in his patrol vehicle. The dog indicated that narcotics were present in or on the vehicle. Officer Jones then initiated a search of the interior of defendant's vehicle. He discovered a small amount of marijuana and a pipe. Officer Jones placed defendant under arrest. A subsequent pat-down search of defendant's person revealed methamphetamine.

On 29 June 2005, defendant was indicted for possession of schedule II controlled substances, drug paraphernalia, and marijuana. On 24 October 2005, defendant filed a motion to suppress all evidence obtained as a result of the stop of defendant's vehicle. On 31 October 2005, Judge Cornelius denied defendant's motion. Defendant pled guilty to all of the charges on that same day, expressly reserving the right to appeal the denial of his motion to suppress under N.C. Gen. Stat. § 15A-979(b). The trial court sentenced defendant to 6-8 months imprisonment. This sentence was suspended and defendant was placed on supervised probation for 18 months. Defendant appeals the trial court's denial of his motion to suppress.

[1] In his sole argument on appeal, defendant contends that the trial court erroneously denied his motion to suppress. We disagree.

Our review of a motion to suppress is limited to determining whether the trial court's findings of fact were supported by competent evidence, in which event they are binding on appeal, and whether those findings support the trial court's conclusions of law. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). The trial court's conclusions of law are reviewable *de novo*. *State v. Brooks*, 337 N.C. 132, 141, 446 S.E.2d 579, 585 (1994).

Defendant was stopped for the violation of N.C. Gen. Stat. § 20-154(a):

> The driver of any vehicle upon a highway or public vehicular area before starting, stopping or turning from a direct line shall first see that such movement can be made in safety . . . and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement.

N.C. Gen. Stat. § 20-154(a) (2005). N.C. Gen. Stat. § 20-154(a) has been held to apply to the type of movement defendant made here: changing lanes. *See Sass v. Thomas*, 90 N.C. App. 719, 723, 370 S.E.2d 73, 75-6 (1988).

In the instant case, defendant assigns error to the following findings of fact:

> The officer did at that point stop the vehicle for an investigatory stop.
>
> The Court will find that the stop by the officer was an investigatory stop in regards to a moving violation that he observed committed in his presence.
>
> That he had probable cause to stop the vehicle.

A "traffic stop based on an officer's [reasonable] *suspicion* that a traffic violation is being committed, but which can only be verified by stopping the vehicle, such as drunk driving or driving with a revoked license, is classified as an investigatory stop . . . ." *State v. Wilson*, 155 N.C. App. 89, 94, 574 S.E.2d 93, 98 (2002) (alteration and emphasis in original) (quotation omitted). However, a stop pursuant to a readily observed traffic violation will be valid if it was supported by probable cause. *State v. Barnhill*, 166 N.C. App. 228, 231, 601 S.E.2d 215, 217 (2004). Probable cause exists when, based upon the facts and circumstances within his knowledge, a reasonably prudent law enforcement officer believes that the defendant has or was committing a traffic violation. *State v. Hernandez*, 170 N.C. App. 299, 306, 612 S.E.2d 420, 425 (2005).

It is clear from the trial court's findings of fact that defendant was traveling immediately in front of Officer Jones. Defendant changed lanes without signaling. Because he readily observed a violation of N.C. Gen. Stat. § 20-154(a), Officer Jones had probable cause to stop defendant's vehicle.

Defendant contends that the trial court's findings of fact regarding an "investigatory stop" were unsupported by the evidence, and that because the only reason for the stop was an alleged traffic violation, no investigatory stop could be made. The trial court's mention of an "investigatory stop" was in fact erroneous because Officer Jones' stop of defendant was based upon a readily observed traffic violation, requiring that Officer Jones have probable cause instead of a reasonable suspicion to stop defendant. However, " 'irrelevant findings in a trial court's decision do not warrant a reversal of the trial court.' " *Hernandez*, at 305, 612 S.E.2d at 424 (citing *Goodson v. Goodson*, 145 N.C. App. 356, 360, 551 S.E.2d 200, 204 (2001)). We have already determined that the trial court properly found that Officer Jones had prob-

able cause to stop defendant. Therefore, the trial court's findings regarding an "investigatory stop" do not warrant a reversal of the trial court.

The trial court made the following conclusions of law:

> State and constitutional rights were not violated in this investigatory stop.
>
> That there was probable cause for the stop and probable cause for the arrest, and the motion to suppress is denied.

The trial court's conclusions of law must reflect a correct application of the law to the facts found. *Barnhill*, at 230-31, 601 S.E.2d at 217. As the trial court erroneously concluded that an investigatory stop occurred without violation of defendant's State and federal constitutional rights, we must apply the correct standard and determine whether defendant's State and federal constitutional rights were violated in the stop, applying the probable cause standard. *See id.* at 231, 601 S.E.2d at 217.

Probable cause exists where a reasonable law enforcement officer readily observes a traffic violation. *See Hernandez*, at 306, 612 S.E.2d at 425. In the instant case, Officer Jones had probable cause to stop and search defendant's car. Therefore, neither defendant's State nor federal constitutional rights were violated. *See State v. Frederick*, 31 N.C. App. 503, 506-07, 230 S.E.2d 421, 423 (1976).

The trial court's findings of fact were supported by competent evidence and those findings support the trial court's conclusions of law. "As a result, [Officer Jones'] stop did not violate defendant's right to be free from unreasonable search and seizure. Since the stop was valid, any evidence which resulted from the stop need not be suppressed." *Barnhill*, at 233, 601 S.E.2d at 219.

Defendant argues that this case is controlled by the recent North Carolina Supreme Court case of *State v. Ivey*, 360 N.C. 562, 633 S.E.2d 459 (2006). In *Ivey*, our Supreme Court held that an Officer did not have probable cause to stop the defendant for violation of N.C. Gen. Stat. § 20-154(a) when the defendant's maneuver could not have affected the Officer or any other vehicle. *Id.* at 565, 633 S.E.2d at 461-62. The defendant in *Ivey* was making a right-hand turn at an intersection where he could only turn right. *Id.* at 563, 633 S.E.2d at 460. The facts of the instant case are readily distinguishable. Defendant was traveling immediately in front of Officer Jones on a

road containing two lanes in his direction of travel. Defendant changed lanes without signaling, which affected the operation of Officer Jones' vehicle, which was proceeding immediately behind defendant. "Because of the violation[] of [this] traffic law[], the officer[] had probable cause to stop the vehicle[] . . . ." *State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 132 (1999). This assignment of error is without merit.

[2] Assignments of error listed in the record but not argued in defendant's brief are deemed abandoned. N.C. R. App. P. 28(b)(6) (2007).

AFFIRMED.

Chief Judge MARTIN concurs.

Judge STEPHENS dissents in a separate opinion.

STEPHENS, Judge, dissenting.

Because I do not conclude that Officer Jones had probable cause to stop Defendant's vehicle, I respectfully dissent.

At the hearing on Defendant's motion to suppress, the trial court made only two findings of fact that could support its conclusion that Officer Jones had probable cause to stop: (1) that Officer Jones "observed a vehicle being operated by the defendant immediately in front of him[]" and (2) "[t]hat [Defendant's] vehicle changed lanes in front of the officer without signaling a change." The only evidence supporting these findings is one exchange between the prosecutor and Officer Jones:

> Q. Okay. And what attracted your attention to the vehicle operated by Mr. Styles?
>
> A. Upon getting behind the vehicle in question, the defendant had changed lanes and failed to signal. That's why I stopped the vehicle.

This evidence arguably supports the trial court's finding that Defendant "changed lanes in front of [Officer Jones] without signaling a change." This evidence does not, however, support the court's finding that Defendant's vehicle was "immediately" in front of Officer Jones, nor do the findings support the court's conclusion that Officer Jones "had probable cause to stop [Defendant]."

It is settled that, under N.C. Gen. Stat. § 20-154(a), "[t]he duty to give a statutory signal of an intended . . . turn [or lane change] does not arise in any event unless the operation of some 'other vehicle may be affected by such movement.' " *Cooley v. Baker*, 231 N.C. 533, 536, 58 S.E.2d 115, 117 (1950). "[F]ailure to give a signal, in and of itself, does not constitute a violation of N.C.G.S. § 20-154(a) . . . ." *State v. Ivey*, 360 N.C. 562, 566, 633 S.E.2d 459, 462 (2006).

The majority concludes without explanation that Defendant's lane change "affected the operation of Officer Jones' vehicle[.]" Officer Jones offered no such testimony, and the trial court made no such finding. On the contrary, Officer Jones testified that there was nothing "erratic" about Defendant's movement from one lane to the other. Furthermore, the State offered no evidence that there was any other automobile traffic on the road at the early morning hour when Defendant and Officer Jones were traveling down Main Street in Bryson City. Therefore, I cannot conclude from the evidence in the record that "a reasonable officer would have believed, under the circumstances of the stop, that defendant's actions violated subsection 20-154(a)[.]" *Id.* at 565, 633 S.E.2d at 461.

I can *imagine* factual circumstances under which the movement of one's vehicle from one lane to another without signaling could affect the safe operation of another vehicle traveling in the same direction. Just as easily, I can imagine factual circumstances under which a lane change would have absolutely no effect on the operation of other vehicles traveling in the same direction. Here, the evidence not only fails to establish that the former factual circumstance was created when Defendant changed lanes in front of Officer Jones, it is patently insufficient to permit even an inference of such. When constitutional rights and protections are involved, I will not presume a violation of the law to give Officer Jones probable cause.

The mere fact that Officer Jones, while traveling "behind" Defendant on a road with two lanes of traffic headed in the same direction, observed Defendant change lanes without signaling did not give Officer Jones probable cause to stop Defendant. Thus, I would reverse the ruling of the trial court on Defendant's motion to suppress.

MERVYN D. LOSING, PLAINTIFF v. FOOD LION, L.L.C., A/K/A FOOD LION AND ROBERT JONES, DEFENDANT

No. COA06-1312

(Filed 7 August 2007)

1. Libel and Slander— slander per se—affirmative defense of truth

The trial court did not err in a defamation case stemming from plaintiff's drug test on 11 December 2001 by entering summary judgment in favor of defendant on the claim of slander per se, because defendant definitively proved the affirmative defense of truth to slander per se when: (1) plaintiff did, under the terms of defendant employer's substance abuse policy, fail a drug test; (2) although the result was ultimately shown to have been a false positive, the fact remained that a finding of a substitute sample constituted a failed test under the employer's policy, and plaintiff's result was of a substituted sample; (3) the statement to another employee that plaintiff's attorney can get you off a drug test was not slanderous when such an assertion does not rise to the level of alleging conduct derogatory to plaintiff's character and standing as a business man, nor does it tend to prejudice him in his business; (4) alleged false statements made by defendants calling plaintiff dishonest or charging that plaintiff was untruthful and an unreliable employee are not actionable per se; and (5) the statements were all true even if plaintiff subsequently showed that they were based on a false underlying premise.

2. Privacy— invasion of privacy—expiration of statute of limitations

The trial court did not err in an invasion of privacy case stemming from plaintiff's drug test on 11 December 2001 by entering summary judgment in favor of defendant on the claim of invasion of privacy, because: (1) N.C.G.S. § 1A-1, Rule 41(a)'s tolling of the applicable statute of limitations applies only to the claims in the original complaint and not to other causes of action that may arise out of the same set of operative facts; (2) plaintiff first filed a complaint against defendant in 2003 or 2004, but essentially conceded in his brief that his claim for invasion of privacy was not made in that complaint; (3) the applicable statute of limitations was three years under N.C.G.S. § 1-52(5); and (4) given that the statements objected to by plaintiff were made in December

2001 and early to mid-January 2002, the claim filed on 28 January 2005 was barred by the statute of limitations.

Appeal by plaintiff from order and judgment entered 13 July 2006 by Judge Narley L. Cashwell in Superior Court, Wake County. Heard in the Court of Appeals 24 April 2007.

Bruce Robinson, for plaintiff-appellant.

Constangy, Brooks & Smith, LLC, by Kenneth P. Carlson, Jr., for defendant-appellee.

WYNN, Judge.

A defendant is entitled to summary judgment when he has shown that the plaintiff cannot overcome an affirmative defense.[1] Because we find that the defendant here definitively proved the affirmative defenses of truth, to slander *per se*; and expiration of the statute of limitations, to invasion of privacy; we affirm the trial court's grant of summary judgment.

On 28 January 2005, Plaintiff Mervyn D. Losing filed a complaint against his employer, Food Lion, LLC, and his direct supervisor, Food Lion district manager Robert Jones, alleging defamation, negligent infliction of emotional distress, negligence, and invasion of privacy, stemming from a drug test of Mr. Losing on 11 December 2001. According to Mr. Losing, he was selected by Food Lion and Mr. Jones for a random drug test soon after returning to work following an accident and injury suffered during the course and scope of his employment. The drug test returned as "substituted," meaning that it was not consistent with human urine. Under Food Lion's substance abuse policy, a "substituted" urine sample was considered a positive screen. A confirmation test conducted by the laboratory facility used by Food Lion likewise found that the sample from Mr. Losing was not consistent with human urine. In accordance with Food Lion's zero tolerance policy, Mr. Jones then fired Mr. Losing from his position at Food Lion on 18 December 2001. However, Mr. Losing exercised his right to a retest, which returned negative. Food Lion ultimately admitted that the initial result was a false positive and reinstated Mr. Losing to his previous position with the same salary and back pay.

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1. *See Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003) (holding that a defendant may prove entitlement to summary judgment by "showing that the plaintiff cannot surmount an affirmative defense" (internal quotation and citation omitted)), *aff'd per curiam*, 358 N.C. 137, 591 S.E.2d 520, *reh'g denied*, 358 N.C. 381, 597 S.E.2d 129 (2004).

Following his return to Food Lion, Mr. Losing was written up by Mr. Jones for failing to maintain his store in accordance with Food Lion policy; he was subsequently suspended for one week in March 2002. Mr. Losing contends that, since his reinstatement, he "has been continually harassed, assigned positions beneath his level of competence, given employees to supervise that were untrained, . . . all because Food Lion desires to have him either resign or set him up in a position where he can be fired." Mr. Losing also contends that Mr. Jones made statements concerning his failed drug test to other Food Lion employees, including that he tested positive, substituted non-human urine in the drug test, and was fired for failing the drug test.

Following answers filed by Food Lion and Mr. Jones, Mr. Losing voluntarily dismissed with prejudice his claim for negligent infliction of emotional distress on 19 December 2005. On 29 June 2006, Food Lion filed an amended motion for summary judgment, arguing that Mr. Losing had failed to establish a *prima facie* case for defamation, negligence, or invasion of privacy, and that such claims were also precluded by qualified privilege, an independent intervening cause, and the statute of limitations, respectively, among other affirmative defenses. Several affidavits, including that of Mr. Jones, were submitted with Food Lion's motion for summary judgment, as well as the interrogatories, requests for admissions, and documents produced during discovery prior to the filing of the motion. On 13 July 2006, the trial court granted Food Lion's motion for summary judgment with prejudice, ordering that Mr. Losing should recover nothing from Food Lion as to any of his causes of action.

Preliminarily, we observe that summary judgment is properly granted when the evidence, viewed in the light most favorable to the non-moving party, shows no genuine issue of material fact. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (citation omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). Additionally, a defendant may show he is entitled 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." *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003) (internal quotation and citation omitted), *aff'd per curiam*, 358 N.C. 137, 591 S.E.2d 520, *reh'g denied*, 358 N.C. 381, 597 S.E.2d 129 (2004).

In his appeal, Mr. Losing argues that summary judgment was improper because a genuine issue of material fact remains as to each element of his claim against Food Lion for (I) slander *per se* and (II) invasion of privacy.[2]

I.

[1] First, Mr. Losing argues that a genuine issue of material fact remains as to each element of his claim for slander *per se* against Food Lion, such that summary judgment was improper. We disagree.

Under North Carolina law, "slander *per se*" is "an oral communication to a third party which amounts to (1) an accusation that the plaintiff committed a crime involving moral turpitude; (2) an allegation that impeaches the plaintiff in his trade, business, or profession; or (3) an imputation that the plaintiff has a loathsome disease." *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29-30, 568 S.E.2d 893, 898 (2002) (quotation and citation omitted), *disc. review denied, dismissed*, 357 N.C. 163, 580 S.E.2d 361, *cert. denied*, 540 U.S. 965, 157 L. Ed. 2d 310 (2003). "False words imputing to a merchant or business man conduct derogatory to his character and standing as a business man and tending to prejudice him in his business are actionable, and words so uttered may be actionable *per se*." *Id.* at 30, 568 S.E.2d at 898 (quotation and citation omitted). Thus, an essential element of a slander *per se* claim based on defaming an individual's business reputation is that the statements are false; truth is therefore an affirmative defense to such a claim. *Long v. Vertical Technologies, Inc.*, 113 N.C. App. 598, 602-03, 439 S.E.2d 797, 801 (1994) ("[I]n order to be actionable, the defamatory statement must be false. The truth of a statement is a complete defense.").

In the instant case, Mr. Losing specifically alleged in his complaint that Mr. Jones had made statements including, but not limited to:

a. That [Mr. Losing] had been fired for substituting non human urine on a drug test.

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2. Although Mr. Losing's sole assignment of error asserts that a genuine issue of material fact remains as to "each contention and argument made . . . except for those causes of action which were voluntarily withdrawn[,]" Mr. Losing has made no argument to this Court concerning his negligence claim against Food Lion. Accordingly, we deem that argument abandoned and dismiss that portion of his assignment of error that included his negligence claim. *See* N.C. R. App. P. 28(b)(6) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

b. That he had failed a drug test.

c. That he was failing to follow store operating procedures.

d. That he was fired over a drug test.

e. That, through Brian Sloan, you need to get [Mr. Losing's] attorney, he can get you off of a drug test.

In his deposition statements, Mr. Losing refers to the "rumors . . . around the whole store" after he was fired, which he acknowledges were recounted to him by others.

He admits that he never heard Mr. Jones tell anyone that his sample showed non-human urine; rather, his "evidence" that Mr. Jones made the slanderous statements is that "if him [sic] and I are in the room and I'm told I have non-human urine and I'm being fired for it, there's only two people in that room. Just him and me [sic]. I told nobody."

In his brief to this Court, Mr. Losing states that, "[t]he simple question is whether or not [Mr.] Losing failed a drug test. If [Mr.] Losing did fail a drug test, then truth would be a defense." Nevertheless, Mr. Losing asserts that the drug test was not "completed" after the initial test and confirmation test conducted by Food Lion. Rather, Mr. Losing contends that the drug test was not "completed" until he exercised his right to the retest and found that the original results had been false positives. We find this argument to be without merit.

The evidence in this case is incontrovertible that Mr. Losing did, under the terms of Food Lion's substance abuse policy, fail a drug test. Although the result was ultimately shown to have been a false positive, the fact remains that a finding of a "substituted" sample constituted a failed test under Food Lion's policy. Mr. Losing's result was of a "substituted" sample; therefore, he failed the test. Under the express terms of Food Lion's zero tolerance policy, Mr. Losing was then fired for failing a drug test. These were all true statements, notwithstanding the underlying falsity of the positive drug test.

Moreover, in the depositions submitted to the trial court for consideration of Food Lion's motion for summary judgment, Mr. Losing recounted that Mr. Jones told him, "I'm going to have to fire you for

non-human urine that came back—non-human urine on a drug test. I have to fire you because it's a positive drug test." Likewise, Mr. Losing admitted in one of his depositions that he was suspended for a week in March 2002 for "failure to follow store operating procedures." Even assuming *arguendo* that Food Lion has *respondeat superior* liability for statements made about Mr. Losing by Mr. Jones—and even acknowledging that such statements might have been uncalled-for, unfair, and perhaps cruel gossip—any statements made by Mr. Jones regarding Mr. Losing's failing a drug test due to non-human urine, being fired for such, and failing to follow store procedures were still strictly true. As such, they are not slanderous *per se*.

Nor is Mr. Losing's claim that Brian Sloan's alleged statement to "get [Mr. Losing's] attorney, he can get you off of a drug test[]" slanderous. Such an assertion does not rise to the level of alleging "conduct derogatory to [Mr. Losing's] character and standing as a business man," nor does it "tend[] to prejudice him in his business." *Boyce & Isley*, 153 N.C. App. at 30, 568 S.E.2d at 898. For that reason, we have "held consistently that alleged false statements made by defendants, calling plaintiff 'dishonest' or charging that plaintiff was untruthful and an unreliable employee, are not actionable *per se*." *Tallent v. Blake*, 57 N.C. App. 249, 253, 291 S.E.2d 336, 339-40 (1982) (quotation and citation omitted).

In sum, the statements objected to by Mr. Losing do not rise to the level of slander *per se*. Moreover, the statements were all true, even if Mr. Losing subsequently showed that they were based on a false underlying premise. As such, because Mr. Losing could not overcome the affirmative defense of truth, we must uphold the trial court's grant of summary judgment to Food Lion.

II.

[2] Mr. Losing also argues that the trial court erred by granting summary judgment because a genuine issue of material fact remains as to his claim for invasion of privacy against Food Lion. We disagree.

Under North Carolina law, a plaintiff may refile within one year a lawsuit that was previously voluntarily dismissed, and the refiled case will relate back to the original filing for purposes of tolling the statute of limitations. N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2005); *see Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 594, 528 S.E.2d 568, 571 (2000) ("[U]nder Rule 41, a plaintiff may dismiss an action that originally was filed within the statute of limitations and

then refile the action after the statute of limitations ordinarily would have expired." (quotation and citation omitted)).

However, the "relate back" doctrine applies only to "a new action based on the *same claim* . . . commenced within one year[.]" N.C. Gen. Stat. § 1A-1, Rule 41(a)(1). This Court has long held that the Rule 41(a) tolling of the applicable statute of limitations applies only to the claims in the original complaint, and not to other causes of action that may arise out of the same set of operative facts. *See Stanford v. Owens*, 76 N.C. App. 284, 289, 332 S.E.2d 730, 733 ("Plaintiffs' contention that the fraud claim has in effect been before the court all along, since it rests upon somewhat the same allegations that were made in support of the negligent misrepresentation claim when the action was first filed, though appealing to some extent is nevertheless unavailing."), *disc. review denied*, 314 N.C. 670, 336 S.E.2d 402 (1985).

In the instant case, Mr. Losing first filed a complaint against Food Lion in 2003 or 2004,[3] but he essentially concedes in his brief that his claim for invasion of privacy was not made in that complaint. After voluntarily dismissing that complaint without prejudice, Mr. Losing refiled his complaint against Food Lion on 28 January 2005, including a new claim for invasion of privacy. The applicable statute of limitations for the tort of invasion of privacy is three years. *See* N.C. Gen. Stat. § 1-52(5) (2005) (specifying a three-year statute of limitations "for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated."). Given that the statements objected to by Mr. Losing were made in December 2001 and early to mid-January 2002, we hold that his claim for invasion of privacy is time-barred, and summary judgment was thus proper.

Affirmed.

Judges TYSON and CALABRIA concur.

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3. This complaint, although referred to by both Mr. Losing and Food Lion in their briefs, is not included in the record before us. Indeed, although Mr. Losing argues that his invasion of privacy claim should "relate back" to the filing of this complaint for purposes of tolling the applicable statute of limitations, nowhere does he provide an actual date on which the initial lawsuit was filed. Our estimate is based on affidavits in the record that were sworn during the course of the first lawsuit, before it was voluntarily dismissed.

STATE OF NORTH CAROLINA v. SONYA CASE HARRIS

No. COA05-111-2

(Filed 7 August 2007)

Sentencing— *Blakely* error—harmless beyond reasonable doubt—joined with more than one other person to commit offense—armed with deadly weapon

The trial court's *Blakely* error in a second-degree murder case in failing to submit to the jury the aggravating factors that defendant joined with more than one other person in committing the murder and was not charged with a conspiracy and that defendant was armed with a deadly weapon at the time of the offense was harmless beyond a reasonable doubt, because: (1) it made no difference that the *Blakely* error occurred at a resentencing hearing rather than at the conclusion of a jury trial; (2) there was overwhelming and uncontradicted evidence that defendant joined with more than one other person in the commission of the offense; (3) it is immaterial whether defendant and two others struck the victim simultaneously; (4) even if defendant's version of events were accepted, there was uncontradicted testimony that defendant and two others hit and kicked the victim in the head, and that the victim died of head trauma; (5) defendant concedes she was armed with a knife at the time of the crime, and defendant testified she was responsible for hitting and assaulting the victim even with a deadly weapon; and (6) there was overwhelming and uncontradicted evidence that defendant was armed with a deadly weapon at the time of the crime.

Appeal by Defendant from judgment dated 9 July 2004 by Judge E. Penn Dameron in Superior Court, Henderson County. Heard by this Court on 11 October 2005, and opinion filed 3 January 2006, finding sentencing error and remanding for resentencing. Remanded to this Court by order of the North Carolina Supreme Court for reconsideration in light of *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006).

Attorney General Roy Cooper, by Assistant Attorney General Joseph Finarelli, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for Defendant-Appellant.

McGEE, Judge.

This case comes before us on remand from the North Carolina Supreme Court for reconsideration in light of its recent decision in *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, *Blackwell v. North Carolina*, ––– U.S. –––, 167 L. Ed. 2d 1114 (2007). Pursuant to *Blackwell*, and for the reasons stated herein, we hold the trial court's *Blakely* error was harmless beyond a reasonable doubt.

Sonya Case Harris (Defendant) was indicted on 8 October 2001 on a charge of second-degree murder. Defendant's case was joined for trial with the cases of Harlan Ponder and Jason Ponder (collectively the Ponders). Defendant and the Ponders were convicted of second-degree murder by a jury. The trial court found three aggravating factors and sentenced Defendant in the aggravated range to a term of 276 months to 341 months in prison. Defendant appealed the conviction and sentence. In an unpublished opinion, *State v. Ponder*, 163 N.C. App. 613, 594 S.E.2d 258 (2004), our Court affirmed Defendant's conviction but remanded her case for resentencing.

The trial court conducted a resentencing hearing on 6 July 2004, six working days after the United States Supreme Court decided *Blakely*. The trial court found two aggravating factors: (1) that Defendant "joined with more than one other person in committing the offense and was not charged with committing a conspiracy[,]"; and (2) that Defendant "was armed with a deadly weapon at the time of the crime." The trial court again sentenced Defendant in the aggravated range to a term of 276 months to 341 months in prison.

Defendant appealed, and our Court determined that Defendant was sentenced in violation of *Blakely*, and remanded the case for resentencing. *See State v. Harris*, 175 N.C. App. 360, 367-68, 623 S.E.2d 588, 592-93 (2006). Our Supreme Court issued an order on 29 December 2006 "(1) vacating that portion of the Court of Appeals opinion ordering remand to the trial court for resentencing and (2) remanding to the Court of Appeals for reconsideration in light of . . . *Blackwell*[.]" The 29 December 2006 order also stated that "[t]he Court of Appeals opinion remains undisturbed in all other respects." We now determine whether the *Blakely* error in Defendant's resentencing, as determined in our previous opinion, was harmless beyond a reasonable doubt, or whether Defendant is entitled to a new sentencing hearing.

In *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 147 L. Ed. 2d at 455. In *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, *reh'g denied*, 542 U.S. 961, 159 L. Ed. 2d 851 (2004), the Supreme Court further held:

> [T]he "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum [the judge] may impose *without* any additional findings.

Id. at 303-04, 159 L. Ed. 2d at 413-14 (internal citations omitted).

In *Blackwell*, our Supreme Court held that in accordance with *Washington v. Recuenco*, 548 U.S. ——, 165 L. Ed. 2d 466 (2006), *Blakely* error is subject to harmless error review. *Blackwell*, 361 N.C. at 44, 638 S.E.2d at 455. "In conducting harmless error review, we must determine from the record whether the evidence against the defendant was so 'overwhelming' and 'uncontroverted' that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *Id.* at 49, 638 S.E.2d at 458 (citing *Neder v. United States*, 527 U.S. 1, 9, 144 L. Ed. 2d 35, 47 (1999)). Our Supreme Court further held that "[a] defendant may not avoid a conclusion that evidence of an aggravating factor is 'uncontroverted' by merely raising an objection at trial. Instead, the defendant must 'bring forth facts contesting the omitted element,' and must have 'raised evidence sufficient to support a contrary finding.' " *Id.* at 50, 638 S.E.2d at 458 (quoting *Neder*, 527 U.S. at 19, 144 L. Ed. 2d at 53).

I.

In support of her argument that the *Blakely* error in her resentencing hearing was not harmless, Defendant first argues that "no jury had been [e]mpaneled to which special verdict forms could have been submitted." Defendant relies upon the following language from *Recuenco*:

> If [the] respondent is correct that Washington law does not provide for a procedure by which his jury could have made a finding

> pertaining to his possession of a firearm, that merely suggests that [the] respondent will be able to demonstrate that the *Blakely* violation *in this particular case* was not harmless.

Recuenco, 548 U.S. at —–, 165 L. Ed. 2d at 474.

However, in *Blackwell*, our Supreme Court indicated that the lack of a procedural mechanism for submission of aggravating factors to a jury was immaterial to a harmless error analysis. *See Blackwell*, 361 N.C. at 46, 638 S.E.2d at 456 (stating that "it logically makes no difference whether the trial judge could submit the issue to the jury, because in every instance of *Blakely* error, the judge did not properly do so."). Nevertheless, in *Blackwell*, our Supreme Court recognized that "North Carolina law independently permits the submission of aggravating factors to a jury using a special verdict." *Id.*

In the present case, Defendant argues that because she appeals from a resentencing hearing at which no jury was empaneled, there was no jury to which special verdict forms could have been submitted. While this is true, this is a distinction without a difference. Had the trial court empaneled a jury, a procedural mechanism did exist by which to submit the aggravating factors to the jury. It makes no difference that the *Blakely* error in the present case occurred at a resentencing hearing rather than at the conclusion of a jury trial, as in *Blackwell*. In both cases, *Blakely* error occurred. Our task is to determine whether or not the *Blakely* error in the present case was harmless beyond a reasonable doubt.

II.

Defendant also argues that because she disputed joining with more than one other person in the commission of the offense, the evidence was not overwhelming and uncontradicted as to the aggravating factor under N.C. Gen. Stat. § 15A-1340.16(d)(2). Therefore, Defendant argues, the *Blakely* error at her resentencing hearing was not harmless. We disagree.

N.C. Gen. Stat. § 15A-1340.16(d)(2) (2005) provides: "The following are aggravating factors: . . . (2) The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy." "The plain language of [N.C.G.S. § 1340.16(d)(2)] requires the participation of [the] defendant and at least two others." *State v. Little*, 163 N.C. App. 235, 244, 593 S.E.2d 113, 118, *disc. review denied*, 358 N.C. 736, 602 S.E.2d 366 (2004).

At the resentencing hearing, Captain Doug Jones (Captain Jones) with the Hendersonville Police Department, testified that he investigated the death of David Boyd (Mr. Boyd), who died of head trauma on 22 July 2001. Captain Jones testified that he spoke with Robert Banks (Mr. Banks), who witnessed the beating of Mr. Boyd in the vicinity of the Hawkins Glass Company in Hendersonville. Mr. Banks told Captain Jones he saw Defendant "screaming at" Mr. Boyd and "kicking" Mr. Boyd. Mr. Banks also told Captain Jones that Defendant "fell down at which time [Defendant's] boyfriend Harlan Ponder came over and began assisting [Defendant] in fighting with [Mr. Boyd]." Mr. Banks also told Captain Jones that Harlan Ponder held Mr. Boyd around the neck while Defendant kicked Mr. Boyd in the head and in the ribs, and hit Mr. Boyd in the face "around 50 blows." Mr. Banks told Captain Jones that Harlan Ponder's son, Jason Ponder, then joined Defendant and Harlan Ponder and the three of them kicked Mr. Boyd in the torso and hit Mr. Boyd in the head.

Captain Jones also testified that he spoke with Lisa Smith (Ms. Smith), who had been housed with Defendant at a women's correctional facility in Raleigh. Ms. Smith gave a statement to Captain Jones in which she said that Defendant told Ms. Smith about beating Mr. Boyd. Specifically, Defendant told Ms. Smith that on the day of Mr. Boyd's death, Defendant had been "doing" drugs and drinking, and had "passed out[.]" Defendant "woke up" to find Mr. Boyd's hands "down her pants." Captain Jones further testified that according to Ms. Smith, Defendant became "very upset" and, along with the Ponders, began kicking and hitting Mr. Boyd. Captain Jones also testified that Defendant was not charged with conspiracy.

Defendant testified that she was in the vicinity of Hawkins Glass Company on 22 July 2001. Defendant testified that she was drunk and was lying down, and that Mr. Boyd was "cussing" at her. Defendant testified that "when they say I kicked [Mr. Boyd], I didn't mean to, but when I started to get up I made contact with [Mr. Boyd]." Defendant further testified that she then "smacked" Mr. Boyd, who was sitting, twice in the face. Defendant testified that Mr. Boyd grabbed her leg, causing her to fall. Defendant got up and hit Mr. Boyd a third time in the face. Defendant testified that Sandra Seay (Ms. Seay), who was Mr. Boyd's girlfriend, said she was going to call 911, and that this made Defendant mad. Defendant then started fighting with Ms. Seay. Defendant testified that while she was fighting with Ms. Seay, she looked back and saw that Harlan Ponder, who was Defendant's boyfriend, had Mr. Boyd in a chokehold. Defendant also testified as

follows: "I guess because [Mr. Boyd] had caused me to fall, Jason [Ponder] or Harlan [Ponder], one, . . . jumped in. I don't know what they did. I never [saw] anything they [did] to [Mr. Boyd]." Defendant testified that she never joined with the Ponders in assaulting Mr. Boyd. Defendant also testified that there was never a time when all three of them simultaneously hit or kicked Mr. Boyd.

Defendant argues the evidence presented at the resentencing hearing was conflicting. Pursuant to Defendant's version of events, Defendant argues she did not join with the Ponders in assaulting Mr. Boyd; Defendant argues that her assault on Mr. Boyd preceded the assault by the Ponders. While we agree that the version of events presented by Captain Jones differed from the version presented by Defendant, we hold there was overwhelming and uncontradicted evidence that Defendant joined with more than one other person in the commission of the offense. Defendant testified that she struck Mr. Boyd three times in the face. According to Defendant, at least one of the Ponders then "jumped in," though Defendant did not see what "they [did] to [Mr. Boyd]." Captain Jones testified that according to Mr. Banks and Ms. Smith, Defendant and the Ponders hit and kicked Mr. Boyd, although according to their version of events, Defendant and the Ponders struck Mr. Boyd simultaneously. We hold that it is immaterial whether Defendant and the Ponders struck Mr. Boyd simultaneously. Even if we accept Defendant's version of events, there is uncontradicted testimony that Defendant and the Ponders hit and kicked Mr. Boyd in the head, and that Mr. Boyd died of head trauma. Accordingly, there is uncontradicted testimony that all three of them participated in the second-degree murder of Mr. Boyd. Therefore, there was overwhelming and uncontroverted evidence that Defendant "joined with more than one other person in committing the offense and was not charged with committing a conspiracy." *See* N.C.G.S. § 15A-1340.16(d)(2).

III.

The trial court also found an aggravating factor under N.C. Gen. Stat. § 15A-1340.16(d)(10) (2005), which provides: "The following are aggravating factors: . . . (10) The defendant was armed with or used a deadly weapon at the time of the crime." As to this aggravating factor found by the trial court judge, Defendant concedes that she testified she was armed with a knife at the time of the crime. Moreover, Defendant testified that she was "responsible for hitting [Mr. Boyd] [and] assault[ing] . . . [Mr. Boyd], even with a deadly weapon." However, Defendant argues her testimony at the resentencing hearing

was not preceded by appropriate warnings as to its effect. Therefore, Defendant argues that her admission must be given no weight.

However, even if we do not give any weight to Defendant's testimony that she had a knife and used it on Mr. Boyd, we hold there was overwhelming and uncontradicted evidence of this aggravating factor. Captain Jones testified that Ms. Smith told him that Defendant had a knife and had "carved some type of markings on [Mr. Boyd's] back." Moreover, the State introduced a photograph of Mr. Boyd showing the markings on his back. Captain Jones also testified that the medical examiner determined that the markings on Mr. Boyd's back were inflicted prior to Mr. Boyd's death. We hold this was overwhelming and uncontradicted evidence that Defendant was armed with a deadly weapon at the time of the crime.

Except as herein modified, the opinion filed by this Court on 3 January 2006 remains in full force and effect.

No prejudicial error.

Judge GEER concurs.

Judge WYNN concurs in the result only.

RALPH C. LUNA, PETITIONER-APPELLEE v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, RESPONDENT-APPELLANT

No. COA06-1388

(Filed 7 August 2007)

Environmental Law— solid waste management—illegal disposal of sheetrock—incorrect regulation

The trial court did not err in a case involving violation of solid waste management statutes by concluding defendant agency erroneously relied upon 15A N.C.A.C. 13B.201(a) in proceeding against plaintiff for the illegal disposal of scrap sheetrock on property owned by another without a permit, because: (1) 15A N.C.A.C. 13B.201(a) does not apply to plaintiff since the regulation applies to owners of land; (2) 15A N.C.A.C. 13B.0106 would be more appropriate to prosecute plaintiff; and (3) even if the finding that plaintiff delivered the sheetrock to the pertinent

property at the express invitation of the landowner was improperly made, the trial court's decision was based upon ownership of the land and not upon whether the sheetrock was placed upon the land with permission.

Appeal by respondent from judgment entered 27 June 2006 by Judge Russell J. Lanier in Onslow County Superior Court. Heard in the Court of Appeals 7 June 2007.

Attorney General Roy Cooper, by Assistant Attorney General Nancy E. Scott, for respondent-appellant.

Jeffrey S. Miller, for petitioner-appellee.

ELMORE, Judge.

North Carolina Department of Environment and Natural Resources (DENR) appeals from judgment entered 27 June 2006 in favor of Ralph C. Luna.

Luna is the sole proprietor of Drytech Drywall, located in Jacksonville. Luna delivered scrap sheetrock from his drywall contracting business to J.D. Cole of Holly Ridge for use as a soil amendment on Cole's land. Luna delivered scrap sheetrock to Cole's property, with Cole's permission, over a period of eight to ten months prior to June, 2002. Cole has since passed away and did not testify at the administrative hearing.

Around the middle of May, 2002, John Crowder, Solid Waste Management Specialist with DENR's Division of Waste Management, received a complaint about sheetrock that had been dumped on Cole's property. He referred the complaint to Kevin Turner of the Onslow County litter control agency, "Keep Onslow Beautiful."

Turner then called Luna on the phone, asking him to remove the sheetrock. Luna explained to Turner that he hauled sheetrock all over Jones and New Hanover Counties. Luna did not deny that he had disposed of the scrap sheetrock on Cole's property. Luna's defense was that sheetrock, because it is primarily gypsum sulfate, was good for the soil and for crops. Prior to depositing the sheetrock on Cole's property, Luna had been disposing of the scrap sheetrock at the Onslow County Landfill. The tipping fee for disposal of the wallboard at the landfill is between $30 and $35 per ton.

Eventually, Crowder asked Ray Williams, an environmental technician with the Division of Waste Management, to help persuade Luna to clean up the site. Williams telephoned Luna, who refused to give his mailing address, his full name, or the name of his lawyer. When Williams told Luna that he wanted to send Luna some information about removing the material from the site so that Luna could help Cole remove it, Luna reaffirmed that he had no intentions of removing the material.

On 7 April 2003, James C. Coffey issued Luna a compliance order with an administrative penalty of $4,000.00 for violation of 15A N.C.A.C. 13B.0201(a) (2006). Coffey is Chief of the Solid Waste Section of the Division of Waste Management, and has the authority to assess administrative penalties for violations of the solid waste management statutes.

After receiving the violation, Luna filed a petition in a contested case in the office of Administrative Hearings on 8 May 2003. At the administrative hearing, Luna immediately objected to DENR proceeding under 15A N.C.A.C. 13B.0201(a) and protested that the proper section under which DENR should have proceeded, according to its regulations, was 15A N.C.A.C. 13B.0106 (2006). The Administrative Law Judge overruled Luna's objection. On 27 January 2005, the Administrative Law Judge filed her decision that Luna had violated 15A N.C.A.C. 13B.0201(a).

At the Administrative Hearing, Ted Lyon, supervisor of the Composting and Land Application Branch of the Solid Waste Section and a licensed soil scientist, testified as an expert witness. Lyon testified that gypsum wallboard, a technical term for sheetrock, is eighty-five to ninety percent gypsum, which is calcium sulfate and water. The remainder of the wallboard is paper and glue. Calcium and sulfur are both considered plant nutrients in proper amounts.

To be permitted for land application, gypsum wallboard must be pulverized into particle sizes of approximately one-quarter inch so that it may be evenly distributed and available to the crop roots. The general rule of thumb for agronomic application rates in North Carolina is the addition of 200 pounds per acre of calcium and 50 pounds per acre of sulfur. Gypsum is approximately twenty-three percent calcium and eighteen to nineteen percent sulfur. Wallboard is eighty-five percent gypsum; thus one ton of wallboard is about 1700 pounds of gypsum. At twenty-three percent calcium, land application of one ton of wallboard will include 390 pounds of calcium. At eigh-

teen percent sulfur, application of one ton of wallboard will include about 300 pounds of sulfur. The normal application rate for pulverized wallboard in North Carolina soils would therefore be considerably less than one ton per acre.

Lyon also examined photographs of the sheetrock that covered Cole's property. Lyon calculated, using dimensions and depths of the sheetrock given to him by Turner, that the sheetrock deposited on Cole's property amounted to an application rate of 413 tons of gypsum per acre. Lyon testified that the calculated 413 tons of gypsum included about 95 tons of calcium per acre and 74 tons of sulfur per acre. According to Lyon there was far too much sheetrock and the particle sizes were far too big for the site to be an agricultural application of gypsum.

On 28 March 2005, DENR rendered its final agency decision, adopting the decision of the Administrative Law Judge. Luna then petitioned for judicial review in the Onslow County Superior Court on 26 April 2005. The trial court held that DENR erroneously relied upon 15A N.C.A.C. 13B.0201(a) in proceeding against Luna. DENR appealed the decision to this Court.

"Upon reviewing a superior court order affirming or reversing an administrative agency decision, this Court must determine if the trial court applied the appropriate standard of review and, if so, whether the court applied that standard properly." *In re Appeal of HPB Enters.*, 179 N.C. App. 199, 201, 633 S.E.2d 130, 132 (2006) (citation omitted). On judicial review of an administrative agency's final decision, the substantive nature of each assignment of error dictates the standard of review. *N.C. Dept. of Env't & Natural Resources v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004) (citations omitted). Questions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test. *Id.* at 658-60, 658 S.E.2d at 894-95. Under the *de novo* standard of review, the trial court "consider[s] the matter anew[] and freely substitutes its own judgment for the agency's judgment." *Sutton v. N.C. Dep't of Labor*, 132 N.C. App. 387, 388-89, 511 S.E.2d 340, 341 (1999).

The trial court correctly applied the *de novo* standard of review, because Luna asserted an error of law in the application of 15A N.C.A.C. 13B.0201(a). This Court now applies the *de novo* standard in our review of the trial court's holding that 15A N.C.A.C. 13B.0201(a) does not apply on the facts of the present case.

DENR's first argument is that the trial court erred in failing to apply 15A N.C.A.C. 13B.0201(a). Solid waste management rule 15A N.C.A.C. 13B.0201(a) states:

> .0201 PERMIT REQUIRED
>
> (a) No person shall establish or allow to be established on his land, a solid waste management facility, or otherwise treat, store, or dispose of solid waste unless a permit for the facility has been obtained from the Division.

15A N.C.A.C. 13B.0201(a) (2006). The superior court concluded as a matter of law that 15A N.C.A.C.13B.0201(a) does not apply to Luna because the regulation applies to owners of land and Luna did not own the land in question. We agree.

This Court applies the rules of statutory construction in interpreting administrative regulations. *Ace-High, Inc. v. Dept. of Transportation*, 70 N.C. App. 214, 218, 319 S.E.2d 294, 297 (1984). "[S]tatutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each." *Brisson v. Santoriello, M.D., P.A.*, 351 N.C. 589, 595, 528 S.E.2d 568, 571 (2000) (quotations and citation omitted).

DENR would have this Court read 15A N.C.A.C. 13B.0201(a) as: "No person shall . . . dispose of solid waste unless a permit for the facility has been obtained from the Division." 15A N.C.A.C. 13B.0201(a) (2006). However, in order for this reading to make sense, the "solid waste management facility" mentioned earlier in the sentence would have to be different from the "facility" which is the seventh from the last word of the regulation. If the two are actually the same facility then the prepositional phrase "on his own land" qualifies both facilities; basic grammar, as both parties agree, requires this Court to conclude that the phrase qualifies the "solid waste management facility" mentioned in the first part of the sentence. As the prepositional phrase "on his own land" qualifies both facilities, 15A N.C.A.C. 13B.0201(a) simply cannot apply to someone who does not own the land on which they are dumping.

By attempting to argue that the "facility" near the end of the regulation is not the same facility as the "solid waste management facility" mentioned earlier in the sentence, DENR is attempting to avoid the unambiguous language of a statute in order to hold Luna accountable for his actions. DENR has pointed to no case in our appellate courts in which it has successfully prosecuted an individual under

15A N.C.A.C. 13B.0201(a) when that individual did not own the land on which he was dumping. In fact, DENR has not even pointed this Court to one of its own administrative decisions in which it used 15A N.C.A.C. 13B.0201(a) to prosecute an individual in the manner that DENR has chosen here. DENR simply cites, in its brief to this Court, the transcript from the administrative hearing containing testimony from various employees of DENR, stating that the statute could apply in the manner chosen.

Luna admitted several times in his brief to this Court that he violated 15A N.C.A.C. 13B.0106. That regulation states:

> .0106 GENERATOR OF SOLID WASTE
>
> (a) A solid waste generator shall be responsible for the satisfactory storage, collections and disposal of solid waste.
>
> (b) The solid waste generator shall ensure that his waste is disposed of at a site or facility which is permitted to receive the waste.

15A N.C.A.C. 13B.0106 (2006). It would be more efficient for DENR and more just to those targeted in the administrative process for DENR to prosecute individuals engaged in open dumping under 15A N.C.A.C. 13B.0106, rather than 15A N.C.A.C. 13B.0201(a). Indeed, if 15A N.C.A.C. 13B.0106 does not apply to Luna in this case, there never has been and never will be a case in which 15A N.C.A.C. 13B.0106 would apply to anyone. "[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). Accordingly, we decline to read the regulation as DENR suggests.

Finally, DENR argues that the trial court erred in making a finding that Luna delivered the wallboard to Cole's property "at the express invitation of Mr. Cole[]," as this was not a finding of fact in either the Administrative Law Judge's decision or the Final Agency Decision. However, even if this finding was improperly made, it was irrelevant and immaterial to the superior court's decision, and does not constitute a basis for reversal. The decision of the superior court

was based upon ownership of the land, not upon whether the wallboard was placed upon the land with permission.

While it is clear that Luna's actions are both flagrant and punishable under the environmental regulations set forth by the DENR, that agency must prosecute him under the correct regulation. DENR failed to do so in this case. Accordingly, we affirm the superior court's decision.

Affirmed.

Judges STEELMAN and STROUD concur.

STATE OF NORTH CAROLINA v. STACEY G. GUTIERREZ, DEFENDANT

No. COA06-1069

(Filed 7 August 2007)

1. Prisons and Prisoners— malicious conduct by prisoner—intentionally spat on officer

The trial court did not abuse its discretion in a malicious conduct by a prisoner case by admitting over defendant's objection the police officers' testimony that defendant intentionally spat on an officer, because: (1) defendant waived his right to appeal the admission of such testimony by eliciting testimony from an officer regarding defendant's intent; and (2) even if the issue was addressed on its merits, defendant failed to prove that had the alleged error not been committed, a reasonable possibility existed that a different result would have been reached at trial.

2. Evidence— malicious conduct by prisoner—physical and emotional state of defendant's wife on night of incident

The trial court did not err in a malicious conduct by a prisoner case by admitting direct testimony of an officer as to the physical and emotional state of defendant's wife on the night of the incident, because: (1) defendant waived his right to appeal this issue when references to that evidence went unchallenged before and after objection; (2) defendant merely made an objection to testimony about where the marks were on his wife's body and not the question establishing her physical state and the exist-

ence of the marks themselves; (3) multiple references were made to the fact that defendant was first in custody and was later arrested for domestic violence against his wife; (4) defense counsel acknowledged in his opening statement that the jury would hear evidence that defendant was being investigated for domestic violence; (5) each of the police officers testified that they responded to defendant's residence upon receiving a report of an assault on a female and that defendant was taken into custody for that very offense; and (6) even assuming defendant properly preserved this issue for appeal, defendant cannot show the admission was error when the evidence was relevant to the charge of malicious conduct by a prisoner when it established the officer was performing his duty at the pertinent time.

Appeal by defendant from judgment entered 19 August 2005 by Judge Vance B. Long in Forsyth County Superior Court. Heard in the Court of Appeals 28 March 2007.

Attorney General Roy Cooper, by Assistant District Attorney John K. Moser, for plaintiff-appellee.

Adrian M. Lapas, for defendant-appellant.

ELMORE, Judge.

On 19 August 2005, Stacey G. Gutierrez (defendant) was convicted by a jury of one felony count of malicious conduct by prisoner. On 19 August 2005, the trial court entered judgment against defendant. Defendant appeals.

On 27 October 2004, Officer M.D. Griffith (Officer Griffith), of the Winston-Salem Police Department, received a radio report of an assault on a female. Officer K.L. Rankin (Officer Rankin) arrived and met with a female, later identified as defendant's wife, who appeared visibly shaken and had red marks on her neck and left arm. Officer Rankin remained with defendant's wife, while Officer George Callender (Officer Callender) and Officer Griffith conducted an area search around defendant's home.

Officer Griffith found defendant sitting under the deck of a home across the street. All three officers testified that defendant refused orders to come out from under the deck, was forcibly pulled from under the deck, resisted Officers Griffith and Callender in their attempts to handcuff him, and was eventually placed into custody.

According to Officer Griffith, defendant acted aggressively, combatively, and somewhat threateningly.

A brief search of defendant's clothing and person revealed a small quantity of marijuana. Defendant was arrested for domestic violence and placed in Officer Rankin's patrol vehicle. Officer Griffith then wrote defendant a citation for possession of marijuana. Defendant was escorted to a different patrol vehicle approximately fifty feet away.

Officer Griffith testified that he then gave defendant the citation, explained how defendant could dispose of it, and told defendant that he would put the citation in defendant's pocket for him. According to all three officers, as Officer Griffith was attempting to place the citation in defendant's pocket, defendant looked directly at him, leaned forward and aggressively spit downward. A quarter-sized amount of blood struck the officer on the back of the hand. Afterwards, the officers placed defendant in the second patrol car. Despite having a spit sock placed over his face, defendant continued to try to spit, defendant also beat his head against the car window on the way to the police station.

On 13 December 2004, a true bill of indictment was returned against defendant, charging him with one felony count of malicious conduct by prisoner in violation of N.C. Gen. Stat. § 14-258.4 (2005). This case was heard before the Superior Court of Forsyth County on 17 August 2005. The case was submitted to a jury, which found defendant guilty of malicious conduct by prisoner.

Defendant appeals, assigning as error the trial court's admission, over defendant's objection, of the police officers' testimony that defendant intentionally spat on Officer Griffith. Defendant also assigns as error the trial court's admission of testimony that defendant's wife was visibly shaken and appeared to have been physically assaulted.

A trial court's decision with regards to the admission of evidence will only be reversed upon a showing of abuse of discretion. *State v. McCree*, 160 N.C. App. 19, 28, 584 S.E.2d 348, 354 (2003). Defendant must show that the ruling was "manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Brown*, 350 N.C. 193, 209, 513 S.E.2d 57, 67 (1999).

[1] Defendant contends that the officers' testimony concerning his intent to spit on Officer Griffith prejudiced the jury. However, defend-

ant waived his right to appeal the admission of such testimony by eliciting testimony from Officer Rankin regarding defendant's intent. *See State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984) (holding that the defendant waived his right to appeal the admission of evidence admitted over his objection when references to that evidence went unchallenged before and after objection). In the instant case, each officer testified, over defendant's objections, that it was their "impression" that defendant had not spit on Officer Griffith "by accident." However, at the very outset of the cross-examination of Officer Rankin, the following colloquy occurred:

> [Defense Counsel]: Officer Rankin, when you say he spit, it hit his hand, correct, mister—Officer Griffith's, correct?
>
> [Officer Rankin]: Yes, sir.
>
> [Defense Counsel]: And in your estimation, that was what he was aiming for was his hand?
>
> [Officer Rankin]: I don't know what he was aiming for, sir.

Defense counsel's second question in this exchange clearly solicits Officer Rankin's opinion about where defendant was aiming the spit that hit Officer Griffith's hand. Accordingly, defendant has failed to preserve this issue for appeal.

Moreover, even were we to address this issue on its merits, defendant failed to prove that, had the alleged error by the trial court not been committed, a reasonable possibility exists that a different result would have been reached at trial. N.C. Gen. Stat. § 15A-1433(a) (2005); *State v. Gardner*, 316 N.C. 605, 613, 342 S.E.2d 872, 877 (1986) (announcing standard of review for alleged prejudicial errors not affecting constitutional rights).

The State's evidence at trial was sufficiently strong to preclude any reasonable possibility that the jury would have found differently if the trial court excluded the challenged testimony. Each officer testified that defendant was combative and belligerent on the evening of the incident. Despite having been escorted fifty feet to the second patrol car, during which time defendant could have cleared the blood and saliva from his mouth, defendant chose the moment that Officer Griffith was preparing to hand him a citation to spit in Officer Griffith's general direction.

All three officers testified that, before spitting, defendant looked directly at Officer Griffith, gathered the fluid in his mouth and aggressively spit downward towards Officer Griffith's hand. Officers Rankin

and Callender also testified that even after having been placed in the second patrol car, defendant remained combative, continuing to spit despite having a spit sock over his face and beating his head against the car window.

Accordingly, defendant has not established prejudice sufficient to warrant a new trial. *State v. Alston*, 307 N.C. 321, 339-40, 298 S.E.2d 631, 644 (1983). There was abundant evidence by which the jury could conclude, as it did, that defendant intentionally spit on Officer Griffith.

[2] Defendant also assigns as error the trial court's admission of direct testimony from Officer Rankin as to the physical and emotional state of defendant's wife on the night of the incident. In particular, defendant's argument centers on the following colloquy:

> [Prosecution]: What did you observe about her physical appearance?
>
> [Officer Rankin]: Well, she was visibly shaken, she—she was crying, she, I mean, she had marks on her.
>
> [Prosecution]: Where—where did you see the marks?
>
> [Defense Counsel]: Objection, Your Honor, relevance to the issue at hand.
>
> [The Court]: Overruled as to this. I don't think we need to go into a great deal of detail. I'm going to allow you to establish why the officer was there.
>
> [Prosecution]: Yes, sir.
>
> [The Court]: Go ahead, please.
>
> [Prosecution]: Could you describe for the jury—the marks that you observed on Ms. Gutierrez?
>
> [Officer Rankin]: Her—her neck was red, her left arm was reddened.

Defendant contends that this testimony prejudiced him before the jury as it was a "clear implication . . . that [defendant] had previously assaulted [his wife] that evening before the police arrived." Defendant's argument is without merit.

As noted above, defendant waived his right to appeal this issue. *Whitley*, 311 N.C. at 661, 319 S.E.2d at 588 (holding that the defendant

waived his right to appeal the admission of evidence admitted over his objection when references to that evidence went unchallenged before and after objection). Defendant merely made an objection to testimony about where the marks were on his wife's body, not the preceding question establishing her physical state and the existence of the marks themselves. In addition, multiple references were made to the fact that defendant was first in custody and was later arrested for domestic violence against his wife.

Defense counsel, in his opening statement, acknowledged to the jury that they would hear evidence that defendant was being investigated for domestic violence. Each of the police officers testified that they responded to defendant's residence upon receiving a report of an assault on a female and that defendant was taken into custody for that very offense. Defense counsel failed to object to or move to strike any of these references about domestic violence against or physical injuries suffered by defendant's wife. Accordingly, defendant has waived his right to appeal this assignment of error.

Moreover, even assuming that defendant properly preserved this issue for appeal, defendant cannot show that the trial court erred by admitting the challenged testimony. Defendant contends that the testimony concerning his wife's physical appearance was prejudicial and irrelevant. However, a review of the statute under which the State charged defendant reveals that defendant's contentions are incorrect. Under N.C. Gen. Stat. § 14-258.4:

> Any person in the custody of . . . any law enforcement officer . . . who knowingly and willfully throws, emits, or causes to be used as a projectile, bodily fluids or excrement at a person who is an employee of the State or local government while the employee is in the performance of the employee's duties is guilty of a Class F felony.

N.C. Gen. Stat. § 14-258.4(a) (2005). The fact that Officer Griffith was at defendant's home on a domestic violence complaint, and that defendant was placed in custody for the commission of a domestic violence offense, was relevant to the charge because it established that Officer Griffith was performing his duty on the night in question. Accordingly, even if defendant had preserved this error for appeal, the trial court did not err in admitting Officer Rankin's testimony about defendant's wife's appearance on the night of the incident.

Defendant waived his right to appeal the admission of the challenged evidence. Accordingly, we find no error.

No error.

Judges McCULLOUGH and STROUD concur.

JACINDA BURTON, ADMINISTRATRIX OF THE ESTATE OF MICHAEL C. BURTON, PLAINTIFF v. PHOENIX FABRICATORS AND ERECTORS, INC. AND DAVIS, MARTIN, POWELL & ASSOCIATES, INC., DEFENDANTS

DONNA DAVIS, ADMINISTRATRIX OF THE ESTATE OF CHARLES M. DAVIS, PLAINTIFF v. PHOENIX FABRICATORS AND ERECTORS, INC. AND DAVIS, MARTIN, POWELL & ASSOCIATES, INC., DEFENDANTS

No. COA06-1195

(Filed 7 August 2007)

Appeal and Error— appealability—denial of motion to dismiss—subject matter jurisdiction—brief not considered petition for certiorari—Rule 2 inapplicable

The trial court's interlocutory orders denying defendant employer's motions to dismiss tort actions for the deaths of two employees in North Carolina on the ground of lack of subject matter jurisdiction based upon defendant's contention that the exclusive remedy provision of the Indiana Workers' Compensation Act provided it with "immunity" from suit did not affect a substantial right and were this not immediately appealable because, upon the final resolution of all of plaintiffs' claims, defendant will be entitled to appeal the issue it asks the appellate court to review, and defendant's desire to avoid a trial on the merits does not warrant immediate appellate review. Furthermore, defendant employer's brief will not be treated as a petition for a writ of certiorari because defendant has not complied with the requirements for such a petition set out in N.C. R. App. P. 21(c), and defendant has not pointed to any "manifest injustice" or compelling need "to expedite decision in the public interest" as required for the application of N.C. R. App. P. 2.

Appeal by defendant from orders entered 16 May 2006 by Judge W. Osmond Smith, III in Granville County Superior Court. Heard in the Court of Appeals 27 March 2007.

Price, Smith, Hargett, Petho & Anderson, by William Benjamin Smith, for plaintiffs-appellees.

Carruthers & Roth, P.A., by Kenneth R. Keller, J. Patrick Haywood, and William J. McMahon, IV, for defendant-appellant Phoenix Fabricators and Erectors, Inc.

GEER, Judge.

Defendant Phoenix Fabricators and Erectors, Inc. ("Phoenix") appeals from the denial of its Rule 12(b)(1) motion to dismiss the complaints of plaintiffs Jacinda Burton and Donna Davis, alleging negligence in the death of their husbands while working for Phoenix in North Carolina. Phoenix acknowledges that the order below is interlocutory, but nonetheless argues that immediate appellate review is justified based on the "exclusive remedy" workers' compensation statute of the State of Indiana. Although Phoenix claims that the Indiana statute grants them "immunity from suit," our appellate courts have held, when considering other analogous circumstances, that a mere desire to avoid trial does not give rise to a substantial right justifying an interlocutory appeal. We, therefore, dismiss Phoenix's appeal.

Facts

Michael Burton and Charles Davis, plaintiffs' decedents, were killed on 30 October 2002 while they were helping to construct an elevated water storage tank on property owned by Granville County. Both men were employees of Phoenix. On 10 June 2004, Jacinda Burton, the Administratrix of the Estate of Michael Burton, and Donna Davis, the Administratrix of the Estate of Charles Davis, filed companion tort actions against three defendants: Phoenix, the employer; Granville County, the property owner; and Davis, Martin, Powell & Associates, Inc., one of the project's contractors.

According to plaintiffs, their husbands were assigned to work on the exterior of the water tower at a height over 80 feet above the ground without having any "fall arrest protection." While the two men were performing their work, a crane was hoisting a section of the structure into place. The crane failed, causing the load to collide with the completed portion of the tower and knocking the two men from the tower. They fell to the ground, suffering fatal injuries.

All defendants filed motions for summary judgment. Subsequently, Phoenix also filed a motion to dismiss both actions pursu-

ant to N.C.R. Civ. P. 12(b)(1), asserting that the trial court lacked subject matter jurisdiction. Judge W. Osmond Smith, III of Granville County Superior Court entered orders granting summary judgment in favor of Granville County and Davis, Martin, Powell & Associates. He denied Phoenix's motions for summary judgment and for dismissal. Phoenix has appealed only from the orders denying its Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction.

Discussion

It is well established in North Carolina that "[a] trial judge's order denying a motion to dismiss for lack of subject matter jurisdiction is interlocutory and not immediately appealable." *Shaver v. N.C. Monroe Constr. Co.*, 54 N.C. App. 486, 487, 283 S.E.2d 526, 527 (1981). *See also Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 327, 293 S.E.2d 182, 184 (1982) (approving *Shaver*); *Data Gen. Corp. v. County of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 246 (2001) (holding that "the denial of a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction is not immediately appealable"). As our Supreme Court has recently acknowledged, however, interlocutory review of such an order nonetheless may be permissible if the appellant demonstrates that, under the circumstances of the particular case, the order affects a substantial right that would be jeopardized in the absence of review prior to a final determination on the merits. *Harris v. Matthews*, 361 N.C. 265, 269, 643 S.E.2d 566, 569 (2007) (permitting interlocutory appeal when order denying motion to dismiss for lack of subject matter jurisdiction affected first amendment right to freedom of religion).

Phoenix bears "[t]he burden . . . to establish that a substantial right will be affected unless [it] is allowed immediate appeal from an interlocutory order." *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001). Phoenix points to the fact that it paid plaintiffs benefits under the Indiana Workers' Compensation Act and argues: "Indiana law is absolutely clear that once an employee or his estate collects workers' compensation benefits, he or it relinquishes the option to pursue a civil action against the employer. Such a receipt of benefits . . . divests the Trial Court of subject matter jurisdiction." *See* Ind. Code Ann. § 22-3-2-6 ("The rights and remedies granted to an employee subject to IC 22-3-2 through IC 22-3-6 on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, the employee's personal representatives, dependents, or next of kin, at common law or otherwise,

on account of such injury or death, except for remedies available under IC 5-2-6.1.").

Phoenix contends that Indiana's "exclusive remedy" statute provides it with "immunity from suit" and that, as a result, it is entitled to immediate review of the denial of its 12(b)(1) motion. Phoenix analogizes this claimed right to avoid suit to other rights this Court has already deemed sufficiently substantial to warrant immediate appellate review, such as when a trial court denies the defense of sovereign immunity. *See Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999) (recognizing "that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review").

This Court has, however, previously rejected similar attempts by appellants to cast their litigation defenses in the mold of an "immunity" in order to obtain immediate appellate review of an adverse ruling. For example, in *Allen v. Stone*, 161 N.C. App. 519, 522, 588 S.E.2d 495, 497 (2003), the "defendant argue[d] the Rule 41(a)(1) two-dismissal rule creates a 'right to be free from the burdens of litigation' giving rise to a 'conditional immunity from suit,' such that denial of a motion to dismiss grounded on Rule 41(a)(1) likewise affects a substantial right and is immediately appealable." We expressly "decline[d] to adopt defendant's interpretation of Rule 41(a)(1) as creating a 'conditional immunity from suit' " and held that we could "discern no substantial right that would be affected absent immediate appellate review." *Id. See also Robinson v. Gardner*, 167 N.C. App. 763, 768, 606 S.E.2d 449, 452 (again rejecting argument that two-dismissal rule under Rule 41(a)(1) "creates a form of immunity that supports an interlocutory appeal"), *disc. review denied*, 359 N.C. 322, 611 S.E.2d 417 (2005).

In *Lee v. Baxter*, 147 N.C. App. 517, 519, 556 S.E.2d 36, 37 (2001), the appellant took a similar approach, "argu[ing] that the statute of repose gives a defendant a 'vested right' not to be sued and is therefore similar to the defense of immunity, which is considered a substantial right." Again, we rejected the contention, noting that "[u]nlike a claim for immunity, [the appellant's] right to raise the statute of repose defense will not be lost if we do not review the case prior to a final judgment since [the appellant] may raise the issue on appeal from a final judgment." *Id.* at 520, 556 S.E.2d at 37. *See also Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 121, 535 S.E.2d 397, 401 (2000) (holding that an interlocutory "order denying a party's motion to dismiss based on a statute of limitation does not effect [sic]

a substantial right and is therefore not appealable"). The Court in *Lee* continued: "The only loss [the appellant] will suffer will be the time and expense of trial. We note, however, that avoiding the time and expense of trial is not a substantial right justifying immediate appeal." 147 N.C. App. at 520, 556 S.E.2d at 37-38. *See also Allen*, 161 N.C. App. at 522, 588 S.E.2d at 497 (holding that "avoidance of a trial, no matter how tedious or unnecessary, is not a substantial right entitling an appellant to immediate review").

In this case, we find that Phoenix's "exclusive remedy" defense under the Indiana Workers' Compensation Act is, with respect to an interlocutory appeal, materially indistinguishable from defenses based on the two-dismissal rule or a statute of repose. Upon the trial court's final resolution of all of plaintiffs' claims, Phoenix will be entitled to appeal, if necessary, the issue it currently asks this Court to review. In the meantime, however, Phoenix's desire to avoid a trial on the merits does not warrant immediate appellate intervention "no matter how tedious or unnecessary" a trial may be. *Id.*

Phoenix also points to decisions allowing an interlocutory appeal from an order denying a motion to compel arbitration. *See Futrelle v. Duke Univ.*, 127 N.C. App. 244, 247, 488 S.E.2d 635, 638 (recognizing that interlocutory order denying arbitration may be immediately appealed because it involves a substantial right that might be lost if appeal is delayed), *disc. review denied*, 347 N.C. 398, 494 S.E.2d 412 (1997). Those decisions are, however, based on the public policy favoring arbitration and the fact that "the right to arbitration would effectively be lost if appeal is delayed" until after the litigation was complete. *Id.* Here, an appeal following final judgment would still permit Phoenix to avoid liability to plaintiffs, a primary benefit of the "exclusive remedy" statute. This appeal should, therefore, be dismissed.

Alternatively, Phoenix asks this Court to review the order below pursuant to a petition for writ of certiorari under N.C.R. App. P. 21(a)(1). We note initially that Phoenix has not complied with the requirements for a petition for writ of certiorari set out in N.C.R. App. P. 21(c). *See State v. McCoy*, 171 N.C. App. 636, 638-39, 615 S.E.2d 319, 321 (refusing to review otherwise belated appeal pursuant to Rule 21 because request in footnote of appellant's brief that brief be treated as an alternative petition for writ of certiorari did not meet requirements of Rule 21(c)), *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005). Second, Phoenix has not pointed to any "manifest injustice" or compelling need "to expedite decision in the public interest," as

required in order for this Court to suspend the requirements of Rule 21 under Rule 2 of the Rules of Appellate Procedure. *See, e.g.*, *Brown v. City of Winston-Salem*, 171 N.C. App. 266, 269, 614 S.E.2d 599, 601 ("Rule 2 of the North Carolina Rules of Appellate Procedure permits this Court to suspend or vary the requirements of the Rules '[t]o prevent manifest injustice to a party, or to expedite decision in the public interest.' We exercise our authority under Rule 2 to consider the parties' appeals as petitions for *certiorari*, and we grant *certiorari* to review the trial court's interlocutory order." (alteration in original)), *cert. denied*, 360 N.C. 60, 621 S.E.2d 176 (2005). Finally, even if we were to treat Phoenix's brief as a petition for writ of certiorari, Phoenix has not shown that the circumstances of this case are such that immediate appellate review is necessary. Accordingly, we decline to review this case pursuant to a petition for writ of certiorari.

Appeal dismissed.

Chief Judge MARTIN and Judge WYNN concur.

STATE OF NORTH CAROLINA v. SHANNON KEITH MOFFITT

No. COA06-1239

(Filed 7 August 2007)

1. Judges— recusal—motion required to be in writing

The trial judge did not err in a double first-degree kidnapping, double robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and felony breaking or entering case by refusing to recuse himself as the sentencing judge even though he had previously sentenced defendant in the same case, because: (1) N.C.G.S. § 15A-1223 requires that a written motion must be filed no less than five days before the time the case is called for trial unless good cause is shown for failure to file within that time; (2) defendant's request to the trial judge to recuse himself was made only orally, and nothing in the record meets the definition of good cause sufficient to excuse defendant's failure to comply with the statute; (3) a mere allegation of bias or prejudice is inadequate to compel recusal, and the burden is on the party requesting the recusal to demonstrate objectively

that grounds for disqualification actually exist; and (4) the trial judge's refreshing his memory as to defendant's case did not suggest he had any bias or prejudice against defendant when his comments were neutral and did not reflect any opinion.

2. Sentencing— resentencing—consolidation of charges differently

The trial court did not err in a double first-degree kidnapping, double robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and felony breaking or entering case by imposing two separate sentences on charges that had previously been consolidated in an earlier sentence, because: (1) while N.C.G.S. § 15A-1335 prohibits trial courts from imposing stiffer sentences upon remand than originally imposed, nothing prohibits the trial court from changing the way in which it consolidated convictions during a sentencing hearing prior to remand; (2) in the first sentencing defendant got a total of 179 to 233 months' imprisonment whereas during resentencing he got a total of 131 to 176 months' imprisonment; and (3) defendant did not receive a more severe sentence on remand and has failed to show any error in the trial court's decision to consolidate the charges differently for resentencing.

3. Constitutional Law— double jeopardy—separate sentencing for kidnapping and other felonies

The trial court did not violate defendant's constitutional rights by imposing consecutive sentences for first-degree kidnapping and robbery with a dangerous weapon even though defendant contends the robbery charge was an element of the kidnapping charge, because: (1) our Supreme Court has previously rejected the argument that separate sentences for kidnapping and other felonies violate the constitutional prohibition against double jeopardy; (2) only defendant's resentencing is before the Court of Appeals, and not the judgments for the underlying convictions; and (3) the trial court was bound to enter sentences for separate convictions when a jury had already concluded there was sufficient evidence to find defendant guilty of the separate offenses.

Appeal by Defendant from judgments entered 5 June 2006 by Judge Henry E. Frye, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 24 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General Kathryne E. Hathcock, for the State.

Bruce T. Cunningham, Jr., for defendant-appellant.

WYNN, Judge.

Defendant appeals from his sentence received after remand from this Court on convictions for two counts of first-degree kidnapping, two counts of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and felony breaking and/or entering. After a careful review of Defendant's arguments and the record before us, we find no error.

On 22 June 2004, Defendant Shannon Keith Moffitt was found guilty of conspiracy to commit robbery with a dangerous weapon, two counts of robbery with a dangerous weapon, two counts of first-degree kidnapping, and felonious breaking and/or entering. The trial court, Judge Henry E. Frye, Jr., entered judgment and sentenced Defendant to a presumptive range sentence of thirty-four to fifty months' imprisonment for the conspiracy conviction. Judge Frye consolidated the other charges for judgment and found as an aggravating factor that Defendant "induced others to participate in the commission of the offense; occupied position of leadership or dominance of the other participants in the commission of the offense." The trial judge then imposed a consecutive, aggravated range sentence of one hundred forty-five to one hundred eighty-three months' imprisonment for those consolidated charges of two counts of first-degree kidnapping, two counts of robbery with a dangerous weapon, and felony breaking and/or entering.

On Defendant's appeal from that conviction and sentence, this Court found no error in his convictions but remanded for resentencing "based on erroneous imposition of the aggravated sentence" because the trial court, and not the jury, found the aggravating factor used to increase his sentence. *State v. Moffitt*, 177 N.C. App. 149, 627 S.E.2d 685 (unpublished, No. COA05-545, 4 April 2006). On 5 June 2006, Defendant was resentenced by Judge Frye, who imposed a mitigated range sentence of seventy to ninety-three months' imprisonment on the two first-degree kidnapping charges and another, consecutive mitigated range sentence of sixty-one to eighty-three months' imprisonment for the consolidated charges of two counts of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and felony breaking and/or entering.

Defendant now appeals, arguing that (I) the trial court erred by refusing to recuse himself as the sentencing judge; (II) the trial court erred by imposing two separate sentences on charges that had previously been consolidated in an earlier sentencing; and (III) the imposition of consecutive sentences for first-degree kidnapping and robbery with a dangerous weapon violated his constitutional rights.

I.

[1] Defendant first argues that the trial court erred by refusing to recuse himself when he was the same judge who had previously sentenced Defendant and was therefore aware of a plea arrangement that Defendant had rejected. Defendant contends that the trial court's failure to recuse himself violated Defendant's right to an impartial judge and due process. We disagree.

North Carolina General Statute § 15A-1223 reads in pertinent part:

> (b) A judge, on motion of the State or the defendant, must disqualify himself from presiding over a criminal trial or other criminal proceeding if he is:
>
> (1) Prejudiced against the moving party or in favor of the adverse party; or
>
> . . .
>
> (4) For any other reason unable to perform the duties required of him in an impartial manner.
>
> (c) A motion to disqualify must be in writing and must be accompanied by one or more affidavits setting forth facts relied upon to show the grounds for disqualification.

N.C. Gen. Stat. § 15A-1223 (2005). Further, such written motion "must be filed no less than five days before the time the case is called for trial unless good cause is shown for failure to file within that time." *Id.* at § 15A-1223(d).

As acknowledged by Defendant in his brief, his request to the trial court to recuse himself was made only orally, not in writing as required by statute. Nothing in the record before us meets the definition of "good cause" sufficient to excuse Defendant's failure to comply with the statute. Additionally, a mere allegation of bias or prejudice is inadequate to compel recusal; rather, the burden is on the party requesting the recusal to "demonstrate objectively that grounds

for disqualification actually exist." *In re Nakell*, 104 N.C. App. 638, 647, 411 S.E.2d 159, 164 (1991) (citation and quotation omitted), *disc. review denied*, 330 N.C. 851, 413 S.E.2d 556 (1992). Thus, a defendant must show "bias, prejudice, or interest . . . refer[ring] to the personal disposition or mental attitude of the trial judge, either favorable or unfavorable, toward a party to the action before him," *State v. Scott*, 343 N.C. 313, 325, 471 S.E.2d 605, 612 (1996), such that "a reasonable man knowing all of the circumstances would have doubt about the judge's ability to rule . . . in an impartial manner." *State v. Poole*, 305 N.C. 308, 321, 289 S.E.2d 335, 343 (1982) (quotation omitted); *see also State v. McRae*, 163 N.C. App. 359, 365, 594 S.E.2d 71, 76, *disc. review denied*, 358 N.C. 548, 599 S.E.2d 911 (2004); *State v. Kennedy*, 110 N.C. App. 302, 304-06, 429 S.E.2d 449, 451-52 (1993).

Defendant has made no such showing here. The trial court's statements quoted by Defendant indicate only that Judge Frye was refreshing his memory as to Defendant's case and do not suggest he had any bias or prejudice against Defendant; his comments were neutral and did not reflect any opinion, either favorable or unfavorable, toward Defendant. This assignment of error is accordingly overruled.

II.

[2] Defendant next argues that the trial court erred by imposing two separate sentences on charges that had previously been consolidated in an earlier sentencing proceeding. Defendant specifically contends that he was sentenced more severely on remand from this Court. We disagree.

North Carolina General Statute § 15A-1335 provides:

> When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

N.C. Gen. Stat. § 15A-1335 (2005). Nevertheless, while that statute "prohibits trial courts from imposing stiffer sentences upon remand than originally imposed, nothing prohibits the trial court from changing the way in which it consolidated convictions during a sentencing hearing prior to remand." *State v. Ransom*, 80 N.C. App. 711, 713, 343 S.E.2d 232, 234, *cert. denied*, 317 N.C. 712, 347 S.E.2d 450 (1986).

Here, Defendant was initially sentenced to a term of thirty-four to fifty months' imprisonment on the conspiracy charge, and a consecutive term of one hundred forty-five to one hundred eighty-three months' imprisonment on the consolidated charges of two counts of first-degree kidnapping, two counts of robbery with a dangerous weapon, and felony breaking and/or entering. On remand, the trial court consolidated the charges differently, sentencing Defendant to seventy to ninety-three months' imprisonment on the two counts of first-degree kidnapping and to a consecutive term of sixty-one to eighty-three months' imprisonment for the conspiracy charge, the felony breaking and/or entering charge, and the two counts of robbery with a dangerous weapon.

Thus, in the first sentencing, Defendant was sentenced to a total of one hundred seventy-nine to two hundred thirty-three months' imprisonment, while in the resentencing, he received a total term of one hundred thirty-one to one hundred seventy-six months' imprisonment. Defendant did not receive a more severe sentence on remand and has failed to show any error in the trial court's decision to consolidate the charges differently for resentencing. Accordingly, this assignment of error is overruled.

III.

[3] Finally, Defendant contends that the imposition of consecutive sentences for first-degree kidnapping and robbery with a dangerous weapon violated his constitutional rights because the robbery charge was an element of the kidnapping charge. We disagree.

As noted by Defendant in his brief, our state Supreme Court has previously rejected the argument that separate sentences for kidnapping and other felonies violate the constitutional prohibition against double jeopardy, holding that, "In order to prove kidnapping it was only necessary to prove a *purpose* of robbery or the other felonies, *not the commission of the felonies themselves*." *State v. Williams*, 295 N.C. 655, 659-60, 249 S.E.2d 709, 713-14 (1978) (emphasis added), *superseded by statute on other grounds*, *State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983).

Moreover, we observe that only Defendant's resentencing is before us on appeal, not the judgments for the underlying convictions. Given that a jury had already concluded that there was sufficient evidence to find Defendant guilty of the separate offenses of first-degree kidnapping and robbery with a dangerous weapon, the

trial court was bound to enter sentences for those separate convictions. *See* N.C. Gen. Stat. § 15A-1340.17 (2005) (punishment limits for each class of offense and prior record level). This assignment of error is accordingly dismissed.

No error.

Judges TYSON and CALABRIA concur.

STATE OF NORTH CAROLINA v. JAMES LINDSAY

No. COA06-1029

(Filed 7 August 2007)

1. Sentencing— prior record level—calculation—harmless error analysis

The trial court did not commit prejudicial error in an assault inflicting serious bodily injury case by calculating under N.C.G.S. § 15A-1340.14 defendant's prior record level for sentencing when it assessed points for being on probation, for convictions occurring in the same week of superior court, and for an out-of-state robbery conviction, because: (1) even if the trial court miscalculated the points involved, the improperly assessed points would not affect defendant's record level; and (2) a sentence within the presumptive range is accepted as valid unless the record shows the trial court considered improper evidence.

2. Appeal and Error— preservation of issues—motion to dismiss assignment of error—vagueness

The State's motion to dismiss defendant's assignment of error in an assault inflicting serious bodily injury case based on an alleged violation of N.C. R. App. P. 10(c)(1) is denied, because: (1) defendant references specific statutes and the applicable transcript and record page numbers; and (2) defendant's assignment of error plainly and concisely stated a specific trial court error.

Appeal by defendant from judgment entered 30 June 2005 by Judge J. Gentry Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 June 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Brenda Eaddy, for the State.

Eric A. Bach for defendant-appellant.

HUNTER, Judge.

On appeal, James Lindsay ("defendant") contends that the trial court erred in calculating his prior record level for sentencing when it assessed points for being on probation, for convictions occurring in the same week of superior court, and for an out-of-state robbery conviction. After careful review, we hold that any miscalculation by the trial court did not affect defendant's sentencing and was therefore harmless error. We therefore find no error.

On 27 June 2005, defendant pled guilty to assault inflicting serious bodily injury, a class F felony, with no agreement on sentencing. The prior record level worksheet prepared by the State indicated that defendant had twenty-nine prior record level points, corresponding to a prior record level VI for sentencing. Defendant agreed and stipulated to the prior record level and points. The trial court accepted defendant's plea and found no aggravating or mitigating factors. On 30 June 2005, the court sentenced defendant within the presumptive range to imprisonment for a minimum of thirty-nine months and a maximum of forty-seven months.

Defendant appeals pursuant to N.C. Gen. Stat. § 15A-1444(a2) (2005), which allows a defendant to appeal a guilty plea as a matter of right when the defendant's prior record level was improperly calculated.

I.

[1] Defendant argues that the trial court incorrectly calculated his prior record level pursuant to N.C. Gen. Stat. § 15A-1340.14 (2005). Specifically, he contends that five of the twenty-nine points were improperly assessed, so his correct point total is twenty-four. He further asserts that, even though level VI includes all point totals from nineteen up, this error was not harmless because the trial court might have considered a shorter sentence within the presumptive range had he been assigned only twenty-four points. This argument is without merit.

This Court applies a harmless error analysis to improper calculations of prior record level points. *State v. Bethea*, 173 N.C. App. 43,

61, 617 S.E.2d 687, 698 (2005); *State v. Smith*, 139 N.C. App. 209, 219-20, 533 S.E.2d 518, 524 (2000). In both *Bethea* and *Smith*, the defendants argued that the trial courts erroneously assessed points in determining their prior record levels. *Id.* This Court held that even if the trial courts did miscalculate the points involved, this constituted harmless error, because deducting the improperly assessed points would not affect the defendants' record levels. *Id.*

Defendant makes a series of arguments as to why individual points were incorrectly assessed. However, whether the trial court miscalculated as to those five points is not dispositive in this case. Assuming *arguendo* that the trial court improperly included all five points, subtracting them would still leave defendant's prior record level at VI. Defendant was correctly sentenced within the presumptive range of an offender with a prior record level VI pursuant to N.C. Gen. Stat. § 15A-1340.17. A sentence in the presumptive range is accepted as valid, unless the record shows that the trial court considered improper evidence. *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987).

While the trial court might have erred in calculating defendant's points, any such error does not affect defendant's record level of VI or the appropriate presumptive sentencing range, and thus the error is harmless. We therefore find no prejudicial error.

II.

[2] In its brief, the State makes a motion to dismiss, arguing that defendant's assignment of error violated Rule 10(c)(1) of the North Carolina Rules of Appellate Procedure. We deny the motion.

Rule 10(c)(1) provides that an assignment of error must be stated plainly and concisely and "is sufficient if it directs the attention of the appellate court to the particular error about which the question is made[.]" N.C.R. App. P. 10(c)(1). Defendant's third assignment of error states:

> The trial court's error in determining the Defendant's criminal history category pursuant to the North Carolina Structured Sentencing Act. The Defendant asserts as a legal basis Chapter 15A of the North Carolina General Statutes and the Due Process Clause of the United States Constitution, N.C. Constitution Art. I, § 19. The Defendant asserts constitutional error, structural error, prejudicial error, or in the alternative plain error.

Transcript page 20.

Record pages 16-20.

The State cites *State v. Mullinax*, 180 N.C. App. 439, 637 S.E.2d 294 (2006), to support its argument. In *Mullinax*, this Court ruled that the defendant violated Rule 10(c)(1) because his assignment of error was too vague when it stated only that the defendant's "prior record level was incorrectly calculated." *Id.* at 441, 637 S.E.2d at 296. The instant case is distinguishable from *Mullinax* in that defendant's assignment of error in our case is not as brief or vague. In fact, defendant references specific statutes and the applicable transcript and record page numbers. We find that defendant's assignment of error plainly and concisely states a specific trial court error. Therefore, the State's motion to dismiss is denied.

III.

Because the trial court's miscalculation of defendant's points does not affect his record level for sentencing, we find no error as to defendant's active prison sentence of thirty-nine to forty-seven months. Furthermore, we find that defendant's assignment of error complies with N.C.R. App. P. 10(c)(1) because it is sufficiently specific, and thus the State's motion to dismiss is denied.

No error.

Judges WYNN and BRYANT concur.

STATE OF NORTH CAROLINA v. JEFFREY TREMAINE WILLIAMS

No. COA06-1420

(Filed 21 August 2007)

1. Constitutional Law— right to confrontation—statements to witness—nontestimonial

The admission of statements made by a murder victim to the witness did not violate defendant's right to confront the witnesses against him. The statements were nontestimonial: they were made during the course of a private conversation, outside the presence of any police officer and before a crime was committed, and without any indication of thought of a future trial.

2. Evidence— statements to witness—present sense impressions

The trial court did not err by admitting as presence sense impressions testimony about the witness's telephone conversations with a murder victim. Moreover, there was other testimony to substantially the same subject matter without objection.

3. Evidence— federal plea bargain—not relevant

The trial court did not abuse its discretion in a first-degree murder prosecution by not allowing a witness to be cross-examined about his federal plea bargain. There was no showing that the witness received anything in exchange for his testimony against defendant.

4. Homicide— shooting during armed robbery—evidence of causation by defendant—sufficient

There was sufficient evidence that defendant was the perpetrator of a first-degree murder committed in the course of an armed robbery where defendant argued that the evidence showed that the victim was shot by his own weapon, but it was reasonable for the jury to infer from the evidence that an act by defendant caused the death.

5. Criminal Law— acting in concert—victim shooting himself

The trial court's correct instruction on acting in concert in a first-degree murder and felony murder prosecution cured the improper argument by the State that defendant would be guilty under an acting in concert theory even if the victim pulled the trigger.

6. Homicide— felony murder—victim shooting himself—State's argument—error cured by instructions

Any error in an argument by the State that it did not matter under the felony murder rule whether the victim or the defendant pulled the trigger was cured by the court's instructions.

7. Criminal Law— deadlocked jury—additional instruction on acting in concert—no error

The trial court did not express an opinion on defendant's guilt by giving an additional instruction on acting in concert after the failure of the jury to come to a unanimous decision (there had been an earlier inquiry from the jury). The court acted appropriately under the totality of the circumstances in giving the additional instruction.

8. Criminal Law— deadlocked jury—inquiry and instruction—verdict not coerced

The trial court did not impermissibly coerce a verdict by giving an additional instruction ex mero motu after the jury deadlocked. The instruction given was not in error, and the court's inquiry into the numerical division was not an inquiry into whether the majority favored conviction.

Appeal by Defendant from judgment dated 31 March 2006 by Judge William C. Gore, Jr. in Superior Court, Johnston County. Heard in the Court of Appeals 6 June 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Jonathan Babb, for the State.

Crumpler, Freedman, Parker, and Witt, by Vincent F. Rabil, for Defendant.

McGEE, Judge.

Jeffrey Tremaine Williams (Defendant) was convicted on 31 March 2006 of first-degree murder. Defendant was convicted under the felony murder rule, with the underlying felony being robbery with a dangerous weapon. The trial court sentenced Defendant to life imprisonment without parole. Defendant appeals.

At trial, Michelle Howell (Ms. Howell) testified that she was a friend of Davie Stancil (the victim) and that she talked with him by telephone around 10:30 p.m. on 9 May 2004. Ms. Howell testified that

they spoke for about ten or fifteen minutes and then hung up because Ms. Howell's cell phone was "going dead."

Ms. Howell testified that the victim called her on her home telephone about ten minutes later. She further testified, over Defendant's objection, that the victim said, "I think somebody just tried to get me." Ms. Howell continued her testimony, over Defendant's objection, as to what the victim had said to her. Ms. Howell testified as follows: the victim said that a woman he did not recognize had knocked on his door and told him that her car had broken down, and that she was looking for Patricia Johnson. The victim told the woman he did not know a Patricia Johnson. The victim further said that the woman had refused the victim's offer to use his telephone. The victim saw "a bulge in the front of her pants" and he then went inside to get his gun. He returned to the door and continued talking with the woman. The woman asked if she could come back around 11:30 p.m., and he said okay, and she left. Ms. Howell further testified that her conversation with the victim ended around 12:15 a.m. when the victim told Ms. Howell: "[H]old on for a minute. . . . I'm going to just call you back in a minute[.]" However, the victim never called Ms. Howell back.

Brandie Spivey (Ms. Spivey) testified that in 2004 she had been Defendant's girlfriend. Ms. Spivey testified that Defendant sent her to the victim's house around 6:00 p.m. on 9 May 2004 to see if a car was parked at the victim's house and to see if anyone was at home. Ms. Spivey did not see a car. She then knocked on the door, but no one answered, and Ms. Spivey walked back to her house.

Ms. Spivey testified that she returned to the victim's house around 9:00 p.m. or 9:30 p.m., and knocked on the door. Ms. Spivey testified that Defendant had again sent her to the victim's house to see if she could "make entrance" to the victim's house so that "[Defendant] could get inside and rob [the victim]." Ms. Spivey further explained that Defendant sent her to the victim's house as a decoy pursuant to a plan to rob the victim, and that Defendant knew the victim had money and drugs. When the victim came to the door, Ms. Spivey gave him a false name, told him her car had broken down, and told him that she was looking for someone. Ms. Spivey and the victim continued to have a conversation for about ten minutes. Ms. Spivey asked the victim if she could come back later, and he told her to come back between 11:00 p.m. and 12:00 midnight.

Ms. Spivey testified that she returned to the victim's house with Defendant around 11:00 p.m. Ms. Spivey testified that she knocked on

the door while Defendant knelt on the side of the steps where the victim could not see him. Just before the victim opened the door, Ms. Spivey heard the victim say to someone over the telephone, "I'll call you back." When the victim opened the door, Ms. Spivey testified that Defendant pushed his way into the victim's house and Defendant and the victim began to "tussle." Ms. Spivey further testified that Defendant and the victim continued "wrestling for [a] gun" in the victim's bedroom. Ms. Spivey testified she "was told it was a 9 millimeter[,]" and the trial court instructed the jury not to consider what Ms. Spivey had been told. Ms. Spivey also testified she saw a second, smaller gun that Defendant was using to hit the victim. During the fight, Ms. Spivey heard a gunshot and then "saw blood everywhere[.]" Ms. Spivey did not testify that she saw who fired the gunshot.

Wayne Bell (Mr. Bell) testified that he met Defendant in 2005 when the two of them were incarcerated in the Johnston County jail. Mr. Bell testified that Defendant told him the following:

> [Defendant] was telling me about his charge. It was his girlfriend went to, was going with this drug dealer and they was planning to rob him. The girlfriend was already at the house when [Defendant] entered the house. [Defendant] and the drug dealer got to tussling over the gun. The gun went off. Shot the drug dealer in his left leg. The girlfriend was in the other room. She didn't know what, who had shot who at the time. [Defendant] got the gun and left with it after he got some drugs and money from the drug dealer. And [Defendant] told me don't nobody know where that gun at but him.
>
> [Defendant's] girlfriend later on, she changed her statement and said [Defendant] done it. But [Defendant] told me out of his own mouth that [Defendant] was the one that did the shooting.

During cross-examination of Mr. Bell, Defendant sought to introduce a motion for downward departure and a plea agreement, both pertaining to unrelated federal criminal charges against Mr. Bell. The documents demonstrated that the federal prosecutor dismissed several charges against Mr. Bell and that Mr. Bell received a reduced sentence for his cooperation with the federal prosecutor. However, the trial court sustained the State's objections to the introduction of this evidence.

Deputy Chief Medical Examiner Thomas Clark (Dr. Clark) testified that he performed an autopsy on the victim. Dr. Clark testified

that the victim had a gunshot wound in his left leg that tore a major artery in the victim's leg, and that the victim had blunt force injuries on his face, head, shoulder, back, and abdomen. Dr. Clark further testified that the gunshot wound "would not have immediately caused [the victim's] death. It would probably have taken several minutes for [the victim] to bleed out to the point of losing consciousness."

At the close of the State's evidence, Defendant moved to dismiss the charge of first-degree murder. The trial court denied Defendant's motion. Defendant did not present evidence. Defendant renewed his motion to dismiss, and the trial court again denied the motion.

The following colloquy regarding acting in concert occurred during the charge conference:

> THE COURT: . . . . I will also include the acting in concert instruction at 202.10. Or is the [S]tate requesting that?
>
> [THE STATE]: We would request.
>
> THE COURT: You would? I've just got it in here. I don't—I'm just asking.
>
> [THE STATE]: Well . . .
>
> THE COURT: I think all the evidence is that . . . [D]efendant did all of the acts personally.
>
> [THE STATE]: [Defendant] just used [Ms. Spivey], you know, as a decoy to get his way in. [Ms. Spivey] . . . knew about the plan, had some knowledge. That's the only reason I would say it's appropriate but we can live without it, also.
>
> THE COURT: What is the defense position on it?
>
> [DEFENSE COUNSEL]: Your Honor, I object to it. [Ms. Spivey] [is] not even . . . indicted.
>
> THE COURT: All right. If you object to it, [and] the [S]tate doesn't care, I won't give it, sir.

The trial court instructed the jury, *inter alia*, on first-degree murder on the basis of malice, premeditation, and deliberation, and also under the felony murder rule. The jury began its deliberations and sent the following note to the trial court: "One, could we get a definition of first-degree murder? Two, reread the difference between malice, premeditation, and deliberation versus first-degree felony murder

rule." In response, the trial court re-read the substantive instruction to the jury without objection.

After this instruction, a juror tendered the following note to the trial court: "If I am not entirely convinced that . . . [D]efendant pulled the trigger but I do believe he was at the scene of the crime, can I still return a guilty verdict?" In response, the trial court instructed the jury as follows: "[A]ll of you must decide the case based on the evidence that has been presented and on the law that I have given you. I cannot specifically answer this question for you." The trial court also re-instructed the jury on the presumption of innocence, reasonable doubt, and the State's burden to prove the identity of Defendant as the perpetrator of the crime.

The jury continued its deliberations. The jury subsequently submitted the following question to the trial court: "[W]e would like to request to have the first-degree murder rule reread, if possible. If not, we would need the whole law reread." Defendant requested that, in addition to a re-instruction on the felony murder rule, the trial court also re-instruct the jury regarding the burden of proof. The trial court denied Defendant's request and instructed the jury on the felony murder rule for the third time. The jury resumed its deliberations and later informed the trial court that "[w]e cannot come to a unanimous verdict on this decision." The trial court then inquired about the numerical breakdown of the deadlock:

> THE COURT: Without giving me any other information, can you just give me two numbers representing those who are one way and those who are another?
>
> FOREPERSON MORGAN: Eleven and one.

The trial court then stated the following outside the presence of the jury:

> Pursuant to [N.C. Gen. Stat. §] 15A-1234, at this time, the Court proposes to charge the jury as to the law relating to acting in concert. . . . Now, the charge I will give is the acting in concert charge as relates to the offense of robbery with a dangerous weapon. Because I intend to charge, I want to give counsel an opportunity to argue to the jury.

Defendant objected and requested an instruction to the effect that a person's mere presence at the scene of a crime does not make him guilty of any crime, even if he was aware the crime was being com-

mitted and made no effort to prevent it. The trial court allowed counsel for the State and Defendant to present new arguments to the jury. The State argued, in part, as follows:

> In the case before you, you've heard all the evidence of [Ms.] Spivey and [Defendant]. You've heard the testimony and the [S]tate's contention that there was a common plan to go to [the victim's] house that night to rob him. And during the course of that robbery, [the victim] was killed. The [S]tate has argued the felony murder theory that during the course of the robbery, if someone is killed, that's felony murder.
>
> It doesn't matter who pulled the trigger. If [Ms.] Spivey pulled the trigger, if [the victim] pulled the trigger, the trigger was pulled during a fight over a gun and it went off, they were acting together in concert to rob [the victim]. And . . . [the victim] was killed during the course of that armed robbery. So we're talking about acting in concert and felony murder.

Following arguments of counsel, the trial court instructed the jury on acting in concert and mere presence. The jury returned a verdict of guilty of first-degree murder under the felony murder rule.

I.

[1] Defendant first argues the trial court violated his constitutional right to confront the witnesses against him by allowing Ms. Howell to testify regarding a conversation she had with the victim. However, because Defendant failed to raise any constitutional objection to this testimony at trial, this argument is not properly before us. *See State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) (recognizing that "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.").

Nevertheless, even assuming *arguendo* that Defendant had preserved this issue, Defendant's argument lacks merit. Defendant argues the victim's "statements to [Ms.] Howell were testimonial because [the victim] must have expected them to be relayed to law enforcement for ultimate use at trial should something happen to [the victim]."

In *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-

examination." *Id.* at 68, 158 L. Ed. 2d at 203. However, "[w]here non-testimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law[.]" *Id.* In *Davis v. Washington*, 547 U.S. ——, 165 L. Ed. 2d 224 (2006), the Supreme Court clarified that

> [s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at ——, 165 L. Ed. 2d at 237. In *Davis*, the Supreme Court also noted: "As in *Crawford*[,] . . . our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are 'testimonial.' " *Id.* at —— n. 2, 165 L. Ed. 2d at 238 n. 2.

While *Crawford* and *Davis* do not speak to the issues of when and whether statements made to individuals other than police and their agents are testimonial, our Court has addressed these issues. In *State v. Lawson*, 173 N.C. App. 270, 619 S.E.2d 410 (2005), *disc. review denied*, 360 N.C. 293, 629 S.E.2d 276 (2006), the victim testified that another individual had told him that the defendant was his attacker. *Id.* at 274, 619 S.E.2d at 413. Our Court recognized that the statements to the victim "were not made during any police investigation, rather they were made during a private conversation . . . and outside the presence of any police officer." *Id.* at 276, 619 S.E.2d at 413. Our Court held that when the individual made these statements to the victim, "it was unlikely that . . . [the individual] was thinking in terms of anything outside the scope of their private conversation—certainly not about testifying as to this matter before the court." *Id.* at 276, 619 S.E.2d at 414.

Likewise, in the present case, the statements the victim made to Ms. Howell were made during the course of a private conversation, outside the presence of any police officer. They were, in fact, made before any crime had occurred. There was no indication that the statements were made with the thought of a future trial in mind. Therefore, pursuant to *Lawson*, the statements at issue in the present case were nontestimonial. Moreover, applying the recent test articu-

lated in *Davis*, these statements were not made under circumstances that objectively indicated the purpose was to prove events potentially relevant to a later criminal prosecution. *See Davis*, 547 U.S. at —–, 165 L. Ed. 2d at 237. Therefore, we hold these statements were non-testimonial, and the trial court did not err by allowing the admission of this testimony. For the same reason, the admission of this testimony did not amount to plain error as Defendant also argues. *See State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468, *cert. denied*, *Torain v. North Carolina*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986) (recognizing that "[a] prerequisite to our engaging in a 'plain error' analysis is the determination that the instruction complained of constitutes 'error' at all.").

[2] Defendant also argues the trial court abused its discretion by admitting the testimony because the statements did not qualify as present sense impressions. We disagree. N.C. Gen. Stat. § 8C-1, Rule 803(1) (2005) provides that the following type of statement is not excluded by the hearsay rule: "Present Sense Impression.—A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Defendant argues that Ms. Howell testified to a telephone conversation about earlier events which were no longer occurring at the time the victim spoke with Ms. Howell. However, according to Ms. Spivey's subsequent testimony, it appears that the victim was speaking with Ms. Howell immediately before Ms. Spivey and Defendant approached the victim's house, which was only about two hours after Ms. Spivey had talked with the victim the first time. Ms. Spivey testified that she first talked with the victim at his house between 9:00 p.m. and 9:30 p.m. Ms. Spivey testified that she returned to the victim's house with Defendant about 11:00 p.m. Just before the victim opened the door, Ms. Spivey heard the victim say the following to someone over the telephone: "I'll call you back." We hold that the trial court did not abuse its discretion by admitting the challenged statements as present sense impressions.

However, even assuming *arguendo* that the challenged statements were not admissible as present sense impressions, Ms. Spivey subsequently testified, without objection, to substantially the same subject matter. Therefore, Defendant lost the benefit of his earlier objection. *See State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984) (holding that "[w]here evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost."). For the

reasons stated above, we overrule the assignments of error grouped under this argument.

II.

[3] Defendant next argues the trial court deprived him of his constitutional right to confront and cross-examine the witnesses against him by not allowing Defendant to cross-examine Mr. Bell as to Mr. Bell's bias. Defendant sought to introduce a motion for downward departure and a plea agreement, both pertaining to unrelated federal criminal charges against Mr. Bell. The records demonstrated that the federal prosecutor dismissed several charges against Mr. Bell and that Mr. Bell received a reduced sentence for his cooperation with the federal prosecutor.

However, the documents did not demonstrate that Mr. Bell received concessions for his participation in this state criminal case against Defendant. The trial court specifically clarified this point:

> THE COURT: Well, let me stop you. [Defense Counsel], . . . did it involve cooperation in this case?
>
> [DEFENSE COUNSEL]: No. I said, what I, what I'm saying is this.
>
> THE COURT: Well, I'm asking you, though. Did I misunderstand you or did you misunderstand me?
>
> [DEFENSE COUNSEL]: I don't know—I may have misunderstood you. I don't know—
>
> THE COURT: Did [Mr. Bell] get, is there some document somewhere that says this witness, Mr. Bell, got favorable treatment from the government for his cooperation in this instant case against [Defendant], the State v. Jeffrey Tremaine Williams?
>
> [DEFENSE COUNSEL]: No, sir.
>
> THE COURT: All right. Objection is sustained.

Accordingly, the records sought to be introduced by Defendant did not establish that Mr. Bell had entered into a plea bargain in return for his cooperation in the case against Defendant. Therefore, the trial court did not err by denying Defendant's request to cross-examine Mr. Bell as to those records.

Defendant argues the trial court erred because the documents related to Mr. Bell's federal criminal case indicated that "[Mr. Bell] has a propensity . . . to trade his way out of cases." However, "[t]he

right to cross examine a witness to expose the witness' bias is not unlimited." *State v. Hatcher*, 136 N.C. App. 524, 526, 524 S.E.2d 815, 816 (2000). " 'The trial judge may and should rule out immaterial, irrelevant, and incompetent matter.' " *State v. Jacobs*, 172 N.C. App. 220, 228, 616 S.E.2d 306, 312 (2005) (quoting *State v. Stanfield*, 292 N.C. 357, 362, 233 S.E.2d 574, 578 (1977)). "On appeal, the trial court's decision to limit cross-examination is reviewed for abuse of discretion, and 'rulings in controlling cross examination will not be disturbed unless it is shown that the verdict was improperly influenced.' " *Id.* (quoting *Hatcher*, 136 N.C. App. at 526, 524 S.E.2d at 816).

In the present case, Mr. Bell's propensity to bargain his way out of cases was irrelevant because there was no showing that Mr. Bell received anything in exchange for his testimony against Defendant. Therefore, the trial court did not abuse its discretion or violate Defendant's constitutional rights by refusing to allow this cross-examination. Accordingly, we overrule these assignments of error.

III.

[4] Defendant next argues the trial court violated his constitutional rights to due process and a fair trial by denying his motions to dismiss. We first note that Defendant did not make these particular constitutional arguments to the trial court. Therefore, these arguments are not properly before us. *See Lloyd*, 354 N.C. at 86-87, 552 S.E.2d at 607 (recognizing that "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.").

Defendant also argues the trial court erred by denying his motions to dismiss because there was insufficient evidence that Defendant was the perpetrator of the crime. On a motion to dismiss for insufficiency of the evidence, a trial court must determine "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995). A trial court views the evidence in the light most favorable to the State, drawing all inferences in the State's favor. *Id.* at 584, 461 S.E.2d at 663.

"When considering a motion to dismiss, the trial court is concerned 'only with the sufficiency of the evidence to carry the case to the jury; it is not concerned with the weight of the evidence.' " *State*

v. Jackson, 161 N.C. App. 118, 122, 588 S.E.2d 11, 14-15 (2003) (quoting *State v. Lowery*, 309 N.C. 763, 766, 309 S.E.2d 232, 236 (1983)). "[T]he credibility of a witness's testimony and the weight to be given that testimony is a matter for the jury, not for the court, to decide." *Id.* at 122, 588 S.E.2d at 14. However, 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. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983).

Pursuant to N.C. Gen. Stat. § 14-17 (2005), "[a] murder . . . which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree[.]" "In accordance with this statute, the two elements of first-degree (felony) murder are: 1) a murder that was 2) committed in the perpetration of a felony." *State v. Bumgarner*, 147 N.C. App. 409, 413, 556 S.E.2d 324, 328 (2001).

Defendant argues that "all the physical evidence, coupled with the only eye-witness testimony of [Ms.] Spivey, establishes that the victim was shot in the leg by his own weapon, a 9mm pistol." Therefore, Defendant argues that the State did not prove that the victim's death was caused by an act of Defendant. We disagree.

Mr. Bell testified that "[Defendant] told me out of [Defendant's] own mouth that [Defendant] was the one that did the shooting." Moreover, Ms. Spivey testified that after Defendant pushed his way into the victim's house, Defendant and the victim began to "tussle." Ms. Spivey further testified that Defendant and the victim continued "wrestling for [a] gun" in the victim's bedroom. Ms. Spivey testified she "was told it was a 9 millimeter[,]" and the trial court instructed the jury not to consider what Ms. Spivey had been told. Ms. Spivey also testified she saw a second, smaller gun that Defendant was using to hit the victim. During the fight, Ms. Spivey heard a gunshot and then "saw blood everywhere[.]" Ms. Spivey did not testify that she saw who fired the gunshot. Based upon the testimony of Ms. Spivey, it is reasonable to infer that Defendant shot the victim, either with Defendant's own gun or with the victim's gun. We hold that the testimony of Mr. Bell and Ms. Spivey was sufficient evidence from which the jury could find that an act by Defendant caused the victim's death. Accordingly, the trial court did not err by denying Defendant's motions to dismiss.

IV.

[5] Defendant next argues the trial court deprived him of his constitutional rights to due process and a fair trial by failing to intervene *ex mero motu* to strike the State's closing argument that Defendant would be guilty of first-degree murder even if the victim had pulled the trigger. Where a defendant does not object at trial to the State's closing argument, "our standard of review is whether the [State's] arguments were so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. Barden*, 356 N.C. 316, 358, 572 S.E.2d 108, 135 (2002), *cert. denied*, *Barden v. North Carolina*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). However, " 'where the trial court's instructions to the jury cure the [State's] alleged improper arguments, the court's failure to correct the arguments *ex mero motu* will not constitute prejudicial error.' " *State v. Poag*, 159 N.C. App. 312, 319, 583 S.E.2d 661, 667 (quoting *State v. Shope*, 128 N.C. App. 611, 614, 495 S.E.2d 409, 412 (1998)), *disc. review denied*, 357 N.C. 661, 590 S.E.2d 857 (2003).

Under a theory of acting in concert,

> " '[i]f "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof." ' "

State v. Mann, 355 N.C. 294, 306, 560 S.E.2d 776, 784 (citations omitted), *cert. denied*, *Mann v. North Carolina*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002).

Defendant contends that the State's argument "was grossly improper because it not only misstated N.C. law requiring [that] an act attributable to [D]efendant cause[d] the death[,] [but it also] allowed the jury to circumvent the glaring insufficiency of evidence as to how the victim died." However, despite Defendant's argument to the contrary, we have already held that there was sufficient evidence that Defendant killed the victim. The testimony of Ms. Spivey and Mr. Bell provided substantial evidence from which the jury could have found that Defendant shot the victim, either with Defendant's gun or with the victim's gun. As to Defendant's contention that the State's argument misstated North Carolina law, Defendant relies on *State v. Jones*, 290 N.C. 292, 225 S.E.2d 549 (1976), for the following proposi-

tion: "To warrant a conviction for homicide the State must establish that the act of the accused was a proximate cause of the death." *Id.* at 298, 225 S.E.2d at 552. Defendant also relies upon *State v. Bonner*, 330 N.C. 536, 411 S.E.2d 598 (1992), in which our Supreme Court held that the felony murder rule does not apply to hold a defendant liable for the killing of the defendant's co-felon by the lawful acts of a law enforcement officer resisting the criminal scheme. *Id.* at 542, 411 S.E.2d at 601. In *Bonner*, our Supreme Court recognized that its ruling was

> consistent with the prevailing rule in the overwhelming majority of states in this country—that "for a defendant to be held guilty of murder, it is necessary that the act of killing be that of the defendant, and for the act to be his, it is necessary that it be committed by him or by someone acting in concert with him."

Id. at 542-43, 411 S.E.2d at 601-02 (quoting Erwin S. Barbre, Annotation, *Criminal Liability Where Act of Killing Is Done By One Resisting Felony or Other Unlawful Act Committed by Defendant*, 56 A.L.R.3d 239, § 2 at 242 (1974)).

In the present case, the victim cannot be said to have been acting in concert with Defendant or Ms. Spivey. Rather, like the law enforcement officer in *Bonner*, the victim's actions were in direct opposition to the criminal scheme of Defendant and Ms. Spivey. *See Bonner*, 330 N.C. at 542, 411 S.E.2d at 601 (recognizing that the law enforcement officer did not "act in concert with [the defendants and their accomplices] in a manner that furthered a common design or purpose. On the contrary, his every action was in direct opposition to the criminal scheme in which [the] defendants and their accomplices were engaged."). Therefore, it was improper for the State to argue that Defendant would be guilty under a theory of acting in concert even if the victim had pulled the trigger. However, following this improper argument, the trial court instructed the jury on acting in concert and the trial court's instructions correctly stated the law regarding acting in concert. Therefore, the trial court's subsequent instructions cured the improper statement made by the State. *See Poag*, 159 N.C. App. at 320, 583 S.E.2d at 668 (holding that "[t]he trial court's instructions to the jury regarding acting in concert correctly stated the law and cured the improper statements made by the State during closing arguments.").

[6] In its closing argument, the State also argued that under the felony murder rule, it did not matter whether Defendant or the victim

pulled the trigger. This was also improper, as North Carolina adheres to the agency theory, and not the proximate cause theory, of felony murder. *See Bonner*, 330 N.C. at 542-44, 411 S.E.2d at 601-02.

> Under the agency theory of felony murder, a felon is not guilty of murder when the homicide is done by a person other than the felon or a co-felon. In other words, the agency theory limits the reach of the felony murder doctrine to homicides committed by the felon or a co-felon.

James W. Hilliard, *Felony Murder in Illinois—The "Agency Theory" vs. The "Proximate Cause Theory": The Debate Continues*, 25 S. Ill. U. L.J. 331, 344 (2001). In contrast,

> Under the proximate cause theory of felony murder, a felon is guilty of murder when a killing is committed by a person other than the felon or a co-felon. Indeed, the proximate cause theory attaches felony murder liability for any death proximately resulting from the felony, regardless of who actually killed the victim.

Id. at 346. Accordingly, in North Carolina, the felony murder rule only applies where the lethal act of a defendant, or someone acting in concert with a defendant, caused the death. *See Bonner*, 330 N.C. at 542-43, 411 S.E.2d at 601-02.

We have found few cases in other jurisdictions where courts have applied the proximate cause theory of felony murder to hold a defendant liable for the killing of the victim where the victim accidentally killed himself. In *State v. Stout*, 154 P.3d 1176, 1182 (Kan. Ct. App. 2007), the Kansas Court of Appeals recognized:

> In this situation it really does not matter whether the victim is shot by himself or herself or by the co-felon. The entire incident in this case, from [the co-felon's] breaking down [the victim's] door to the wrestling where each participant is shot, was a continuous felonious event without any break in the chain of causation.

In *Miers v. State*, 251 S.W.2d 404, 407-08 (Tex. Crim. App. 1952), the Court of Criminal Appeals of Texas held that the fact that the victim may have accidentally shot and killed himself did not provide the defendant with a defense because the defendant "set in motion the cause which occasioned the death of [the] deceased[.]" In *People v. Payne*, 194 N.E. 539, 543 (Ill. 1935), the Illinois Supreme Court recognized that "[i]t reasonably might be anticipated that an attempted rob-

bery would meet with resistance, during which the victim might be shot either by himself or some one else in attempting to prevent the robbery, and those attempting to perpetrate the robbery would be guilty of murder."

Nevertheless, in the present case, even if the trial court erred by failing to intervene *ex mero motu*, any error was cured by the trial court's other instructions to the jury. The trial court correctly instructed the jury on felony murder before the jury originally began its deliberations. Specifically, the trial court instructed the jury that to convict Defendant of felony murder, the jury would have to find that "[D]efendant killed the victim with a deadly weapon[.]" The trial court then re-instructed the jury on felony murder on two other occasions in response to inquiries from the jury. Therefore, the jury had been correctly instructed on felony murder three times when the State made its improper statement. Moreover, after the State's improper statement, and before instructing the jury on acting in concert, the trial court instructed the jury as follows:

> Now, ladies and gentlemen, you've heard the additional arguments of counsel. I want to give you some further instructions on the law and before that, I want to remind you that you are to consider these instructions in context with and in light of all of the other instructions I have previously given you, both at the original time I charged you and the subsequent instructions that I have given you at your request. If all of you understand that you must do that and will agree to do that, please indicate by raising your hand.
>
> (All jurors indicate.)
>
> THE COURT: Let the record show that all jurors have so indicated.

For these reasons, we hold the trial court did not commit reversible error by failing to intervene *ex mero motu* following the State's improper argument.

V.

[7] Defendant argues the trial court violated his constitutional rights to due process, a fair trial, and a trial by a fair and impartial judge, when the trial court expressed an opinion regarding Defendant's guilt. Specifically, Defendant argues the trial court impermissibly expressed an opinion as to Defendant's guilt by instructing the jury,

ex mero motu, on acting in concert after (1) a juror asked whether the juror could return a guilty verdict if Defendant was at the scene of the crime but did not pull the trigger, (2) the jury could not come to a unanimous decision, (3) the trial court inquired of the numerical breakdown, (4) the jury foreman said it was 11-1, and (5) the trial court did not give the jury an *Allen* charge. Defendant argues that "[b]y instructing for the first time on acting-in-concert, long after the jury had been deliberating, the trial judge's additional instructions clearly communicated to the jury that he was frustrated and they should convict . . . Defendant." Defendant also argues:

> By framing its instruction on acting-in-concert as a direct response to the jury's note that it was deadlocked so soon after the previous note from a juror stating they did not believe [Defendant] pulled the trigger, the trial court directly signaled the jury that it should convict [Defendant] of the charges against him. In the context in which it was given, the instruction was susceptible to no other interpretation than that [Defendant] was guilty no matter who fired the gun.

N.C. Gen. Stat. § 15A-1222 (2005) provides that a "judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1232 (2005) provides: "In instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." "A defendant's failure to object to alleged expressions of opinion by the trial court in violation of [N.C.G.S. § 15A-1222 and N.C.G.S. § 15A-1232] does not preclude his raising the issue on appeal." *State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989). "Whether the accused was deprived of a fair trial by the challenged remarks must be determined by what was said and its probable effect upon the jury in light of all attendant circumstances, the burden of showing prejudice being upon the appellant." *State v. Faircloth*, 297 N.C. 388, 392, 255 S.E.2d 366, 369 (1979). "In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized." *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995).

In the present case, the trial court did not instruct the jury on acting in concert in response to a juror's question regarding whether the juror could find Defendant guilty if Defendant did not pull the trigger. Rather, in response to the juror's question, the trial court merely

instructed the jury to "decide the case based on the evidence that has been presented and on the law that I have given you." The trial court also re-instructed the jury on the presumption of innocence, reasonable doubt, and the State's burden to prove the identity of Defendant as the perpetrator of the crime.

The trial court did not instruct the jury on acting in concert until after the jury had deadlocked. Pursuant to N.C. Gen. Stat. § 15A-1234(a) (2005),

> After the jury retires for deliberation, the judge may give appropriate additional instructions to:
>
> (1) Respond to an inquiry of the jury made in open court; or
>
> (2) Correct or withdraw an erroneous instruction; or
>
> (3) Clarify an ambiguous instruction; or
>
> (4) Instruct the jury on a point of law which should have been covered in the original instructions.

"Whether or not to give additional instructions rests within the sound discretion of the trial court and will not be overturned absent abuse of that discretion." *State v. Bartlett*, 153 N.C. App. 680, 685, 571 S.E.2d 28, 31 (2002), *disc. review denied*, 356 N.C. 679, 577 S.E.2d 892 (2003).

In the present case, the trial court did not specify the specific subsection of N.C.G.S. § 15A-1234(a) under which it was giving the additional instruction. However, the trial court gave the additional instruction following a jury deadlock rather than in response to an inquiry of the jury. Therefore, the trial court was not proceeding under N.C.G.S. § 15A-1234(a)(1). There is also no indication that the trial court gave the additional instruction to correct or withdraw an erroneous instruction or to clarify an ambiguous instruction. Accordingly, the trial court did not proceed under N.C.G.S. § 15A-1234(a)(2) or (3). However, the State had offered evidence that Ms. Spivey and Defendant had a plan to rob the victim and that Ms. Spivey acted as a decoy to allow Defendant to enter the victim's house. Therefore, it was entirely appropriate for the trial court to instruct the jury on acting in concert. Because acting in concert should have been addressed in the trial court's original instructions, we hold that the trial court appropriately proceeded under N.C.G.S. § 15A-1234(a)(4).

Defendant argues that given the events preceding the additional instruction, the trial court expressed an opinion regarding Defendant's guilt by giving the additional instruction. However, this argument calls for excessive speculation. As we have already recognized, the trial court did not give the additional instruction in response to the question from the juror who was "not entirely convinced that . . . [D]efendant pulled the trigger[.]" Moreover, because the trial court could have and should have instructed the jury on acting in concert at the time of the original instructions, the trial court acted appropriately in giving the additional instruction. Under the totality of the circumstances, we cannot say that by giving the additional instruction the trial court expressed an opinion regarding Defendant's guilt. Accordingly, we overrule these assignments of error.

VI.

[8] In a related argument, Defendant argues the trial court impermissibly coerced a jury verdict by instructing the jury, *ex mero motu*, on acting in concert after the jury had begun deliberating. "Article I, section 24 of the North Carolina Constitution prohibits a trial court from coercing a jury to return a verdict." *State v. Dexter*, 151 N.C. App. 430, 433, 566 S.E.2d 493, 496, *aff'd per curiam*, 356 N.C. 604, 572 S.E.2d 782 (2002).

> [A] defendant is entitled to a new trial if the circumstances surrounding jury deliberations "might reasonably be construed by [a] member of the jury unwilling to find the defendant guilty as charged as coercive, suggesting to him that he should surrender his well-founded convictions conscientiously held or his own free will and judgment in deference to the views of the majority and concur in what is really a majority verdict rather than a unanimous verdict."

Id. (quoting *State v. Roberts*, 270 N.C. 449, 451, 154 S.E.2d 536, 538 (1967)).

In the present case, Defendant relies upon the same sequence of events he relied upon in his previous argument to argue that the trial court impermissibly coerced a verdict. However, for the same reasons stated above, we hold that the trial court did not coerce the jury's verdict.

Defendant also relies upon *Brasfield v. United States*, 272 U.S. 448, 450, 71 L. Ed. 345, 346 (1926), where the United States Supreme Court held that it was reversible error for a trial court to inquire into

the numerical division of a jury deadlock. However, in *Lowenfield v. Phelps*, 484 U.S. 231, 240 n. 3, 98 L. Ed. 2d 568, 578 n. 3, *reh'g denied*, 485 U.S. 944, 99 L. Ed. 2d 286 (1988), the United States Supreme Court noted that its decision in *Brasfield* "makes no mention of the Due Process Clause or any other constitutional provision. The Federal Courts of Appeals have uniformly rejected the notion that *Brasfield's per se* reversal approach must be followed when reviewing state proceedings on habeas corpus." In *State v. Fowler*, 312 N.C. 304, 308, 322 S.E.2d 389, 392 (1984), our Supreme Court held:

> We do not consider questions concerning the division of the jury to be a *per se* violation of Art. I, § 24 when the trial court makes it clear that it does not desire to know whether the majority is for conviction or acquittal. Such inquiries are not inherently coercive, and without more do not violate the right to trial by jury guaranteed by the North Carolina Constitution.

In the present case, we hold the trial court's inquiry into the numerical division of the jury's deadlock did not coerce the jury's verdict. The trial court did not inquire whether the majority favored conviction. Moreover, the trial court had earlier given an appropriate response to the question from a juror who was "not entirely convinced that . . . [D]efendant pulled the trigger[.]" Furthermore, under the facts of the case, acting in concert was an appropriate instruction for the trial court to give to the jury. We overrule the assignments of error grouped under this argument.

No error.

Judges STEPHENS and SMITH concur.

IN THE MATTER OF: T.H.T.

No. COA07-122

(Filed 21 August 2007)

1. Child Abuse and Neglect— findings of fact—clear and convincing evidence

The trial court's conclusions that a child was abused and neglected by respondent mother were supported by findings of fact that were uncontested or supported by clear and convincing

evidence where those findings established: (1) the child was seen at a hospital for various injuries, including a skull fracture; (2) a pediatrician concluded that the skull fracture was a depression fracture caused by nonaccidental means; (3) respondent mother's explanations were not consistent with the injuries observed; (4) the injuries occurred during a period of time while the child was in the physical custody of respondent mother; (5) the injuries were severe and obvious; and (6) respondent mother failed to obtain medical attention for the child.

2. Child Abuse and Neglect— disposition—Chapter 50 custody—best interests of child

The trial court did not err in a child abuse and neglect case by concluding that awarding custody of the minor child to her father was in the minor child's best interest, because: (1) the trial court found that the minor child's injuries were severe and obvious, and that respondent mother should have obtained medical attention but did not; (2) the trial court found that DSS's allegations of abuse and neglect relating to the father were not proven by clear and convincing evidence; (3) there was evidence from which the trial court could find that the injuries occurred while the minor child was in respondent mother's care and not in her father's care; and (4) the father testified in detail regarding his actions of calling the police and a magistrate, and taking the minor child to the hospital, after picking her up from her mother.

3. Child Abuse and Neglect— Chapter 50 custody—findings of fact—sufficiency of evidence

The trial court did not err in a child abuse and neglect case by decreeing that its order resolved any pending claim for custody even though respondent mother contends the trial court failed to make proper findings of fact and conclusions of law under N.C.G.S. § 7B-911, because: (1) the trial court's order contains findings of fact which are relevant to the issue of the minor child's best interest and welfare including her safety; (2) the trial court made the necessary conclusion that awarding custody to the minor child's father was in the best interest of the minor child; (3) the order contained findings which established that respondent mother failed to seek medical attention for the minor child's injuries, yet the father took appropriate action; and (4) the trial court made the required findings that no continued intervention was needed by the State and that the order be filed in the existing civil action relating to custody of the minor child.

4. Child Abuse and Neglect— time delay—failure to hold hearing after delay—failure to show prejudice

The trial court did not err in a child abuse and neglect case by failing to enter its adjudication and disposition within the thirty-day requirement and by failing to hold a subsequent hearing to determine and explain the reason for the delay as required by N.C.G.S. § 7B-807, because: (1) although there was a two-month delay, respondent mother was not prejudiced when her visitation rights were not affected nor was her right to appeal the order; and (2) although the trial court failed to conduct a hearing when the order was not entered within thirty days, the goal of a speedy resolution of cases involving juvenile custody would not be furthered by reversal where no prejudice was shown.

Judge TYSON dissenting.

Appeal by Respondent-Mother from order entered 3 November 2006 by Judge J. Henry Banks in Vance County District Court. Heard in the Court of Appeals 23 July 2007.

No brief for Petitioner-Appellee Vance County Department of Social Services.

Wyrick, Robbins, Yates & Ponton L.L.P., by K. Edward Greene and Adrienne E. Allison, for Respondent-Appellant.

McGEE, Judge.

K.T. (Respondent-Mother) and B.T. were married on 11 October 1999 and separated on 26 July 2005. A daughter, T.H.T., was born to the parties, and she was seven months old at the time of her injuries. Pursuant to an agreed upon custodial arrangement, B.T. and Respondent-Mother shared custody of T.H.T. Between 12 October 2005 and 16 October 2005, T.H.T. was in Respondent-Mother's custody. When Respondent-Mother returned T.H.T. to B.T. on 16 October 2005, B.T. noticed that T.H.T.'s face was bruised and her head was swollen. B.T. attempted to contact police and a magistrate. B.T. then took T.H.T. to Granville Medical Center. Granville Medical Center was concerned that T.H.T. had a small subdural hemorrhage and she was transferred to Duke University Hospital for further evaluation. One month later, on 14 November 2005, B.T. filed a civil action in Vance County District Court seeking child custody, child support, and attorney's fees.

The Vance County Department of Social Services (DSS) filed a juvenile petition on 2 February 2006, alleging that T.H.T. was abused and neglected. The petition alleged (1) that during a scheduled visitation with Respondent-Mother, T.H.T. had sustained a traumatic head injury that required medical attention; (2) that T.H.T. suffered a "complex trauma, non-accidental closed head fracture" and had "facial swelling, a left neck bruise, and a bruised left arm"; and (3) that Respondent-Mother knew or had reason to know that T.H.T. was injured and failed to seek appropriate medical attention.

The trial court conducted a hearing on the petition on several different days between 5 April 2006 and 26 July 2006. Dr. Karen St. Claire (Dr. St. Claire), a pediatrician and Medical Director for the Inpatient and ER Child Abuse Consult Team, testified that T.H.T. was examined in the Duke University Hospital emergency room and was also examined by Dr. St. Claire. Dr. St. Claire and a radiologist determined that T.H.T. did not have a subdural hemorrhage, but that she did have a skull fracture and other bruising on her body. T.H.T. was admitted for further evaluation and remained at Duke for two days. When Dr. St. Claire spoke with B.T., he reported that he picked up T.H.T. from her great-grandmother's house and immediately saw a scratch over T.H.T.'s eyebrow, a bruise on her right forehead, swelling on the left side of her scalp, a red mark on her neck, and a bruise on her upper left arm.

Dr. St. Claire also spoke with Respondent-Mother. Respondent-Mother gave Dr. St. Claire several possible explanations for T.H.T.'s injuries, including (1) Respondent-Mother's toddler falling on T.H.T. or pulling a crib toy down onto T.H.T.; (2) T.H.T.'s great-grandmother holding T.H.T. by one arm; and (3) a "rough" child who stayed with T.H.T.'s great-grandmother when T.H.T. was also staying with her great-grandmother.

Dr. St. Claire was asked if she was able to determine when T.H.T.'s skull fracture had occurred. She responded that T.H.T. had swelling at the site of the fracture and that

> swelling is something that can develop fairly quickly. It can develop over minutes or hours. In some cases over skull fractures, swelling may not be seen for a couple of days after a fracture, so to date it from the swelling is not possible. It could have been there . . . for a longer period of time but should have been noticed there for that period of time. The skull fracture itself by

> its appearance on x-ray could not be dated. We can't date skull fractures from that.

Dr. St. Claire also testified that

> my medical opinion is that this was non-accidental trauma, and that I had not heard a mechanism that could [cause] the fracture in particular, although some of the bruising may have been caused by things such as the child falling on another child but I would not see the skull fracture could have been caused in that regard.

B.T. testified that Respondent-Mother called him once on Saturday, 15 October 2005 and twice on Sunday, 16 October 2005, to tell him that T.H.T. had bruises on her face and to say that B.T. should not be "mad with [Respondent-Mother] . . . because [T.H.T.] had bruises on her face and [Respondent-Mother] didn't know what had happened." Respondent-Mother dropped T.H.T. off at her great-grandmother's house on Sunday, 16 October 2005. When B.T. picked T.H.T. up, he noticed that T.H.T. was "disoriented, real sleepy, [and] sluggish[.]" B.T. called the magistrate's office, the police department, and 911. B.T. then took T.H.T. to the Granville Medical Center. B.T. testified that based upon: (1) the phone calls he received from Respondent-Mother; (2) the information he obtained at the hospitals where T.H.T. was treated; (3) the information he received from DSS; and (4) Dr. St. Claire's testimony about the injuries, he believed that T.H.T.'s injuries occurred when T.H.T. was with Respondent-Mother.

Respondent-Mother also testified about the events leading to T.H.T.'s hospital stay. Respondent-Mother testified that she picked up T.H.T. from day care on Friday, 14 October 2005. On Saturday, 15 October 2005, Respondent-Mother, her toddler, and T.H.T. left Respondent-Mother's home in Henderson and traveled to Raleigh. She met her boyfriend, Brian Goddard (Goddard), for lunch. After lunch, they placed the children's car seats in Goddard's four-door truck. Goddard was in the process of moving, so they went to the house he was moving from so Goddard could move some boxes. While there, Respondent-Mother's toddler needed a diaper change, so Respondent-Mother took the toddler inside the house to change her, leaving T.H.T. in the truck. Respondent-Mother testified that when she returned, T.H.T. was crying. Respondent-Mother asked Goddard what had happened, and Goddard said he did not know. Respondent-Mother then took T.H.T. inside to change her diaper. Respondent-

Mother called B.T. and left him a message. She then took T.H.T. and the toddler home. The following morning, Respondent-Mother discovered the toddler climbing into T.H.T.'s crib, noticed one of the crib toys had fallen down, and saw a bruise on T.H.T.'s face. Respondent-Mother testified that she immediately called B.T. to report the bruise. She dropped T.H.T. off with B.T.'s grandmother later that morning and called B.T. again to tell him about the bruises on T.H.T.'s face.

Respondent-Mother testified that she was not aware that T.H.T. was in the hospital until Monday, 17 October 2005, when an individual from DSS contacted her. Respondent-Mother called Goddard twice that night to find out whether he knew what could have happened to T.H.T. Respondent-Mother testified that she spoke with Goddard again on Tuesday, 18 October 2005, and Goddard admitted that a box containing dishes and glasses may have hit T.H.T. while she was in his truck. Respondent-Mother testified that when she received this information, she reported it to DSS.

Goddard testified that when Respondent-Mother was helping him move and the children were in his truck, he stacked sheets and pillows between the car seats. He then placed a box containing plates and glasses on top of the pile of sheets and pillows. He went back inside to bring out more boxes and found T.H.T. crying. He noticed that the box was no longer on top of the sheets, but was "in between the seat, in between the two kids, but it was kind of falling[.]" Goddard moved the box into the back of the truck. Goddard also testified that the children were never left alone because a friend of his named "Davey" was also present.

The trial court entered an order on 3 November 2006. Based upon numerous findings of fact, the trial court concluded (1) that T.H.T. was an abused juvenile in that Respondent-Mother created or allowed to be created a substantial risk of serious physical injury by other than accidental means; and (2) that T.H.T. was a neglected juvenile in that Respondent-Mother did not provide proper care or supervision. The trial court awarded legal and physical custody of T.H.T. to B.T., and awarded Respondent-Mother unsupervised visitation privileges. The trial court relieved DSS and the guardian ad litem of any further involvement in the case. The trial court also ordered that, pursuant to N.C. Gen. Stat. § 7B-911, its 3 November 2006 order would resolve any pending claim for custody, and upon entry of a civil order in the parties' existing civil action, the jurisdiction of the trial court would be terminated. Respondent-Mother appeals.

I. Findings of Fact and Conclusions of Law

[1] Respondent-Mother first challenges the trial court's determination that T.H.T. was an abused and neglected juvenile. Respondent-Mother challenges several of the trial court's findings of fact and conclusions of law.

"The allegations in a petition alleging abuse, neglect, or dependency shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2005). The role of this Court in reviewing a trial court's adjudication of neglect and abuse is to determine "(1) whether the findings of fact are supported by 'clear and convincing evidence,' and (2) whether the legal conclusions are supported by the findings of fact[.]" *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citation omitted). If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary. *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003). "The trial [court] determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, [the trial court] alone determines which inferences to draw and which to reject." *In re Hughes*, 74 N.C. App. 751, 759, 330 S.E.2d 213, 218 (1985).

Respondent-Mother challenges the following findings of fact made by the trial court:

> 7. That because [T.H.T.] at the time of [the] injuries was unable to crawl or walk, the injury "had to come by her" by at least two different means of contact according to Dr. St. Clair[e]'s testimony herein.
>
> 8. That the Court further finds based upon Dr. St. Clair[e]'s testimony that the two means of contact consisted of a forceful pressing or squeezing which caused the injury to [T.H.T.'s] arm and at least four or five forceful impacts to the skull with something hitting her or she hit something with fairly significant force.
>
> 9. That none of the several explanations of . . . Respondent-Mother . . . were consistent with the injuries observed.
>
> 10. The Court finds that between October 15, 2005 and October 16, 2005, while in the physical custody of [Respondent-Mother], [T.H.T.] suffered the aforementioned physical injuries by non-accidental means.

11. That [Respondent-Mother] at all relevant times herein failed to properly monitor and supervise [T.H.T.]; and that [Respondent-Mother] created or allowed to be created a substantial risk of serious physical injury.

Respondent-Mother argues, and we agree, that Dr. St. Claire's testimony referencing the "four or five impacts" referred to the number of impacts required to produce *all* of T.H.T.'s injuries, not just the skull fracture. Therefore, we find the portion of finding of fact 8 referencing "four or five forceful impacts to the skull" to be unsupported by clear and convincing evidence.

As to finding of fact 9, we conclude that the testimony of Dr. St. Claire provides clear and convincing evidence to support the trial court's finding. Dr. St. Claire testified that, in her medical opinion, the injuries sustained by T.H.T. were the result of non-accidental trauma, and that she had not heard an explanation that could have caused the skull fracture. We find this testimony adequately supports the finding.

We also conclude that finding of fact 10 was supported by clear and convincing evidence. In her argument, Respondent-Mother refers only to Dr. St. Claire's testimony regarding the timing of the injuries. Dr. St. Claire testified about the difficulty of determining exactly when the skull fracture had occurred, stating that she could not date the injury based upon observation of the swelling, or the x-ray taken. With regard to all the injuries, Dr. St. Claire stated that she could not date the injuries within a day, but that she could say the injuries occurred within "hours to a couple of days" of her examination.

First, we note that Dr. St. Claire's testimony did not state that T.H.T.'s injuries could not have occurred during 15-16 October 2005 and, therefore, her testimony could provide some support for a finding that the injuries occurred during that time frame. We also note that the testimony of a number of the other witnesses' focused on when the injuries could have occurred. B.T. testified that Respondent-Mother called him on Sunday, 16 October 2005, and said that T.H.T. had bruises on her face. B.T. also testified that he observed the bruises when he picked up T.H.T. from his grandmother's house, where Respondent-Mother had dropped off T.H.T. Further, Goddard testified that he was with Respondent-Mother and T.H.T. on Saturday, 15 October 2005 and that he believed a box in his truck could have fallen onto T.H.T. while she was in the back seat. Therefore, we conclude that the trial court's finding as to the timing of T.H.T.'s injuries was supported by clear and convincing evidence.

Respondent-Mother also challenges finding of fact 11. Respondent-Mother states that the second part of the finding is actually more properly treated as a conclusion of law, and that the finding that Respondent-Mother failed to properly monitor and supervise T.H.T. was not supported. We agree with Respondent-Mother that the trial court improperly included a conclusion of law in this finding of fact when it stated that "Respondent-Mother created or allowed to be created a substantial risk of serious physical injury." Therefore, we consider that language with the challenged conclusions of law. However, we disagree with Respondent-Mother that the remainder of finding of fact 11 was unsupported by clear and convincing evidence. Although Respondent-Mother and Goddard stated at times during their testimony that T.H.T. was not left alone, other parts of their testimony do not support that assertion. Respondent-Mother testified that she was inside using the restroom while changing her older daughter's diaper during the time T.H.T. was in Goddard's truck. Goddard testified that during this time he was bringing boxes from his house to his truck. Further, this occurred around the time when the box of dishes and glasses was stacked upon the sheets and pillows next to T.H.T.'s car seat. We find this evidence sufficient to support the trial court's finding that Respondent-Mother failed to properly monitor and supervise T.H.T.

We find the language of finding of fact 7 to be unclear. However, even if we assume *arguendo* that this finding is unsupported by clear and convincing evidence, we conclude that the findings affirmed above, along with the unchallenged findings, support the trial court's conclusions that T.H.T. was abused and neglected.

N.C. Gen. Stat. § 7B-101(15) (2005) includes in its definition of a neglected juvenile, "[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker[.]" N.C. Gen. Stat. § 7B-101(1) (2005) defines an abused juvenile as, *inter alia*, a juvenile whose parent "creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means[.]" The uncontested findings of fact, together with the findings affirmed above, establish, *inter alia*, (1) that T.H.T. was seen at Duke University Hospital for a scratch and bruise above her right eye, some left-sided facial swelling, a left neck bruise, a left arm bruise, mild diaper rash from previous diarrhea, and a left parietal skull fracture; (2) that Dr. St. Claire concluded that the skull fracture was a depression fracture caused by non-accidental means; (3) that Respondent-Mother's

explanations were not consistent with the injuries observed; (4) that the injuries occurred between 15-16 October 2005, while T.H.T. was in the physical custody of Respondent-Mother; (5) that the injuries were severe and obvious; and (6) that Respondent-Mother failed to obtain medical attention for T.H.T. These findings support the trial court's conclusions of law (1) that T.H.T. was an abused juvenile in that Respondent-Mother created or allowed to be created a substantial risk of serious physical injury to T.H.T. by other than accidental means; and (2) that T.H.T. was a neglected juvenile in that T.H.T. did not receive proper care or supervision from Respondent-Mother.

II. Disposition Issues

[2] Respondent-Mother next contends that the trial court erred by concluding that awarding custody of T.H.T. to B.T. was in T.H.T.'s best interest. Specifically, Respondent-Mother contends that the findings of fact pertaining to B.T. were unsupported by clear and convincing evidence and therefore could not support the trial court's conclusion regarding T.H.T.'s best interest. We disagree.

At a dispositional hearing, the trial court must consider the best interests of the child. *In re O.W.*, 164 N.C. App. 699, 701, 596 S.E.2d 851, 853 (2004). The trial court's decision is discretionary. *Id.*

In the present case, the trial court found that T.H.T.'s injuries were severe and obvious, and that Respondent-Mother should have obtained medical attention but did not. This finding was not challenged by Respondent-Mother. The trial court also concluded that allegations of abuse and neglect made by DSS as they related to B.T. were not proven by clear and convincing evidence. As a result, the trial court dismissed any claim relating to B.T.

Further, the trial court made the following findings of fact relevant to B.T.:

> 4. That on or about October 16, 2005, [B.T.] sought medical treatment for [T.H.T.] due to physical injuries about [T.H.T.'s] head and body areas.
>
> . . .
>
> 13. That [B.T.] at all relevant times herein took appropriate and prompt action to seek necessary medical attention for [T.H.T.] and to protect [T.H.T.] from further injury.

> 14. That [B.T.] was in no way responsible for the injuries sustained by [T.H.T.]

We conclude that these findings were supported by clear and convincing evidence. Respondent-Mother argues that the findings were not supported because (1) B.T. called police and a magistrate before taking T.H.T. to the hospital; and (2) Dr. St. Claire's testimony as to when the injuries to T.H.T. occurred allowed for the possibility that the injuries were sustained while T.H.T. was in B.T.'s custody. We note, as Respondent-Mother acknowledges, that findings may be sustained where the evidence would support a contrary finding. *McCabe*, 157 N.C. App. at 679, 580 S.E.2d at 73. Further, for the same reasons we stated in upholding the trial court's finding that the injuries occurred on 15-16 October 2005, while T.H.T. was in Respondent-Mother's custody, we uphold finding of fact 14. There was evidence from which the trial court could find that the injuries occurred while T.H.T. was in Respondent-Mother's care, and not in B.T.'s care. B.T. also testified in detail regarding his actions after picking up T.H.T., and we find this testimony sufficient to support finding of fact 13. We also conclude that these findings were sufficient to support the trial court's conclusion that custody with B.T. was in T.H.T.'s best interest. Therefore, we overrule Respondent-Mother's assignments of error relating to the trial court's disposition.

III. N.C. Gen. Stat. § 7B-911

[3] Respondent-Mother next argues that the trial court erred by decreeing that its order resolved any pending claim for custody because the trial court failed to make proper findings of fact and conclusions of law pursuant to N.C. Gen. Stat. § 7B-911. Specifically, Respondent-Mother argues that the trial court's findings of fact and conclusions of law were insufficient to satisfy the requirements of a custody order under Chapter 50, and therefore, the trial court's order did not comply with N.C. Gen. Stat. § 7B-911.

N.C. Gen. Stat. § 7B-911(c) (2005) provides, in part:

> The court may enter a civil custody order under this section and terminate the court's jurisdiction in the juvenile proceeding only if:
>
> (1) In the civil custody order the court makes findings and conclusions that support the entry of a custody order in an action under Chapter 50 of the General Statutes or, if the juvenile is

> already the subject of a custody order entered pursuant to Chapter 50, makes findings and conclusions that support modification of that order pursuant to G.S. 50-13.7[.]

N.C. Gen. Stat. § 50-13.2(a) (2005) provides, in part:

> An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and shall make findings accordingly. An order for custody must include findings of fact which support the determination of what is in the best interest of the child[.]

"The judgment of the trial court should contain findings of fact which sustain the conclusion of law that custody of the child is awarded to the person who will best promote the interest and welfare of the child." *Green v. Green*, 54 N.C. App. 571, 572, 284 S.E.2d 171, 173 (1981). "These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child." *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978).

As noted above, the trial court's order contains findings of fact which are relevant to the issue of T.H.T.'s best interest and welfare, that is, T.H.T.'s safety. Further, the trial court made the necessary conclusion that awarding custody to B.T. was in the best interest of T.H.T. The order contains findings which establish that Respondent-Mother failed to seek medical attention for T.H.T.'s injuries, yet B.T. took appropriate action. The trial court also made the required findings (1) that no continued intervention was needed by the State; and (2) that the order be filed in the existing civil action relating to custody of T.H.T. We do not believe, as Respondent-Mother urges, that the above findings are "mere conclusory statements that the party being awarded custody is a fit and proper person to have custody and that it will be in the best interest of the child to award custody to that person," *Dixon v. Dixon*, 67 N.C. App. 73, 77, 312 S.E.2d 669, 672 (1984). Rather, we conclude the trial court made sufficient findings pursuant to N.C. Gen. Stat. § 7B-911(c).

IV. N.C. Gen. Stat. § 7B-807

[4] Respondent-Mother makes two arguments relating to N.C. Gen. Stat. § 7B-807. Respondent-Mother argues that the trial court erred (1) in not entering its adjudication and disposition order within the thirty-day requirement; and (2) in not holding a subsequent hearing to determine and explain the reason for the delay.

A. Delay in Entry of Adjudication Order

Respondent-Mother asserts that the trial court erred by failing to enter the adjudication and disposition order within the time required by N.C. Gen. Stat. § 7B-807. Respondent-Mother further asserts that she was prejudiced by the delay, and we must therefore reverse the order. We do not agree.

N.C. Gen. Stat. § 7B-807(b) (2005) provides that an adjudicatory order "shall be reduced to writing, signed, and entered no later than 30 days following the completion of the hearing." N.C. Gen. Stat. § 7B-905(a) (2005) imposes an identical thirty-day deadline for the entry of a disposition order. When a trial court fails to meet this mandate, our Court has held that the error does not establish a ground for reversal absent a showing of prejudice. *In re E.N.S.*, 164 N.C. App. 146, 153-54, 595 S.E.2d 167, 171-72, *disc. review denied*, 359 N.C. 189, 606 S.E.2d 903 (2004). We stated:

> While we have located no clear reasoning for [the addition of the thirty-day deadline], logic and common sense lead us to the conclusion that the General Assembly's intent was to provide parties with a speedy resolution of cases where juvenile custody is at issue. Therefore, holding that the adjudication and disposition orders should be reversed simply because they were untimely filed would only aid in further delaying a determination regarding [a child's] custody because juvenile petitions would have to be refiled and new hearings conducted.

Id. at 153, 595 S.E.2d at 172. We determined that no prejudice resulted from the late entry of the order in *E.N.S.* because the record demonstrated that the "respondent's right to visitation with [the child] was not affected by the untimely filings nor was her right to appeal the orders." *Id.* at 154, 595 S.E.2d at 172.

In the present case, the adjudication and disposition hearing was concluded on 26 July 2006. The adjudication order was entered on 3 November 2006, over two months after the order should have been

entered. However, like in *E.N.S.*, Respondent-Mother's visitation with T.H.T. was not affected, nor was her right to appeal the order. For reasons similar to those stated in *E.N.S.*, we conclude that Respondent-Mother was not prejudiced by the untimely filing of the order.

B. Hearing Requirement of N.C. Gen. Stat. § 7B-807(b)

Respondent-Mother's final argument relates to the General Assembly's 2005 amendment of N.C. Gen. Stat. § 7B-807(b). In Session Law 2005-398, the General Assembly added the following language to N.C.G.S. § 7B-807(b):

> If the order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters shall schedule a subsequent hearing at the first session of court scheduled for the hearing of juvenile matters following the 30-day period to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order shall be entered within 10 days of the subsequent hearing required by this section.

The relevant portion of the title of the act was "An Act to Amend the Juvenile Code to Expedite Outcomes for Children and Families Involved In Welfare Cases[.]" The General Assembly added identical language to N.C. Gen. Stat. § 7B-907(c), pertaining to permanency planning hearings, and N.C. Gen. Stat. § 7B-1110(a), pertaining to orders terminating parental rights.

Respondent-Mother argues that the order of the trial court must be reversed because no hearing was held when the order was not entered within thirty days. We hold that it was error not to conduct the hearing required by N.C.G.S. § 7B-807(b) when the order was not entered within thirty days. Although we do not condone this failure to comply with the statutory mandate of N.C.G.S. § 7B-807(b), we believe that by enacting this requirement, like the time requirements found throughout Chapter 7B, the General Assembly intended "to provide parties with a speedy resolution of cases where juvenile custody is at issue." *E.N.S.*, 164 N.C. App. at 153, 595 S.E.2d at 172. Based upon this goal, absent a showing of prejudice, our Court has refused to reverse untimely but otherwise proper orders. *See In re As.L.G. & Au.R.G.*, 173 N.C. App. 551, 619 S.E.2d 561 (2005), *disc. review improvidently allowed*, 360 N.C. 476, 628 S.E.2d 760 (2006) (discussing numerous cases from our Court applying the prejudice requirement in juvenile cases where statutory deadlines were not fol-

lowed). We find the same rationale applies to the hearing requirement added to N.C. Gen. Stat. § 7B-807(b) and believe that the goal of a speedy resolution of cases involving juvenile custody would not be furthered by reversal where no prejudice is shown.

Our cases have applied the prejudice requirement outside the context of adjudication and disposition orders affecting custody. This Court has also held that when a trial court fails to timely enter an order terminating a parent's rights, that error may be harmless absent a showing of prejudice. *In re J.L.K.*, 165 N.C. App. 311, 316, 598 S.E.2d 387, 391 (2004). We have also required a showing of prejudice when the statutory time requirement applicable to the filing of petitions seeking termination of a parent's rights is violated. *In re B.M., M.M., An.M., & Al.M.*, 168 N.C. App. 350, 354-55, 607 S.E.2d 698, 701 (2005). Further, this Court has conducted a prejudice analysis in other contexts in the juvenile setting. *See, e.g., In re M.G.T.-B.*, 177 N.C. App. 771, 775, 629 S.E.2d 916, 919 (2006) (holding that even if inadmissible hearsay was improperly admitted, the error must be prejudicial to require reversal); *In re Clark*, 159 N.C. App. 75, 80, 582 S.E.2d 657, 600 (2003) (applying a prejudice requirement to an error under N.C. Gen. Stat. § 7B-806 requiring electronic or mechanical recording of all adjudicatory and dispositional hearings); *In re Joseph Children*, 122 N.C. App. 468, 471-72, 470 S.E.2d 539, 541 (1996) (finding that although a statute governing notice and service by publication was violated, reversal was not warranted where there was no prejudice to the respondent). For these reasons, we conclude that applying a prejudice analysis to this error is appropriate.

In the present case, Respondent-Mother has not shown, nor do we find, that she was prejudiced by the trial court's failure to hold the hearing required by N.C.G.S. § 7B-807(b). Therefore, we do not reverse on this basis.

Affirmed.

Judge ELMORE concurs.

Judge TYSON dissents with a separate opinion.

TYSON, Judge dissenting.

The majority's opinion erroneously affirms the trial court's order that adjudicated T.H.T. an abused and neglected juvenile and awarded

custody of T.H.T. to her father. I vote to reverse the trial court's order pursuant to N.C. Gen. Stat. § 7B-807(b). The adjudication order was not entered within thirty days to respondent-mother's extreme prejudice and no statutorily mandated hearing was held to explain any purported reason for the delay or to expedite entry of the order. Petitioner fails to argue any basis to explain why the order was entered late or to show the reason for the failure to hold the hearing. I respectfully dissent.

I. Late Entry of Order

Respondent-mother argues the adjudication order should be reversed because she was prejudiced by the late entry of the order. I agree.

N.C. Gen. Stat. § 7B-807(b) (2005) states an adjudication order "*shall* be reduced to writing, signed, and entered no later than 30 days following the completion of the hearing." (Emphasis supplied). Here, the adjudicatory hearing commenced on 5 April 2006 and concluded on 26 July 2006 over three and one-half months later. At the conclusion of the hearing, the trial court ordered DSS "to draw up the Order with the appropriate findings." DSS failed to comply with the court's order. The adjudicatory order was not filed until 3 November 2006, more than thirteen weeks after the completion of the last hearing in July, and six months after the hearing commenced.

The majority's opinion concedes the entry of the adjudication order was late and violates the statute, but holds respondent-mother was not prejudiced because neither her visitation with T.H.T. was affected, nor was she delayed in her right to appeal the order. I disagree.

The order established legal and physical custody of T.H.T. with her father and orally disposed of the pending custody action. Respondent-mother argues she was prejudiced by DSS and the unexplained delays in entering the order in violation of N.C. Gen. Stat. § 7B-807(b). Respondent-mother asserts "the delay prejudiced [her] ability to move forward with a motion to modify, or seek other relief in, the civil custody case until [after] entry of the order" and she was prejudiced because she could not appeal the trial court's order. I agree.

"[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2005). "The announcement of judgment in open court is the mere rendering of judgment, not the entry of judgment. The

entry of judgment is the event which vests this Court with jurisdiction." *In re Pittman*, 151 N.C. App. 112, 114, 564 S.E.2d 899, 900 (2002) (citation omitted); *see In re Bullabough*, 89 N.C. App. 171, 180, 365 S.E.2d 642, 647 (1988) (The trial court may make an oral entry of a juvenile order provided the order is subsequently reduced to written form.).

Until the order was reduced to writing, filed, and entered, respondent-mother could neither seek to modify custody nor appeal from the oral rendition. Respondent-mother, T.H.T., and all other parties are prejudiced by DSS's repeated and extraordinary delays in the initiation, resolution, and disposition of this matter. The trial court and DSS's unexplained and repeated failures to comply with the statutory time limits "defeats the purpose of the time requirements specified in the statute, which is to provide [all] parties with a speedy resolution of cases where juvenile custody is at issue" and prejudiced both respondent-mother and T.H.T. *In re B.M., M.M., An.M., & Al.M.*, 168 N.C. App. 350, 355, 607 S.E.2d 698, 702 (2005).

Prejudice is also shown because the "appellate process was put on hold[] [and] any sense of closure for the children, respondent, or the children's current care givers was out of reach . . . ." *In re C.J.B. & M.G.B.*, 171 N.C. App. 132, 135, 614 S.E.2d 368, 370 (2005). Respondent-mother, T.H.T., and T.H.T.'s care-givers suffered delays, and respondent-mother has alleged and shown prejudice resulting from the trial court and DSS's failure to comply with the statutory mandated maximum time limits in N.C. Gen. Stat. § 7B-807(b). I vote to reverse the trial court's order.

II. No Subsequent Hearing

Respondent-mother also argues the adjudication order should be reversed because no subsequent hearing was held "to determine and explain the reasons for the delay" as required by N.C. Gen. Stat. § 7B-807(b). As a conjunctive reason or as an alternative basis to respondent-mother's argument above, the order should be reversed.

N.C. Gen. Stat. § 7B-807(b) was amended in 2005 and mandates:

> If the order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters *shall schedule a subsequent hearing* at the first session of court scheduled for the hearing of juvenile matters following the 30-day period *to determine and explain the reason for the delay* and to obtain any needed clarification as to the contents of the order.

(Emphasis supplied). This amendment unambiguously shows the General Assembly's obvious and continuing concern with and its intent: (1) to further mandate a halt to the long delays in entry of orders after the conclusion of hearings; (2) to remove procrastination and inaction from DSS's trial and post-trial tactics; and (3) to further the juvenile code's stated purpose to timely resolve the issues that lead to the removal of the child and "for the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents." N.C. Gen. Stat. § 7B-100(4) (2005); *see Adams v. Tessener*, 354 N.C. 57, 60, 550 S.E.2d 499, 501 (2001) ("[A] parent enjoys a fundamental right to make decisions concerning the care, custody, and control of his or her children under the Due Process Clause of the Fourteenth Amendment to the United States Constitution." (internal quotation omitted)). Here, the record fails to show the statutorily required hearing was conducted after the thirty days elapsed from the prior hearing and why the order was not entered earlier.

The majority's opinion again properly concludes the trial court erred by failing to conduct the hearing as is statutorily required by N.C. Gen. Stat. § 7B-807(b), but concludes respondent-mother must show further prejudice to justify reversal on this ground. The statute clearly places the mandate and burden on "the clerk of court . . . *shall* schedule a subsequent hearing" and places no burden on respondent-mother to prove any prejudice. N.C. Gen. Stat. § 7B-807(b) (emphasis supplied). Prejudice to respondent-mother had already occurred because the order was not timely entered as required by the statute in order to trigger this provision.

The majority's opinion erroneously relies on *In re E.N.S.*, 164 N.C. App. 146, 595 S.E.2d 167, *disc. rev. denied*, 359 N.C. 189, 606 S.E.2d 903 (2004), to conclude absent a showing of prejudice the trial court's failure to hold the hearing as is required by N.C. Gen. Stat. § 7B-807(b) does not require reversal of the order. The majority's opinion concludes the goal of a speedy resolution of juvenile custody cases would not be furthered by reversal where no prejudice is shown. *In re E.N.S.*, 164 N.C. App. at 153, 595 S.E.2d at 172. I disagree. The requirement to hold the subsequent hearing does not arise until after the trial court has violated the thirty day mandate for entering the order.

In re E.N.S. was decided in 2004 and involved the late entry of an adjudication order pursuant to N.C. Gen. Stat. § 7B-807(b) and *not* the

failure to hold the required hearing. 164 N.C. App. at 153, 595 S.E.2d at 172. N.C. Gen. Stat. § 7B-807(b) was amended in 2005, after *In re E.N.S.* was decided, to include the additional mandatory language to require a subsequent hearing, if the order was not entered within thirty days post hearing.

The amendment was enacted and amended the juvenile code to require expedited outcomes for children and their families involved in juvenile cases and appeals. The General Assembly clearly intended to restore the effectiveness of the statutory time lines in juvenile cases by mandating an additional hearing to be held "to determine and explain the reason[s]" for non-entry of an order within the statutory deadlines. N.C. Gen. Stat. § 7B-807(b).

No burden is placed on the respondent to demonstrate further prejudice. Prejudice is already shown by the trial court's failure to enter these orders within thirty days after the hearing as is previously mandated. This provision only arises after previous failures to comply with the statute. Here, thirteen weeks elapsed after the hearing concluded and six months had passed after hearings commenced before the order was entered. The trial court's failure to hold the additional hearing is error requiring reversal. To hold otherwise would recognize the respondent-mother's statutory right to the hearing, yet provide no remedy for its violation.

Even if a further showing of prejudice is required, respondent-mother has clearly shown prejudice. The trial court's failure to hold the hearing deprived respondent-mother from requiring the trial court "to determine and explain the reason[s] for the delay" or "to obtain any needed clarification . . . ." N.C. Gen. Stat. § 7B-807(b). The statute mandates the order to be entered within thirty days after the hearing. *Id.* This additional information "to determine and explain the reason" may have aided respondent-mother in her appeal to this Court. *Id.* Even though no showing of prejudice is required, and the clerk carries the statutory burden and mandate to "schedule a subsequent hearing at the first session of court . . . following the 30-day period." Respondent-mother has clearly demonstrated the prejudice she suffered by the trial court's failure to hold the hearing required by N.C. Gen. Stat. § 7B-807(b) by suffering even further delays, longer separation from her child, and her inability to appeal until the order was entered. *Id.* Concurrently with the reasons above, or alternatively on this ground alone, I vote to reverse the trial court's order.

III. Conclusion

The trial court's order adjudicating T.H.T. as an abused and neglected juvenile and awarding custody to her father should be reversed pursuant to N.C. Gen. Stat. § 7B-807. The adjudication order was not entered within the statutorily mandated thirty days after the hearing. Respondent-mother was prejudiced by delays exceeding six months from when the hearing commenced and over thirteen weeks after conclusion of the hearing before the order was entered.

No statutory mandated hearing was scheduled and held after the original thirty days mandate was violated to "determine and explain" any purported reasons for the delays or "obtain any needed clarification . . . ." *Id.* DSS failed to file a response to respondent-mother's arguments of prejudice on appeal to this Court, offers no excuse for, and makes no attempt to "explain the reason[s] for the delay . . . ." *Id.*

The majority's opinion argument is an attempt to shift the burden to respondent-mother to show further prejudice where the burden to hold the hearing clearly and solely rests upon the clerk, and ultimately upon the trial court. The only legislative intent that can be inferred from the amended statute is to place the duty and burden on the trial court to timely enter its order to avoid prejudice to respondent-mother. Even if a showing of prejudice is required, respondent-mother has clearly articulated and shown prejudice to reverse the order. I vote to reverse the order and respectfully dissent.

NORTH CAROLINA INDUSTRIAL CAPITAL, LLC, Plaintiff v. JOHN E. CLAYTON, JR., individually and d/b/a West's Charlotte Metro Moving & Storage; DAVID D. RUSHING, individually and d/b/a West's Charlotte Metro Moving & Storage; BERTRAM ALEXANDER BARNETTE, III, a/k/a TREY BARNETTE, individually and d/b/a West's Charlotte Metro Moving & Storage; W. BUFF CLAYTON, individually and d/b/a West's Charlotte Metro Moving & Storage; and WEST'S CHARLOTTE TRANSFER & STORAGE, INC., Defendants

No. COA06-732

(Filed 21 August 2007)

1. Landlord and Tenant— commercial lease—damages—question for jury

The trial court did not err in an action involving a commercial lease by denying defendant's motions for a directed verdict and judgment n.o.v. in an action to determine damages. The evidence

and documentation provided more than a scintilla of evidence to support the assertion that plaintiff's claims were exaggerated.

2. Landlord and Tenant— payments to clerk—applicability of lease late fee provisions

The trial court did not err by deciding that plaintiff was not entitled to late fees where there was a dispute under a commercial lease, defendant made payments to the Clerk of Court, and plaintiff argued that the payments from the Clerk were not timely under the terms of the lease. The lease terms regarding late fees were not applicable because the Clerk's order satisfied the statutory requirements for an "undertaking" on defendant's part. N.C.G.S. § 42-34(b).

3. Landlord and Tenant— disputed lease amounts—payment to clerk—prejudgment interest

Defendant's payment of certain disputed lease amounts did not stop the running of interest, and the trial court did not err by awarding prejudgment interest, where the payments were required by the Clerk to stay execution of a summary ejectment and were not tenders of payment to plaintiff.

4. Attorneys— fees—commercial lease—basis for calculation

The trial court did not err in its calculation of attorney fees in an action involving a commercial lease where the court used the amount of damages as determined by the jury to calculate those fees.

5. Attorneys— fees—commercial lease and ejectment—no fees in ejectment action

The trial court did not abuse its discretion by not awarding attorney fees in an underlying summary ejectment action arising from a commercial lease where plaintiff argued that the ejectment claim was reasonably related to the breach of contract action for which the court awarded fees. While it has been held that the court may award fees when a reasonable relationship between the proceedings is proved, the court is not required to award fees and the burden is on the claimant to present evidence that the other proceedings are reasonably related.

6. Costs— attorney fees denied as costs—breach of lease

The trial court did not err by failing to award attorneys' fees as costs under N.C.G.S. § 6-20 in an action involving an ejectment under a commercial lease.

7. Judgments— findings and conclusions—not required for de novo review

It was not necessary for the trial judge to make findings of fact and conclusions of law in denying plaintiff's motion for judgment notwithstanding the verdict and for a new trial. Review is de novo; findings of fact and conclusions will not aid the review and are not required.

8. Appeal and Error— presentation of issues—multiple orders

Defendants' argument was dismissed where they did not follow the proper procedure to have the merits of their argument considered. They did not appeal from a trial court order dismissing their appeal following their failure to perfect appeal or petition for certiorari, but instead purported to appeal from an earlier order striking defenses. They also did not present an argument in their brief addressing their assignment of error to the denial of a motion to set aside the order striking their defenses.

9. Landlord and Tenant— commercial lease—ejectment and breach of contract—res judicata

Defendant Clayton's dismissal with prejudice in an ejectment action did not operate as res judicata or collateral estoppel on his liability in a breach of contract case. The summary ejectment statute specifically allows a lessor to bring an action to regain possession of the premises separate from an action for damages; the disposition of the underlying case would have no res judicata or collateral estoppel effect on plaintiff's subsequent suit for recovery of damages. Furthermore, although the defenses were pled, they were struck by the court and have no application here.

10. Evidence— hearsay—lease—damages—business records exception

The trial court did not err in an action arising from a commercial lease by admitting testimony from the person responsible for the management of the premises about the extent of damages incurred by plaintiff. Although defendants contend that the witness had no personal knowledge of the matters to which he was testifying, the witness was referring to documents from plaintiff's file and it is clear that the documents were admissible under the business records exception to the hearsay rule.

Appeal by Plaintiff from judgment entered 23 March 2005 and order entered 30 November 2005 by Judge W. Robert Bell in Mecklenburg County Superior Court. Appeal by Defendants from or-

ders entered 11 April 2003 and 19 October 2004 by Judge Yvonne Mims Evans in Mecklenburg County Superior Court and from judgment entered 23 March 2005 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 January 2007.

Koehler & Cordes, PLLC, by Stephen D. Koehler, for Plaintiff.

Law Offices of Dale S. Morrison, by Dale S. Morrison, for Defendants.

STEPHENS, Judge.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of a June 1999 lease of commercial property in Charlotte, North Carolina, between Plaintiff and its lessee, Defendant West's Charlotte Transfer & Storage, Inc. ("WCT"). On 15 August 2001, Plaintiff filed a complaint in Mecklenburg County small claims court seeking summary ejectment against David D. Rushing ("Rushing") and John Clayton ("Clayton"), allegedly doing business as West's Charlotte Metro Moving & Storage. On 4 October 2001, the court entered judgment in favor of Plaintiff against Rushing and West's Charlotte Metro Moving & Storage. The court dismissed Clayton from the suit with prejudice. Rushing appealed to district court, where his motion to dismiss himself as a party and to add the actual lessee, Defendant WCT, was allowed.

On 9 April 2002, Plaintiff filed a motion in Mecklenburg County District Court for summary judgment against Defendant WCT in the ejectment case. The court granted Plaintiff's motion for possession of the property on 14 May 2002. Defendant WCT appealed to this Court from this order.[1] Pending this appeal, the Mecklenburg County Clerk of Superior Court issued an order requiring Defendant WCT to pay into the Clerk's office $11,719.77 monthly to stay the district court's judgment. This sum represented base rent and other common area expense amounts due under the lease. The Clerk's office forwarded payment to Plaintiff, less $2,200.00 per month which represented the portion of the monthly payment Defendant WCT disputed. Defendant WCT contested a portion of the common area operating expenses Plaintiff alleged was owed. At the time this case was heard by the trial

1. In an unpublished opinion this Court affirmed the trial court's grant of summary judgment in the ejectment proceeding. *N.C. Indus. Capital, LLC v. Rushing*, 163 N.C. App. 204, 592 S.E.2d 620 (unpublished) (COA03-274) (Mar. 2, 2004).

court, the amount withheld by the Clerk totaled $48,400.00 in contested expenses.

On 13 June 2002, Plaintiff filed a complaint in Mecklenburg County Superior Court against the individual Defendants[2] and WCT seeking monetary damages for breach of the lease. Plaintiff also sought to "pierce the corporate veil" against the individual Defendants, claiming, *inter alia*, that the individual Defendants

> are and have always been the sole shareholders and officers of West's[,] . . . commingled their own funds with those of West's[,] . . . caused West's to be inadequately capitalized[,] . . . so dominated and controlled West's as to make the corporation their alter-ego, . . . caused distributions to be made from West's which have caused the corporation to be unable to pay its debts as they come due in the usual course of business[,] [and that] . . . the total assets of [West's] did not exceed total liabilities after the distributions occurred.

Plaintiff sought "damages in an amount in excess of $373,000.00, plus attorney's fees and interest at the maximum legal rate from the date of the breach until paid." On 6 September 2002, Defendants filed an answer to Plaintiff's complaint. In their answer, Defendants moved to dismiss the suit against the individual Defendants because "they have never entered into possession of the premises." Defendants also asserted that the only amounts "due and owing to Plaintiff are the remaining amounts of common area operating expenses that are an issue in the first lawsuit . . . [and that] Plaintiff's claim for $300,000.00 for actual consequential and incidental damages has no factual basis and should be dismissed." Finally, Defendants pled that the funds of WCT and the individual Defendants were never commingled and that WCT was not "an alter-ego and a mere instrumentality for the individual Defendants."

On 11 September 2002, Plaintiff served on Defendants a set of interrogatories and requests for production of documents. On 4 October 2002, Defendants moved to enlarge the time to respond to Plaintiff's discovery requests and, that same day, an order was entered enlarging the response time to 13 November 2002. Defendants nevertheless failed to respond and, on 10 December 2002, Plaintiff moved to compel responses.

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2. In addition to Rushing and Clayton, Plaintiff named Bertram Alexander (Trey) Barnette, III, and W. Buff Clayton, individually and doing business as West's Charlotte Moving and Storage, as Defendants in this civil action.

By order filed 2 February 2003, the Honorable Robert P. Johnston ordered Defendants to answer the interrogatories and respond to the requests for production of documents on or before 21 February 2003. Defendants did not comply with Judge Johnston's order and, on 3 March 2003, Plaintiff moved for sanctions. The motion for sanctions was heard before the Honorable Yvonne Mims Evans on 9 April 2003. By order entered 11 April 2003, Judge Evans struck "those portions of each Defendants' [sic] Answer which constitute a defense to or denial of liability to the Plaintiff[.]" She further ordered that the civil action "shall proceed to judgment solely on the issue of the amount of damages to be awarded to Plaintiff[.]"

On 9 May 2003, Defendants gave notice of appeal from Judge Evans's order. However, Defendants failed to timely perfect their appeal and, on 15 October 2003, Plaintiff moved to dismiss. By order filed 3 November 2003, the Honorable David S. Cayer dismissed Defendants' appeal. Defendants did not appeal from Judge Cayer's order.

On 17 September 2004, Defendants moved to vacate Judge Evans's order striking portions of their answer. By order filed 19 October 2004, Judge Evans denied Defendants' motion to vacate. The case then proceeded to trial between 4 and 6 January 2005 before the Honorable W. Robert Bell on the sole issue of the amount of damages Plaintiff was entitled to receive for breach of its lease. Following Judge Bell's denial of Plaintiff's motion for directed verdict at the close of the evidence, the jury awarded Plaintiff $101,830.38 in actual, consequential, and incidental damages. Based on this verdict Judge Bell entered judgment against Defendants on 23 March 2005 in the amount of $101,830.38, with "prejudgment interest at the maximum legal rate from June 9, 2001 [date of breach of the lease] to date of this Judgment on the amount of $53,430.38[,]"[3] and "an award of attorneys['] fee in the amount of $15,274.55 representing 15% of the $101,830.38 amount the jury determined to be the outstanding balance [owed under the lease]."

On 4 April 2005, Plaintiff moved for judgment notwithstanding the verdict, seeking damages in the amount alleged in its complaint, or in the alternative a new trial. On 2 November 2005, pursuant to Rule 52(a)(2) of the North Carolina Rules of Civil Procedure, Plaintiff requested that the trial court make findings of fact and conclusions of law in ruling on its 4 April 2005 motion. By order entered 30

3. The amount on which Judge Bell awarded prejudgment interest represents the jury's verdict less the undisbursed sum of $48,400.00 which Defendant WCT paid into the Clerk's office in the summary ejectment action.

November 2005, Judge Bell denied Plaintiff's motion for judgment notwithstanding the verdict or new trial, without making findings of fact or conclusions of law.

On 29 December 2005, Plaintiff filed notice of appeal from Judge Bell's judgment entered 23 March 2005 and his order of 30 November 2005. On 30 December 2005, Defendants filed notice of appeal from Judge Evans's 11 April 2003 order striking portions of Defendants' answer, Judge Evans's 19 October 2004 order denying Defendants' motion to vacate the 11 April 2003 order, and Judge Bell's 23 March 2005 judgment. We affirm Judge Evans's orders and uphold the judgment for Plaintiff, but remand for an additional award of interest and an order containing findings of fact and conclusions of law regarding Plaintiff's motion for a new trial.

II. PLAINTIFF'S APPEAL

A. DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT

[1] By its first argument, Plaintiff contends the trial court erred in failing to grant its motions for directed verdict and judgment notwithstanding the verdict. Specifically, Plaintiff argues that because "the lease itself was unambiguous and the evidence was uncontroverted, [the amount due under the lease] was not a factual issue that required jury determination[,]" and thus, Plaintiff was entitled to judgment as a matter of law in the amount of $154,340.55, plus prejudgment interest, attorneys' fees, and costs. We disagree.

> The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. When determining the correctness of the denial for directed verdict or judgment notwithstanding the verdict, the question is whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor, or to present a question for the jury. Where the motion for judgment notwithstanding the verdict is a motion that judgment be entered in accordance with the movant's earlier motion for directed verdict, this Court has required the use of the same standard of sufficiency of evidence in reviewing both motions.

Davis v. Dennis Lilly Co., 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991) (internal citations and citations omitted). Generally, when there is more than a scintilla of evidence to support the non-movant's

claim or defense, a motion for directed verdict and thus a motion for judgment notwithstanding the verdict should be denied. *Turner v. Ellis*, 179 N.C. App. 357, 633 S.E.2d 883 (2006), *disc. review denied*, 361 N.C. 370, 644 S.E.2d 564 (2007).

In this case, though Plaintiff offered documentary evidence supporting its claim for damages, the evidence on which Plaintiff relied and the amount of damages alleged by Plaintiff were in dispute. During his testimony, Defendant Rushing stated that Defendants contested some of the common expenses for which Defendant WCT was charged because they "had issues with the property management [fee of $24,175.00 for the year 2000] that was being charged[.]" Defendants also believed Defendant WCT was being charged "an exorbitant amount" for repairs to the premises. Furthermore, Rushing testified that Defendant WCT was charged for repairs to the parking lot and roadway but that the repairs were not of a high quality. "It was a poor job that was done. There was [sic] raises in the pavement, there were areas all throughout the whole parking lot where you could see that it just wasn't a good job that was done by this company." Additionally, Rushing testified that there were holes and cracks in the pavement that appeared "all over the parking lot shortly after the paving job was done." In support of Rushing's testimony, Defendants offered in evidence photographs of the parking lot documenting the holes and cracks that appeared after the repairs were completed.

This testimony and documentation provides more than a scintilla of evidence supporting Defendants' assertion that Plaintiff's claims for damages were exaggerated. Accordingly, the question of the extent of Plaintiff's damages was for the jury to determine, and thus, the trial court did not err in denying Plaintiff's motion for directed verdict. Similarly, because the standard of review is the same, the trial court did not err in denying Plaintiff's motion for judgment notwithstanding the verdict. Plaintiff's argument is therefore overruled.

B. CONTRACTUAL LATE FEES

[2] Plaintiff next argues the trial court erred in ruling that Plaintiff was not entitled to contractual late fees on sums that Defendant WCT paid to the Mecklenburg County Clerk of Superior Court. Plaintiff contends the Clerk lacked authority to issue an order superceding the terms of the original lease and, because Defendant WCT failed to make payments under the Clerk's order in a manner which would allow timely payment to Plaintiff pursuant to the provisions of its

lease, the trial court erred in failing to award late fees required by the lease. Again, we disagree.

As noted *supra*, after the district court granted summary judgment in favor of Plaintiff in the ejectment action, Defendant WCT appealed to this Court. Pursuant to section 42-34.1 of our General Statutes, "[i]f the judgment in district court is against the defendant appellant and the defendant appellant appeals the judgment, it shall be sufficient to stay execution of the judgment if the defendant appellant posts a bond as provided in G.S. 42-34(b)." N.C. Gen. Stat. § 42-34.1(b) (2005). Section 42-34(b) provides that

> it shall be sufficient to stay execution of a judgment for ejectment if the defendant appellant pays to the clerk of superior court any rent in arrears . . . and signs an undertaking that he or she will pay into the office of the clerk of superior court the amount of the tenant's share of the contract rent as it becomes due periodically after the judgment was entered[.]

N.C. Gen. Stat. § 42-34(b) (2005). This section provides further that

> [a]ny magistrate, clerk, or district court judge shall order stay of execution upon the defendant appellant's paying the undisputed rent in arrears to the clerk and signing the undertaking. *If either party disputes the amount of the payment or the due date in the undertaking, the aggrieved party may move for modification of the terms of the undertaking before the clerk of superior court or the district court.* Upon such motion and upon notice to all interested parties, the clerk or court shall hold a hearing within 10 calendar days of the date the motion is filed and determine what modifications, if any, are appropriate.

Id. (Emphasis added.) An undertaking is a "promise, pledge, or engagement." *Black's Law Dictionary* 1562 (8th ed. 2004).

In this case, in order to stay the judgment of the district court pending Defendant WCT's appeal of the court's summary ejectment order, on 19 August 2002, the Mecklenburg County Clerk of Superior Court ordered Defendants to pay "to the Clerk's office . . . $11,719.77, on or before the 5th day of each month (or next business day if the 5th day of each month falls on a Saturday, Sunday or a court holiday)." This sum represented base rent and other common area expense amounts due under the lease. The order filed by the Clerk substantially complied with N.C. Gen. Stat. § 42-34 because it determined the amount Defendant WCT owed in arrears, the amount of

prospective monthly rent, and the dates upon which the monthly rent was due to the Clerk's office. Further, the Clerk ordered that the stay of the summary ejectment judgment would be dissolved if Defendant WCT failed to make timely payments. Upon receipt of these payments, the Clerk's office disbursed to Plaintiff the amount of monthly fees owed under the lease ($11,719.77), less the expenses contested by Defendants ($2,200.00). Plaintiff does not contend that WCT failed to make payments timely under the terms of the Clerk's order, only that such payments were not timely under the terms of the lease.

There is no evidence before us that Defendant WCT signed an "undertaking" to make payments required by the Clerk's order as contemplated by the statute. However, based on Defendant WCT's compliance with the order and the absence of evidence demonstrating that Plaintiff or WCT objected to its terms, we conclude that both Plaintiff and WCT intended to be bound by the order, and that the order satisfied the statutory requirements for an "undertaking" on WCT's part.[4] Thus, the lease terms regarding late fees were no longer applicable. Additionally, although Plaintiff contends it was harmed because the payments it received were late under the terms of the lease, there is no evidence that Plaintiff made a motion to the Clerk to have the payment date changed, as was Plaintiff's right under N.C. Gen. Stat. § 42-34(b). Accordingly, the trial court did not err in determining that Plaintiff was not entitled to late fees. This argument is overruled.

C. PREJUDGMENT INTEREST

[3] By its third argument, Plaintiff contends the trial court erred by denying Plaintiff prejudgment interest on the monthly payments of $2,200.00 withheld by the Mecklenburg County Clerk of Superior Court pending this litigation.[5] We agree.

Section 24-5 of our General Statutes provides in relevant part that, in an action for breach of contract, "the amount awarded on the contract bears interest *from the date of breach.*" N.C. Gen. Stat. § 24-5(a) (2005) (emphasis added). " 'Interest is the compensation

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4. Our research reveals no reported appellate cases interpreting this provision of N.C. Gen. Stat. § 42-34. We note, however, and are persuaded by an opinion of the Attorney General determining that the only undertaking the General Assembly intended to require of a summary ejectment defendant is the rent undertaking (*i.e.*, past and prospective payments) which such defendant must make to stay execution of the ejectment order when the defendant appeals. 1995 N.C.A.G. fop12 (February 10, 1995).

5. When this case was heard by the trial court, the Clerk had withheld $48,400.00 in contested expenses.

allowed by law, or fixed by the parties, for the use, or forbearance, or detention of money.' " *Parker v. Lippard*, 87 N.C. App. 43, 49, 359 S.E.2d 492, 496 (1987) (quoting *Ripple v. Mortgage & Acceptance Corp.*, 193 N.C. 422, 424, 137 S.E. 156, 157 (1927)). "Put simply, interest . . . means compensation allowed by law as additional damages for the *lost use of money* during the time between the accrual of the claim and the date of the judgment." *Members Interior Constr., Inc. v. Leader Constr. Co.*, 124 N.C. App. 121, 125, 476 S.E.2d 399, 402 (1996) (quotation marks and citations omitted), *disc. review denied*, 345 N.C. 754, 485 S.E.2d 56 (1997).

A judgment is "the final amount of money due to the plaintiff, consisting of the verdict, costs, fees, and interest." *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 896 (1998) (citations omitted). "[A] valid tender of payment for the full amount, plus interest to date, will be effective to stop the running of interest . . . ." *Thompson-Arthur Paving Co. v. Lincoln Battleground Assoc., Ltd.*, 95 N.C. App. 270, 282, 382 S.E.2d 817, 824 (1989) (citation omitted). However, "unconditional payment offers are, by definition, not tender offers as tender offers are made in full and final settlement of a claim[.]" *Members*, 124 N.C. App. at 125, 476 S.E.2d at 403 (citations omitted).

In this case, Defendant WCT's monthly payments to the Clerk of the contested $2,200.00 were not valid tenders of payment to Plaintiff. Rather, these payments were part of the undertaking required by the Clerk to stay execution of the summary ejectment judgment against Defendant WCT. Because (1) the payments did not include interest and were not a final settlement of the claim, and (2) Plaintiff was deprived of the use of this money during the period it was retained by the Clerk, Defendant WCT's payment of the disputed amount to the Clerk did not stop the running of interest. *See id.*; *see also Thompson-Arthur*, *supra*. Accordingly, the trial court erred in not awarding pre-judgment interest on the $48,400.00 withheld by the Clerk.

D. ATTORNEYS' FEES

[4] Next, Plaintiff argues the trial court erred in calculating the amount of attorneys' fees due Plaintiff from Defendants. This argument is without merit.

The trial court awarded Plaintiff $15,274.55 in attorneys' fees, based on a calculation of fifteen percent of $101,830.38, the amount that the jury determined to be the outstanding balance due on the lease of the property. Citing N.C. Gen. Stat. § 6-21.2, Plaintiff argues

the trial court erroneously used the amount of damages as determined by the jury to calculate the attorneys' fees when, instead, the court should have awarded attorneys' fees under the "time price balance" method set out in the statute.

Section 6-21.2 of our General Statutes provides in relevant part as follows:

> Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:
>
> (1) If such note, conditional sale contract or other evidence of indebtedness provides for attorneys' fees in some specific percentage of the "outstanding balance" as herein defined, such provision and obligation shall be valid and enforceable up to but not in excess of fifteen percent (15%) of said "outstanding balance" owing on said note, contract or other evidence of indebtedness.
>
> (2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.
>
> (3) As to notes and other writing(s) evidencing an indebtedness arising out of a loan of money to the debtor, the "outstanding balance" shall mean the principal and interest owing at the time suit is instituted to enforce any security agreement securing payment of the debt and/or to collect said debt.
>
> (4) As to conditional sale contracts and other such security agreements which evidence both a monetary obligation and a security interest in or a lease of specific goods, the "outstanding balance" shall mean the "time price balance" owing as of the time suit is instituted by the

> secured party to enforce the said security agreement and/or to collect said debt.

N.C. Gen. Stat. § 6-21.2 (2005).

The lease[6] between the parties here provides:

> If any Party or Broker brings an action or proceeding to enforce the terms hereof or declare rights hereunder, the Prevailing Party . . . [i]n any such proceeding, action, or appeal thereon, shall be entitled to reasonable attorneys' fees. . . . The attorneys' fee award shall not be computed in accordance with any court fee schedule, but shall be such as to fully reimburse all attorneys' fees reasonably incurred.

The terms of the lease contemplate a recovery of all attorneys' fees by Plaintiff. However, section 6-21.2 limits recovery to fifteen percent of the "outstanding balance" owing on the lease. Plaintiff contends the "outstanding balance" under the lease is the amount of damages sought in its complaint, *i.e.*, the amount owed on the lease at the time suit was filed, not the amount awarded by the jury. We disagree. Because Defendants presented testimonial and documentary evidence that raised doubts about the extent of Plaintiff's damages under the contract, the "outstanding balance" due under the lease was a question for the jury. *See G. L. Wilson Bldg. Co. v. Thorneburg Hosiery Co.*, 85 N.C. App. 684, 688, 355 S.E.2d 815, 818 ("The 'outstanding balance' due on the contract . . . consists of the amount awarded by the arbitrator for any of the items requested . . . .), *disc. review denied*, 320 N.C. 798, 361 S.E.2d 75 (1987).

Plaintiff argues further, however, that the jury's verdict "was a measure of damages due for the breach of the lease, not a measure of the outstanding balance to be used for determination of allowable attorney's fees under N.C.G.S. § 6-21.2." Therefore, according to Plaintiff, the trial court should have used the "time price balance" method as described by subparagraph (4) of section 6-21.2 to determine the "outstanding balance" due on its lease and awarded attorneys' fees based on that calculation. This argument ignores the plain language of the statute which unambiguously limits the "time price balance" method of determining the "outstanding balance" of indebtedness to "conditional sale contracts and other such security agreements which evidence both a monetary obligation and a security

6. Our appellate courts have held that a lease of real property is "evidence of indebtedness" under section 6-21.2. *See, e.g., WRI/Raleigh, L.P. v. Shaikh*, 183 N.C. App. 249, 644 S.E.2d 245 (2007).

interest in or a lease of *specific goods*[.]" N.C. Gen. Stat. § 6-21.2(4) (emphasis added). Since the contract at issue in this case concerns the lease of real property and not goods, this provision of the statute is inapplicable here. Furthermore, it is clear to us that because the lease is for real property and does not specify a percentage of the "outstanding balance" to be awarded as attorneys' fees, Judge Bell correctly chose to apply section 6-21.2(2). Under this section, Judge Bell properly awarded Plaintiff attorneys' fees in the amount of fifteen percent of the "outstanding balance" as determined by the jury. Therefore, Plaintiff's argument is without merit.

[5] Plaintiff also asserts that the trial court abused its discretion by not awarding attorneys' fees in the underlying summary ejectment action. Citing *Coastal Production Credit Ass'n v. Goodson Farms, Inc.*, 70 N.C. App. 221, 319 S.E.2d 650, *disc. review denied*, 312 N.C. 621, 323 S.E.2d 922 (1984), Plaintiff argues that because the summary ejectment action was "reasonably related" to the breach of contract action for which the court awarded fees, the trial court was required to award fees in the underlying action. Again, we disagree.

In *Coastal Production*, this Court held that it was not an abuse of discretion to allow "fees for participation in other proceedings to expedite collection or preserve assets[.]" *Id.* at 228, 319 S.E.2d at 656. However, the Court recognized that "the burden remains on the claimant to present evidence that the other proceedings are reasonably related" to the principal proceeding before the trial court. *Id.* (Citation omitted). Further, this Court held only that the trial court *may* award fees when a reasonable relationship between the proceedings is proved; it did not hold that the court is required to award fees. *Id.* "Our result[] [is] that participation in other proceedings *may be allowed* as costs . . . ." *Id.* (Emphasis added).

"A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980) (citation omitted). After a thorough review of the record on appeal herein, we cannot conclude that Plaintiff has proved the trial judge abused his discretion in not awarding Plaintiff attorneys' fees in the underlying ejectment action. This argument is overruled.

[6] Finally, Plaintiff argues that Judge Bell erred in failing to award attorneys' fees without considering the application of N.C. Gen. Stat. § 6-20. Section 6-20 provides that "[i]n other actions, costs may be allowed or not, in the discretion of the court, unless otherwise pro-

vided by law." N.C. Gen. Stat. § 6-20 (2005). Plaintiff's reliance on this statute is misplaced. In *Lee Cycle Ctr., Inc. v. Wilson Cycle Ctr., Inc.*, 143 N.C. App. 1, 13, 545 S.E.2d 745, 752, *aff'd per curiam*, 354 N.C. 565, 556 S.E.2d 293 (2001), this Court determined that "section 6-20 does not authorize a trial court to include attorney's fees as a part of the costs awarded under that section, unless specifically permitted by another statute." Plaintiff does not provide citation to any statute and our research reveals none that allows an award of attorneys' fees in breach of contract cases. We thus hold that the trial court did not err in failing to award attorneys' fees under section 6-20.

Plaintiff's assignments of error challenging the attorneys' fees as calculated and awarded by Judge Bell are overruled.

E. FINDINGS OF FACT IN ORDER DENYING JUDGMENT NOTWITHSTANDING THE VERDICT AND NEW TRIAL

[7] Plaintiff's final argument is that the trial court erred in failing to make findings of fact and conclusions of law, as requested by Plaintiff, in its order denying Plaintiff's motion for judgment notwithstanding the verdict or new trial.

"Findings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu only when requested by a party and as provided by Rule 41(b)." N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2005). Generally, a trial court's compliance with a Rule 52(a)(2) motion is mandatory and, once requested, "the findings of fact and conclusions of law on a decision of a motion, as in a judgment after a non-jury trial, must be sufficiently detailed to allow meaningful review." *Andrews v. Peters*, 75 N.C. App. 252, 258, 330 S.E.2d 638, 642 (1985) (citations omitted), *aff'd*, 318 N.C. 133, 347 S.E.2d 409 (1986).

When considering a trial court's ruling on a motion for judgment notwithstanding the verdict, our standard of review is *de novo*. *See Davis*, *supra*. " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court].' " *Penninsula Prop. Owners Ass'n, Inc. v. Crescent Resources, LLC*, 171 N.C. App. 89, 92, 614 S.E.2d 351, 353 (quoting *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)), *appeal dismissed and disc. review denied*, 360 N.C. 177, 626 S.E.2d 648 (2005).

Since our review of the trial court's denial of Plaintiff's motion for judgment notwithstanding the verdict is *de novo*, the purpose

for requiring findings of fact and conclusions of law under Rule 52—to allow meaningful appellate review—does not arise in this case. That is, "we consider[] the matter anew" and would freely substitute our judgment for that of the trial court regardless of whether the trial court made findings of fact and conclusions of law. *Id.* Therefore, it was not necessary for Judge Bell to make findings of fact and conclusions of law in his order denying Plaintiff's motion for judgment notwithstanding the verdict. Accordingly, Plaintiff's argument is overruled.

We next address Plaintiff's alternative motion for a new trial. On 4 April 2005, Plaintiff moved for a new trial pursuant to Rule 59(a)(5) ("[m]anifest disregard by the jury of the instructions of the court"), Rule 59(a)(6) ("inadequate damages appearing to have been given under the influence of passion or prejudice"), Rule 59(a)(7) ("[i]nsufficiency of the evidence to justify the verdict or that the verdict is contrary to law"), Rule 59(a)(8) ("[e]rror in law occurring at the trial and objected to by the party making the motion"), and Rule 59(a)(9) ("[a]ny other reason heretofore recognized as grounds for a new trial"). On 2 November 2005, Plaintiff requested findings of fact and conclusions of law in the trial court's ruling on its motion for a new trial.

"Generally, a motion for new trial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed absent a manifest abuse of that discretion." *Kinsey v. Spann*, 139 N.C. App. 370, 372, 533 S.E.2d 487, 490 (2000) (citing *In re Will of Herring*, 19 N.C. App. 357, 198 S.E.2d 737 (1973)). "[W]hen requested, findings of fact and conclusions of law must be made even on rulings resting within the trial court's discretion." *Andrews*, 318 N.C. at 139, 347 S.E.2d at 413. "However, where the motion involves a question of law or legal inference, our standard of review is *de novo*." *Kinsey*, 139 N.C. App. at 372, 533 S.E.2d at 490 (citing *In re Will of Herring*, *supra*).

Here, as with the motion for judgment notwithstanding the verdict, Plaintiff's motion for a new trial pursuant to Rule 59(a)(7) and Rule 59(a)(8) presents questions of law which receive *de novo* review on appeal. Accordingly, as discussed *supra*, findings of fact and conclusions of law will not aid our review and thus are not required. However, because the trial court's ruling on Plaintiff's motion under Rule 59(a)(5), Rule 59(a)(6), and Rule 59(a)(9) is evaluated for an abuse of discretion, findings of fact and conclusions of law are necessary to effectuate meaningful appellate review. Therefore, the trial

court erred in failing to make findings and conclusions as requested by Plaintiff. Accordingly, this matter is remanded to the trial court for the entry of an order containing appropriate findings of fact and conclusions of law on Plaintiff's motion for a new trial under Rule 59(a)(5), (a)(6), and (a)(9).

III. DEFENDANTS' APPEAL

A. ORDER STRIKING ANSWERS DENYING LIABILITY

[8] We now turn our attention to Defendants' assignments of error. Defendants first contend the trial court erred by striking their answers denying liability, leaving only damages to be determined by the jury. Because Defendants did not properly preserve this argument for our review, it is dismissed.

During the early stages of this case, Defendants failed to cooperate with Plaintiff regarding certain discovery matters. After unsuccessful and repeated attempts to obtain responses to interrogatories and requests for production of documents from Defendants, on 13 December 2002 Plaintiff filed a motion to compel discovery. Following a hearing, on 29 January 2003 Judge Johnston entered an order compelling discovery. When Defendants did not comply with this order, on 3 March 2003 Plaintiff filed a motion for sanctions. After determining that "there was no good cause or justification" for the failure to comply with the trial court's 29 January 2003 order, by order filed 11 April 2003, Judge Evans struck "those portions of each Defendants' [sic] Answer which constitute a defense to or denial of liability to the Plaintiff[.]" On 9 May 2003, Defendants appealed from Judge Evans's order.

After filing notice of appeal, Defendants failed to timely perfect their appeal, and by order filed 3 November 2003, Judge Cayer dismissed Defendants' appeal. Defendants did not appeal from this order. Instead, after final judgment was entered, Defendants gave notice of appeal purporting, *inter alia*, to appeal from Judge Evans's 11 April 2003 order striking their defenses.

Once Defendants' right to appeal from Judge Evans's 11 April 2003 order was lost for failure to timely perfect that appeal, the appropriate action would have been to petition this Court for certiorari. *See* N.C. R. App. P. 21(a)(1) ("[C]ertiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . ."). Here,

Defendants did not petition for certiorari. Because Defendants failed to follow the proper procedure to have the merits of this argument considered, this argument is dismissed. Furthermore, although Defendants assigned error to Judge Evans's 19 October 2004 order denying their motion to vacate the 11 April 2003 order, they present no argument in their brief addressing this assignment of error. Therefore, this assignment of error is deemed abandoned. *See* N.C. R. App. P. 28(b)(6) (noting that 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").

B. RETRYING DEFENDANT CLAYTON

[9] By their next argument, Defendants contend the trial court erred in "retrying" Defendant Clayton because he had been dismissed with prejudice from the underlying summary ejectment case. Specifically, Defendants contend that Clayton's dismissal with prejudice in the ejectment action operated as *res judicata* or collateral estoppel on Clayton's liability in the breach of contract case. We do not agree.

Generally, "[t]he doctrine of *res judicata* applies where there are two actions involving the same parties and the same claims or demands; the doctrine of collateral estoppel operates where there are two actions involving the same parties, but where the second action arises from a different claim or demand." *Chrisalis Properties, Inc. v. Separate Quarters, Inc.*, 101 N.C. App. 81, 87-88, 398 S.E.2d 628, 633 (1990) (citations omitted), *disc. review denied*, 328 N.C. 570, 403 S.E.2d 509 (1991). Section 42-28 of the General Statutes provides in relevant part that

> [w]hen the lessor or his assignee files a complaint [for summary ejectment] . . . [t]he plaintiff may claim rent in arrears, and damages for the occupation of the premises since the cessation of the estate of the lessee, . . . but if he omits to make such claim, he shall not be prejudiced thereby in any other action for their recovery.

N.C. Gen. Stat. § 42-28 (2005). A plain reading of this statute establishes that "the summary ejectment statute specifically allows a lessor to bring an action to regain possession of the premises separate from an action for damages[.]" *Chrisalis Properties*, 101 N.C. App. at 88, 398 S.E.2d at 633. Therefore, the disposition of the underlying case would have no *res judicata* or collateral estoppel effect on

Plaintiff's subsequent suit for recovery of damages. Furthermore, because *res judicata* and collateral estoppel are affirmative defenses that must be pled, *In re D.R.S.*, 181 N.C. App. 136, 638 S.E.2d 626 (2007), and although they were properly pled in Defendants' answer, Judge Evans struck these defenses. They thus have no application here. This argument is overruled.

C. TESTIMONY OF PAUL KAPLAN

[10] By their final argument, Defendants contend the trial court erred by allowing Paul Kaplan ("Kaplan"), a person responsible for the management of the premises which are the subject of this litigation, to testify regarding the extent of damages incurred by Plaintiff because Kaplan had no personal knowledge of the matters to which he was testifying. We disagree.

"Admission of evidence is 'addressed to the sound discretion of the trial court and may be disturbed on appeal only where an abuse of such discretion is clearly shown.' " *Gibbs v. Mayo*, 162 N.C. App. 549, 561, 591 S.E.2d 905, 913 (quoting *Sloan v. Miller Bldg. Corp.*, 128 N.C. App. 37, 45, 493 S.E.2d 460, 465 (1997)), *appeal dismissed and disc. review denied*, 358 N.C. 543, 599 S.E.2d 45 (2004). "A trial court abuses its discretion only when its ruling is 'manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.' " *Lane v. American Nat'l Can Co.*, 181 N.C. App. 527, 532, 640 S.E.2d 732, 736 (2007) (quoting *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998)).

Defendants argue the trial court erred in admitting Kaplan's testimony because when "a witness does not possess the required personal knowledge of the matters to which he or she is testifying, then such testimony constitutes inadmissible hearsay." Generally, a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." N.C. Gen. Stat. § 8C-1, Rule 602 (2005). However, in *U.S. Leasing Corp. v. Everett, Creech, Hancock & Herzig*, 88 N.C. App. 418, 423, 363 S.E.2d 665, 667 (citation omitted), *disc. review denied*, 322 N.C. 329, 369 S.E.2d 364 (1988), this Court determined that even though the knowledge of the witness may be "limited to the contents of plaintiff's file with which he had familiarized himself, he could properly testify about the records and their significance so long as the records themselves were admissible under the business records exception to the hearsay rule[.]" The business records exception provides

> [a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, . . . made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness[,]

is not excluded by the hearsay rule. N.C. Gen. Stat. § 8C-1, Rule 803(6) (2005).

In this case, it is clear that throughout his testimony Kaplan was referring to documents from Plaintiff's file and that he did not have personal knowledge of the matters contained in those documents. However, it is also clear that the documents to which Kaplan referred were admissible in evidence under the business records exception to the hearsay rule. Specifically, Kaplan testified that the documents were "maintained during the normal course of business[,]" that he was "one of the custodians of [the] business records[,]" and that he was "familiar with the contents . . . [of the] business records relating to [the] property" that is the subject of this litigation. Based on this testimony, Kaplan's subsequent testimony about the matters contained in the business records was admissible under our holding in *U.S. Leasing Corp.* Accordingly, Defendants' argument is overruled.

For the reasons stated, the judgment and orders of the trial court are affirmed in part, reversed in part, and the case is remanded for the entry of an order on prejudgment interest and findings of fact and conclusions of law on Plaintiff's motion for a new trial consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges TYSON and STROUD concur.

STATE OF NORTH CAROLINA v. KENNETH JAMES WIGGINS AND ROBERT ALPHONSO CARTWRIGHT

No. COA06-1481

(Filed 21 August 2007)

1. Constitutional Law— right to confrontation—statements to deputy

There was no Sixth Amendment *Crawford* error in a drug trafficking case where a deputy's testimony included statements made by an informant. The statements were not offered for their truth, but to explain how the investigation unfolded.

2. Evidence— statements to deputy—not hearsay

Testimony by a deputy in a drug trafficking prosecution that included statements by an informant was not offered for its truth and was not hearsay.

3. Appeal and Error— preservation of issues—no objection at trial

An issue was not preserved for appellate review where there was no objection on that basis at trial.

4. Evidence— testimony by deputy—statements by an informant—not unduly prejudicial

The probative value of testimony by a deputy that included statements by an informant was not outweighed by its prejudicial effect and there was no abuse of discretion in its admission. Also, there was no abuse of discretion in the denial of a motion for a mistrial on this basis.

5. Drugs— trafficking by possession—sufficiency of evidence

There was sufficient evidence to deny a motion to dismiss a prosecution for trafficking in cocaine by possession where defendant argued that there was no evidence that he actually or constructively possessed the cocaine, but cocaine and digital scales were recovered from his vehicle, and paraphernalia from his hotel room.

6. Drugs— trafficking by possession—proximity

A passenger in a truck in which cocaine was found was not simply in close proximity; there were other incriminating circumstances permitting the inference that he had knowledge of the cocaine under the hood.

7. Drugs— possession with intent to sell—sufficiency of evidence

There was sufficient evidence to deny defendant's motion to dismiss a charge of possession of cocaine with intent to sell.

8. Drugs— trafficking by possession—conspiracy—mutual implied understanding

The evidence in a prosecution for conspiracy to traffic in cocaine by possession was sufficient, taken collectively, to permit an inference of a mutual implied understanding.

9. Drugs— constructive possession—control of motel room

There was sufficient evidence that defendant Wiggins constructively possessed an opium derivative even though he contended that he did not have exclusive control of a motel room in which the opium derivative was found.

10. Jury— comments of prospective juror—not unduly prejudicial

The comments of a prospective juror in a narcotics prosecution were not so prejudicial as to require a new trial where defendant Cartwright contended that the comments implied that Cartwright "partied" with a person on probation. None of the statements linked Cartwright to the use or sale of unlawful drugs, and the fact that the prospective juror had a probation officer was not enough to infer that Cartwright was involved with illegal drugs.

11. Criminal Law— instructions—invited error

There was no plain error by charging the jury on out-of-court statements where the instruction was requested and drafted by defendant. Any error was invited.

Appeal by Defendants from judgments entered 13 April 2006 by Judge Cy Anthony Grant, Sr. in Superior Court, Dare County. Heard in the Court of Appeals 6 June 2007.

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

Thomas R. Sallenger for Defendant-Appellant Kenneth James Wiggins; William D. Spence for Defendant-Appellant Robert Alphonso Cartwright.

McGEE, Judge.

Kenneth James Wiggins (Wiggins) and Robert Alphonso Cartwright (Cartwright) (collectively Defendants) were arrested on various drug-related charges after police found cocaine, drug paraphernalia, and opium derivatives in the vehicle in which they were riding and in their hotel rooms. Wiggins was convicted of (1) trafficking in cocaine by possession; (2) trafficking in cocaine by transportation; (3) possession of cocaine with intent to sell; (4) conspiracy to traffic cocaine by possession; (5) possession of drug paraphernalia; and (6) trafficking in opium by possession. Cartwright was convicted of (1) trafficking in cocaine by possession; (2) trafficking in cocaine by transportation; (3) possession of cocaine with intent to sell; and (4) conspiracy to traffic in cocaine by possession. Defendants appeal.

Before pretrial motions on 12 April 2006, Cartwright moved for a mistrial based upon comments made by a prospective juror during jury selection. During jury selection, a prospective juror commented that he knew Cartwright because he had "partied" with Cartwright. The prospective juror was also asked if he knew "anyone else within the bar" and the prospective juror indicated he knew his probation officer and pointed to a probation officer. Cartwright argued that these comments implied that the prospective juror was on probation, and that the prospective juror "[hung] out [and] partie[d] with" Cartwright, and that this implication tainted the jury. The trial court denied Cartwright's motion.

At trial, Deputy Kevin Duprey (Deputy Duprey), a narcotics investigator with the Dare County Sheriff's Department, testified that on 18 October 2004, while training outside of Dare County, he was contacted by a confidential informant (the informant). The informant stated that Defendants would be going to a hotel room the following day "to use and sell drugs." Deputy Duprey stated that although he had spoken with the informant prior to that day, the informant had not done any work with the Dare County Sheriff's Department. The informant had, however, worked with the Chowan County Sheriff's Department, and had been "productive" and "reliable[.]"

Deputy Duprey testified that the informant called him again on 19 October 2004 and stated that Defendants were staying at the Quality Inn in Kill Devil Hills in Rooms 208 and 209. The informant described the vehicle Defendants were using as "a red over black pickup truck." The informant described Wiggins as a male "in his forties with short

brown hair and skinny with some facial hair." The informant described Cartwright as being "bald with a goatee." Deputy Duprey testified that after receiving this information, he contacted a sergeant to act on the information while Deputy Duprey was out of the county.

Deputy Duprey testified that the informant called him again on 20 October 2004 and stated that Wiggins would be leaving Dare County to travel to Gates County to pick up cocaine, and he would then return to the Quality Inn. The informant was unsure as to whether Cartwright would be accompanying Wiggins. The informant also stated that Wiggins had a handgun, but he was unsure whether Wiggins would take the gun with him. The informant again provided Deputy Duprey with a physical description of both Defendants and a description of Defendants' vehicle.

Deputy Duprey testified that he returned to Dare County at approximately 7:30 p.m. on 20 October 2004 and waited in Currituck to see if a red and black pickup truck would pass him, traveling toward Dare County. At approximately 11:15 p.m., Deputy Duprey observed a vehicle that matched the informant's description. Deputy Duprey testified that he observed two males in the vehicle who matched the informant's description. Deputy Duprey followed the vehicle from Currituck to the Quality Inn in Dare County. Deputy Duprey and other law enforcement officers who were waiting at the Quality Inn surrounded the vehicle. Wiggins was driving and Cartwright was riding in the passenger seat. The officers informed Defendants they were being stopped because of information the officers had received that Defendants were bringing drugs into Dare County. Deputy Duprey testified that Wiggins stated "he didn't have anything" and that the officers "could look." Defendants were separated and Deputy Duprey contacted a canine unit. Deputy Duprey stated that when he spoke with Defendants separately, each gave a different account of where they had been.

During this portion of Deputy Duprey's testimony, Defendants objected to testimony regarding the statements made to Deputy Duprey by the informant. Outside the presence of the jury, Cartwright's attorney argued that the statements were hearsay and requested a limiting instruction to avoid jury confusion. The State argued that the statements were not hearsay because they were not offered to prove the truth of the matter asserted, but rather, were offered to explain the actions of Deputy Duprey. The trial court agreed the testimony was not hearsay, but agreed to give a limiting instruction. The trial court asked Cartwright's attorney to draft the

instruction he would like the trial court to give the jury. The trial court ultimately included that instruction in its charge to the jury.

Deputy Duprey testified that a canine unit was deployed on the vehicle. The dog was trained to alert officers by scratching and/or biting at a specific area if the dog smelled a controlled substance. Deputy Duprey testified that the dog scratched at the passenger side of the vehicle and at the console area inside the vehicle. The officers searched the inside of the vehicle. In the console, the officers found digital scales and a .25 caliber handgun magazine containing one bullet.

Deputy Duprey testified that he opened the hood of the vehicle because the hood was a common place for drugs to be hidden. He saw a plastic bag inside the right side of the fender well. He described the bag as "very clean[.]" The officers brought the dog back to the vehicle, and the dog "scratch[ed]" and "pull[ed]" at the area where the bag was located. Deputy Duprey removed the bag from the vehicle. He saw a "very clean" shirt inside the bag. He unrolled the shirt, smelled the odor of cocaine, and saw a bag containing white powder. Deputy Duprey testified that he then placed Defendants under arrest.

Deputy Duprey asked Wiggins whether there was any contraband in his hotel room, and Wiggins stated that there was "some marijuana and paraphernalia." Cartwright told Deputy Duprey that his room contained paraphernalia, but no drugs. Both Defendants consented to a search of their rooms.

According to Deputy Duprey's testimony, Wiggins was staying in Room 208 of the Quality Inn. When Deputy Duprey entered Room 208, he found various items that had been converted into devices used for smoking drugs, including a pill bottle that had been converted for use in smoking marijuana, and "a brass-type abrillo pad" used for smoking crack cocaine. He also found several marijuana smoking pipes, a bottle of Clear Eyes, a second pill bottle, push rods used to clean out or pack a pipe, and a spoon containing white powder and burn marks suggesting that it had been used to liquify cocaine for injection. Deputy Duprey also recovered some white pills and some red and white pills in a brown bag in Room 208. In the same brown bag, Deputy Duprey recovered what he believed to be marijuana. In a black bag, he found a .25 caliber handgun containing six bullets. On a table, he found an open box of baking soda, which he stated could be used to create a base to turn cocaine into a solid, and a lighter. The

State asked Deputy Duprey whether he was able to determine if another individual was staying with Wiggins. Deputy Duprey testified that some items in Room 208 could have belonged to another person, but the officers "never physically saw [another] person inside that room."

Deputy Duprey testified that he next searched Room 209, Cartwright's room. Deputy Duprey observed a crack pipe and a needle. Deputy Duprey testified that he did not seize the items he saw in Cartwright's room.

Deputy Duprey also testified that the reports received from the State Bureau of Investigation revealed (1) that the bag found in the vehicle contained 54.3 grams of cocaine hydrochloride; (2) that the white pills found in Room 208 were oxycodone and weighed 5.2 grams; and (3) that the white and red pills were a "pharmaceutical preparation containing oxycodone[,]" an opium derivative, and weighed 3.2 grams. He testified that the amount of cocaine found in the vehicle was an amount of cocaine that a person "would possess to sell."

On cross-examination by the attorney for Wiggins, Deputy Duprey was asked whether an individual named Nicole Ballard was staying in the hotel room with Wiggins. Deputy Duprey answered:

> I have no clue [whether] she was staying in the room. She was not seen in the room. There [were] pictures found of her inside the room but we [didn't] see[] that she was actually inside the room.

Deputy Duprey was also asked:

> [Attorney for Wiggins]: Investigator Duprey, do you have any further knowledge of Nicole Ballard staying in the hotel room with Mr. Wiggins?
>
> [Deputy Duprey]: Except for his statement that she stayed there. Other than that, I do not.
>
> [Attorney for Wiggins]: She wasn't present at the hotel during the arrest, is that correct?
>
> [Deputy Duprey]: That's correct.
>
> [Attorney for Wiggins]: But there was some of her stuff in the hotel room?
>
> . . .

[Deputy Duprey]: There [were] two pictures of her. There [were] female clothing items in the room.

Major Norman Johnson (Major Johnson), with the Dare County Sheriff's Department, testified that at the time of Defendants' arrest, Major Johnson was "the sergeant of narcotics" for the Dare County Sheriff's Department. Major Johnson testified that he spoke with Deputy Duprey on 19 October 2004. Deputy Duprey asked Major Johnson to verify the information Deputy Duprey had received from the informant regarding the red and black pickup truck and the hotel rooms at the Quality Inn. Major Johnson located the vehicle in the parking lot of the Quality Inn, obtained the tag number, and noted some specific stickers on the vehicle. Major Johnson observed a white female go to Room 208 and knock on the door. He saw a "skinny" white male with brown hair open the door, have a short conversation with the female, and close the door. The female then went to Room 209 and knocked on the door. A "bald" white male answered the door, but he shut the door very quickly. The female then knocked again on the door of Room 208, but she received no answer. She then knocked again on the door of Room 209, but she received no answer. She waited for a few minutes and then left. Major Johnson testified that he recognized the woman as a known drug user and seller. Although Major Johnson could not recall whether he or Deputy Duprey ran the vehicle's tag, they learned the vehicle was registered to Wiggins.

Major Johnson testified that he spoke with Deputy Duprey again on 20 October 2004. Deputy Duprey told Major Johnson that he had received further information that Defendants would be traveling to Gates County that day to pick up cocaine. Major Johnson returned to the Quality Inn and saw that the vehicle was still there. He returned to the Quality Inn forty-five minutes later and the vehicle was gone. After determining that the vehicle was not at a local bar, Major Johnson returned to the Quality Inn to wait for the vehicle to return. Major Johnson was present for the arrest of Defendants and the search of their rooms.

Clint Friddle (Friddle), general manager of the Quality Inn, testified that Cartwright paid for the rental of Rooms 208 and 209. Friddle testified that both rooms contained two double beds, and that two adults were registered in Room 208. The State rested its case.

Defendants moved to dismiss each of the charges against them. The trial court denied Defendants' motions. Neither Wiggins nor

Cartwright presented any evidence. Cartwright also moved for a mistrial based upon Deputy Duprey's testimony referencing the statements made by the informant. Cartwright argued that, pursuant to N.C. Gen. Stat. § 8C-1, Rule 403, admission of the statements was "confusing and prejudicial to the jury." The trial court denied the motion.

I. Joint Issues

Although Defendants filed separate briefs, they bring forward several identical issues for our review, which we address together.

A. Statements of the informant

[1] Defendants argue that the trial court improperly admitted testimony regarding the statements made by the informant to Deputy Duprey in violation of Defendants' constitutional right to confrontation under *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), and under state evidence rules.

In *Crawford*, the United States Supreme Court held that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68, 158 L. Ed. 2d at 203. However, where nontestimonial evidence is at issue, the ordinary rules of evidence govern admissibility. *Id.* In its analysis, the Court also noted that the Confrontation Clause does not prohibit "the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* at 59, n.9, 158 L. Ed. 2d at 198, n.9.

In *State v. Leyva*, 181 N.C. App. 491, 640 S.E.2d 394 (2007), our Court addressed an argument similar to the one before us now. In *Leyva*, the trial court admitted testimony by detectives referencing statements made by a confidential informant. *Id.* at 498-99, 640 S.E.2d at 398-99. The defendant argued that his right to confrontation was violated by admission of that evidence. *Id.* at 500, 640 S.E.2d at 399. We concluded that the defendant incorrectly categorized the statements as testimonial because the evidence was introduced to explain the officers' presence at the location of a drug sale, not for the truth of the matter asserted. *Id.*

Applying *Crawford* and *Leyva* to the present case, we find no error in the admission of Deputy Duprey's testimony referencing the statements of the informant. The State specifically noted that the statements were not offered for their truth. Rather, the statements

were offered to explain how the investigation of Defendants unfolded, why Defendants were under surveillance at the Quality Inn, and why Deputy Duprey followed the vehicle to the Quality Inn. We further note that, as requested by Cartwright, the trial court gave the jury a limiting instruction pertaining to confidential informants. The instruction read:

> Evidence has been received of statements made by a confidential informant. You must not consider this evidence as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe that these statements were made then you may consider this evidence for the purpose of explaining the actions of the investigating officers. Except as it bears upon the actions of the investigating officers, the statements made by the confidential informant may not be used by you in your determination of any fact in this case.

Crawford explicitly states that testimonial statements are not barred by the Confrontation Clause if not offered for their truth. *Crawford*, 541 U.S. at 59, n.9, 158 L. Ed. 2d at 198, n.9. Because the challenged testimony was not offered for its truth, as was the case in *Leyva*, we conclude that no *Crawford* error occurred.

[2] Wiggins also argues that the testimony was inadmissible hearsay. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 801(c) (2005) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Our Supreme Court has stated that "[o]ut-of-court statements that are offered for purposes other than to prove the truth of the matter asserted are not considered hearsay. Specifically, statements are not hearsay if they are made to explain the subsequent conduct of the person to whom the statement was directed." *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (citations omitted), *cert. denied*, *Gainey v. North Carolina*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). Further, in *Leyva*, this Court applied the same reasoning to find that statements made to an officer by a confidential informant were properly admitted as nonhearsay. *Leyva*, 181 N.C. App. at 500-01, 640 S.E.2d at 399-400. As stated above, the challenged testimony was not offered for its truth and was therefore not inadmissible hearsay.

[3] Both Defendants argue that the statements were also inadmissible under N.C. Gen. Stat. § 8C-1, Rule 403. We note that our review

of the transcript reveals that Wiggins did not object on this basis at trial. By failing to obtain a ruling from the trial court, Wiggins failed to properly preserve this issue for our review pursuant to N.C.R. App. P. 10(b)(1). Further, even had Wiggins properly preserved this issue, and as it applies to Cartwright, we see no error in the trial court's decision.

[4] Pursuant to N.C. Gen. Stat. § 8C-1, Rule 403 (2005), "[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." The decision regarding "[w]hether to exclude relevant but prejudicial evidence under Rule 403 is a matter left to the sound discretion of the trial court." *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992). Neither Defendant articulates an abuse of discretion, and we see none. Therefore, we overrule the relevant assignments of error.

We also note that Cartwright moved for a mistrial based upon the admission of this testimony. In his brief, Cartwright incorporates his argument that the testimony was improperly admitted under N.C. Gen. Stat. § 8C-1, Rule 403, to argue that the trial court improperly denied his motion for a mistrial on this basis. Because we have concluded that the trial court did not abuse its discretion by admitting this evidence, we also overrule this assignment of error.

B. Sufficiency of the State's evidence

Defendants next argue that the trial court erred by denying their motions to dismiss the following charges: (1) trafficking in cocaine by possession; (2) trafficking in cocaine by transportation; (3) possession of cocaine with intent to sell; and (4) conspiracy to traffic in cocaine by possession. We consider each charge separately.

When a defendant moves to dismiss based on insufficiency of the evidence, the trial court must determine whether there is substantial evidence of each element of the crime charged and of the defendant being the perpetrator. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). " 'Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt.' " *State v. Alston*, 131 N.C. App. 514, 518, 508 S.E.2d 315, 318 (1998) (quoting *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986)). "The evidence must be viewed in the light most favorable to the State, and the State must receive every reasonable inference to

be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996) (citations omitted).

1. Trafficking in cocaine by possession

[5] N.C. Gen. Stat. § 90-95(h)(3) (2005) provides that "[a]ny person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine . . . shall be guilty of a felony . . . known as 'trafficking in cocaine[.]' " Further, "[s]ale, manufacture, delivery, transportation, and possession of 28 grams or more of cocaine as defined under N.C.G.S. § 90-95(h)(3) are separate trafficking offenses for which a defendant may be separately convicted and punished." *State v. Garcia*, 111 N.C. App. 636, 641, 433 S.E.2d 187, 190 (1993). To establish trafficking by possession, the State must show that a defendant (1) knowingly possessed a given controlled substance; and (2) that the amount possessed was greater than 28 grams. *State v. Shelman*, 159 N.C. App. 300, 305, 584 S.E.2d 88, 93, *disc. review denied*, 357 N.C. 581, 589 S.E.2d 363 (2003).

Our Supreme Court has noted that

> possession of a controlled substance may be either actual or constructive. A person is said to have constructive possession when he, without actual physical possession of a controlled substance, has both the intent and the capability to maintain dominion and control over it.

State v. Jackson, 103 N.C. App. 239, 243, 405 S.E.2d 354, 357 (1991) (citations omitted), *aff'd per curiam*, 331 N.C. 113, 413 S.E.2d 798 (1992). "Moreover, power to control [an] automobile where a controlled substance was found is sufficient, in and of itself, to give rise to the inference of knowledge and possession sufficient to go to the jury." *State v. Dow*, 70 N.C. App. 82, 85, 318 S.E.2d 883, 886 (1984). Further, we have held that "evidence that [the defendant] owned the van and was present therein when the controlled substance was found was sufficient to allow the jury to infer that he had the power and intent to control the contraband found there." *State v. Thompson*, 37 N.C. App. 628, 636, 246 S.E.2d 827, 833 (1978), *aff'd*, 296 N.C. 703, 252 S.E.2d 776, *cert. denied*, *Thompson v. North Carolina*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979). "However, unless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before

constructive possession may be inferred." *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989).

In the present case, Wiggins argues there was no evidence that he actually or constructively possessed any cocaine. We disagree. We note that the State's evidence tended to show that the officers recovered 54.3 grams of cocaine in the fender well of the vehicle, which was registered to, and driven by, Wiggins. This evidence was sufficient "to give rise to the inference of knowledge and possession sufficient to go to the jury." *Dow*, 70 N.C. App. at 85, 318 S.E.2d at 886. Further, digital scales were found in the center console of the vehicle, and paraphernalia for use with cocaine was found in Wiggins' hotel room. Accordingly, we find that the trial court did not err by denying Wiggins' motion to dismiss the charge of trafficking in cocaine by possession.

[6] Cartwright argues that he was a mere passenger in a vehicle in which cocaine was recovered and that this fact, without more, was insufficient to submit the case to the jury. In support of his argument, Defendant cites *State v. Weems*, 31 N.C. App. 569, 230 S.E.2d 193 (1976). In *Weems*, the defendant was sitting in the right front seat of a vehicle which was stopped by police. *Id.* at 570, 230 S.E.2d at 194. A search of the automobile revealed packets of heroin in three different areas of the vehicle, two of which were near the defendant's seat. *Id.* There was no evidence the defendant owned or controlled the vehicle, nor was there evidence he had ever been in the vehicle prior to the short time during which police observed him in the vehicle. *Id.* at 571, 230 S.E.2d at 194. This Court noted that:

> [P]ower and intent to control the contraband material can exist only when one is aware of its presence. Therefore, evidence which places an accused within close juxtaposition to a narcotic drug under circumstances giving rise to a reasonable inference that he knew of its presence may be sufficient to justify the jury in concluding that it was in his possession. 'However, mere proximity to persons or locations with drugs about them is usually insufficient, in the absence of other incriminating circumstances to convict for possession.'

Id. (quoting Annot., 91 A.L.R.2d 810, 811 (1963)). This Court held that there was insufficient evidence to connect the defendant in *Weems* to the illegal substances. *Id.* at 571, 230 S.E.2d at 195.

In the present case, unlike in *Weems*, there was sufficient evidence to infer that Cartwright knowingly possessed the cocaine in the

vehicle. First, Cartwright was a passenger in the vehicle in which the cocaine was found. Deputy Duprey testified that when questioned as to their purpose for traveling, Wiggins and Cartwright provided different explanations to the officers as to why they had traveled to Gates County together. A drug-sniffing dog located digital scales and a .25 caliber handgun in the console between Wiggins' seat and Cartwright's seat. Further, the cocaine found in the fender well was located in a clean plastic bag that appeared to have been recently placed under the hood. Wiggins and Cartwright were also staying in adjacent hotel rooms, both of which Cartwright rented. A known drug seller and user visited the rooms of both Wiggins and Cartwright the day before their arrest. Deputy Duprey found drug paraphernalia associated with cocaine when he searched Cartwright's room. Thus, unlike in *Weems*, Cartwright was not simply found in close proximity to the cocaine found in the vehicle. Rather, the State presented evidence of other incriminating circumstances which permitted the inference that Cartwright had knowledge of the cocaine under the vehicle's hood. Both Defendants' assignments of error pertaining to this charge are overruled.

2. Trafficking in cocaine by transportation

Both Defendants assigned error to the trial court's denial of their motions to dismiss the charge of trafficking in cocaine by transportation. Wiggins articulated no specific argument as to this charge. Cartwright confined his argument on this point to the contention that the State failed to show Cartwright's knowledge of the cocaine. We concluded above that the State produced sufficient evidence to support a finding of knowledge on the part of both Defendants. Therefore, for the same reasons stated above, we overrule the assignments of error pertaining to this charge.

3. Possession of cocaine with intent to sell

[7] "Under the charge of possession with the intent to sell or deliver cocaine, the State has the burden of proving: (1) the defendant possessed the controlled substance; and (2) with the intent to sell or distribute it." *State v. Diaz*, 155 N.C. App. 307, 319, 575 S.E.2d 523, 531 (2002), *cert. denied*, 357 N.C. 464, 586 S.E.2d 271 (2003).

Defendants argue only that the State's evidence of possession was insufficient as to this charge. For the same reasons stated above, we conclude that the trial court did not err by denying Defendants' motion to dismiss this charge.

4. Conspiracy to traffic in cocaine by possession

[8] To prove criminal conspiracy, the State must prove "an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner." *State v. Worthington*, 84 N.C. App. 150, 162, 352 S.E.2d 695, 703, *disc. review denied*, 319 N.C. 677, 356 S.E.2d 785 (1987). The State need not prove an express agreement. *Id.* Evidence tending to establish a "mutual, implied understanding will suffice to withstand a defendant's motion to dismiss." *Id.* Further,

> "[d]irect proof of conspiracy is rarely available, so the crime must generally be proved by circumstantial evidence." *State v. Burmeister*, 131 N.C. App. 190, 199, 506 S.E.2d 278, 283 (1998). A conspiracy "may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Whiteside*, 204 N.C. 710, 712, 169 S.E.2d 711, 712 (1933).

State v. Clark, 137 N.C. App. 90, 95, 527 S.E.2d 319, 322 (2000).

When viewed in the light most favorable to the State, the evidence in the present case tended to show that Defendants stayed in two adjacent hotel rooms, both of which were rented and paid for by Cartwright. Major Johnson testified that a known drug user and seller knocked on Wiggins' door, then knocked on Cartwright's door. At the time the cocaine was recovered, Defendants were together in Wiggins' vehicle, after having traveled together into Dare County. The hotel rooms of both Defendants contained drug paraphernalia, and both rooms contained paraphernalia for use with cocaine. We conclude that this evidence, taken collectively, permitted the inference that Defendants had a "mutual implied understanding" sufficient to survive Defendants' motion to dismiss the conspiracy charge.

II. Wiggins' Remaining Issue

[9] Wiggins also argues that the State did not produce substantial evidence of his possession of the opium derivative recovered in his hotel room because he did not have exclusive control of the room. We disagree.

N.C. Gen. Stat. § 90-95(h)(4) (2005) provides that "[a]ny person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate" is guilty of trafficking in opium or heroin. If a defendant does not maintain exclusive control of the

place where the controlled substance is found, the State must show "other incriminating circumstances" to permit the inference of constructive possession. *State v. Butler*, 147 N.C. App. 1, 11, 556 S.E.2d 304, 311 (2001), *aff'd*, 356 N.C. 141, 567 S.E.2d 137 (2002). " 'No single factor controls, but ordinarily the questions will be for the jury[.]' " *Id.* (quoting *Jackson*, 103 N.C. App. at 243, 405 S.E.2d at 357). Further, "[t]he State is not required to prove that the defendant owned the controlled substance, or that [the] defendant was the only person with access to it." *State v. Rich*, 87 N.C. App. 380, 382, 361 S.E.2d 321, 323 (1987) (citations omitted).

We first note that the evidence was conflicting as to whether Wiggins maintained exclusive control over Room 208 of the Quality Inn. Deputy Duprey testified that he was "not able to determine" whether another individual was staying in Room 208 with Wiggins. T.164. He further stated that the law enforcement officers watching the room "never physically saw [another] person inside the room." However, Deputy Duprey also testified that some items in the room "possibly belonged to another person." Friddle's testimony also established that the registration cards for the hotel rooms indicated that there were two double beds and two adults registered in Room 208. Therefore, we conclude that to establish constructive possession, the State was required to show evidence of "other incriminating circumstances." *Butler*, 147 N.C. App. at 11, 556 S.E.2d at 311.

Viewing the evidence in the light most favorable to the State, we find the State produced sufficient evidence that Wiggins constructively possessed the opium derivative. Wiggins consented to a search of Room 208 where the pills were found and he admitted to Deputy Duprey that marijuana and other paraphernalia would be found in the room. The pills were found in the same brown bag as the marijuana. Further, Major Johnson testified that he saw a man matching the general description of Wiggins open the door to Room 208 the day before Wiggins was arrested and Room 208 was searched. Based upon these circumstances, we conclude that the State produced sufficient evidence that Wiggins constructively possessed the opium derivative to survive Wiggins' motion to dismiss this charge. We overrule this assignment of error.

III. Cartwright's Remaining Issues

Cartwright also brings the following issues before this Court: (1) whether the trial court erred by denying his motion for a mistrial based on remarks made during jury selection; and (2) whether the

trial court committed plain error by charging the jury as to the statements of the informant.

A. Motion for mistrial based upon jury selection

[10] N.C. Gen. Stat. § 15A-1061 (2005) provides that:

> Upon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case.

"The decision whether to grant a motion for mistrial rests within the sound discretion of the trial judge and will not ordinarily be disturbed on appeal absent a showing of abuse of that discretion." *State v. Primes*, 314 N.C. 202, 215, 333 S.E.2d 278, 286 (1985).

Cartwright argues that his motion for a mistrial should have been granted because the statements made by the prospective juror in the presence of the other prospective jurors tainted the jury. At trial, Cartwright argued that the implications of the statements were that Cartwright "partie[d]" with a person on probation for an unknown offense.

In support of this argument, Cartwright cites *State v. Mobley*, 86 N.C. App. 528, 358 S.E.2d 689 (1987). We find *Mobley* to be distinguishable from the present case. In *Mobley*, during jury selection, a potential juror "identified himself as a police officer [and] stated that he had 'dealings with the defendant on similar charges' " in the presence of the other potential jurors. *Id.* at 532, 358 S.E.2d at 691. The trial court then "excused the juror and instructed the jury: . . . 'to strike from their mind any reference the officer may have made to the defendant because it is not evidence in the case.' " *Id.* at 532-33, 358 S.E.2d at 691. On appeal, this Court granted the defendant a new trial, holding that "[a] statement by a police officer-juror that he knows the defendant from 'similar charges' is likely to have a substantial effect on other jurors. The potential prejudice to the defendant is obvious." *Id.* at 533, 358 S.E.2d at 692. This Court also noted that "the trial court, at the least, should have made inquiry of the other jurors as to the effect of the statement." *Id.* at 534, 358 S.E.2d at 692.

In *State v. McAdoo*, 35 N.C. App. 364, 241 S.E.2d 336, *disc. review denied*, 295 N.C. 93, 244 S.E.2d 262 (1978), each of the defendants

argued that the trial court erred by failing to grant their motions for a mistrial when a potential juror announced in the presence of the other potential jurors that a defendant had tried to steal a power saw from him. *Id.* at 366, 241 S.E.2d at 337. The defendant's attorney was then permitted to ask if it was true the defendant was found not guilty of the charge, to which the juror answered, "yes." *Id.* The trial court denied the defendant's motion for a mistrial. *Id.* On appeal, this Court affirmed the trial court's decision, holding that the potential juror's statement was not "so prejudicial as to require a new trial." *Id.* at 366, 241 S.E.2d at 338.

Cartwright argues that, like the comments made in *Mobley*, the prospective juror's comments had a substantial effect on the other jurors and "tended to color [Cartwright] as the very type [of] person who would deal (and had dealt) with unlawful drugs and prejudiced his case from the very beginning of the trial." In the present case, however, the prospective juror's statements did not contain the same potential for prejudice as the police officer's comments in *Mobley*. None of the statements indicated Cartwright had been involved in the use or sale of unlawful drugs. Moreover, the fact that the prospective juror had a probation officer was not enough to infer that Cartwright was involved with illegal drugs, nor did it result in "substantial and irreparable prejudice" to Cartwright's case. N.C.G.S. § 15A-1061. We hold that the prospective juror's statements in the present case, like *McAdoo*, were not "so prejudicial as to require a new trial." *McAdoo*, 35 N.C. App. at 366, 241 S.E.2d at 338. Thus, this assignment of error is overruled.

B. Jury charge on informant's statements

[11] Lastly, Cartwright argues that the trial court committed plain error by charging the jury on the out-of-court statements made by the informant to Deputy Duprey. We point out that the trial court's inclusion of this instruction was at Cartwright's request. Further, the trial court asked Cartwright's attorney to draft the instruction he desired, and the trial court then included that language in its final instructions. "A criminal defendant will not be heard to complain of a jury instruction given in response to his own request." *State v. McPhail*, 329 N.C. 636, 643, 406 S.E.2d 591, 596 (1991). While we express no opinion as to whether giving the instruction was error, "[a]ny error in the giving of this jury instruction was invited by [Cartwright.]" *State v. Duke*, 360 N.C. 110, 124, 623 S.E.2d 11, 21 (2005), *cert. denied*, *Duke v. North Carolina*, ––– U.S. –––, 166

L. Ed. 2d 96 (2006). We therefore overrule Cartwright's assignment of error on this issue.

Defendants do not argue their remaining assignments of error and we therefore deem them abandoned pursuant to N.C.R. App. 28(b)(6).

No error.

Judges STEPHENS and SMITH concur.

KENDRA TROY WILLIAMS, PLAINTIFF v. MICHAEL LAWRENCE WALKER, DEFENDANT, AND LARRY WALKER AND MARIE B. WALKER, INTERVENORS

No. COA06-781

(Filed 21 August 2007)

1. Child Support, Custody, and Visitation— custody—motion to intervene—standing—paternal grandparents

The trial court did not abuse its discretion in a child custody case by granting intervenor paternal grandparents' N.C.G.S. § 1A-1, Rule 60(b) motion even though plaintiff mother contends they lacked standing, because: (1) plaintiff failed to assign error to the trial court's order granting the motion to intervene, and the record contains no objection by plaintiff to the motion; and (2) an intervening party has standing to seek relief from a judgment under Rule 60(b).

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

Although plaintiff mother contends the trial court erred in a child custody case by concluding that intervenor paternal grandparents' N.C.G.S. § 1A-1, Rule 60(b) motion was untimely, this assignment of error is dismissed under N.C. R. App. P. 10(b)(1) because: (1) the record contains no indication that plaintiff argued the timeliness of intervenors' motion before the trial court; and (2) plaintiff did not contend in her written opposition to a motion for relief from judgment that the Rule 60(b) motion was untimely, and the trial court made no finding or ruling with respect to the issue of timeliness.

3. Child Support, Custody, and Visitation— custody—jurisdiction—PKPA-UCCJEA

The trial court erred in a child custody case by finding and concluding in a 6 October 2005 order that it was without jurisdiction to enter its 15 July 2003 order, because: (1) although the Court of Appeals could not determine whether the original Illinois order was made consistently with the Parental Kidnapping Prevention Act (PKPA), the Illinois court relinquished jurisdiction in its 14 July 2003 order to the North Carolina court, and the North Carolina court properly assumed exclusive jurisdiction over custody matters involving the parties' minor child; (2) an unchallenged finding of fact stated the minor child has resided with plaintiff in North Carolina since 12 July 2002, and thus consistent with 28 U.S.C. 1738A(f)(1), North Carolina was the minor child's home state under both PKPA and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA); and (3) although the Illinois court subsequently held a hearing during which it learned of intervenors' guardianship, the Illinois court's attempt to recapture jurisdiction was ineffectual when it had already relinquished jurisdiction on 14 July 2003.

Judge WYNN dissenting.

Appeal by plaintiff from order entered 6 October 2005 by Judge Phyllis M. Gorham in New Hanover County District Court. Heard in the Court of Appeals 6 March 2007.

Fred D. Webb, Jr., for plaintiff-appellant.

No brief filed, for defendant-appellee.

No brief filed, for intervenors-appellees.

JACKSON, Judge.

This appeal arises out of competing custody orders entered in Illinois and North Carolina with respect to M.L.W., the minor child of Kendra Troy Williams ("plaintiff") and Michael Lawrence Walker ("defendant"). For the following reasons, we affirm in part and reverse in part the trial court's 6 October 2005 order.

M.L.W. ("the minor child") was born in Wilmington, North Carolina, on 9 September 1992. At the time, plaintiff was in high school and determined that she was unable to provide adequate care for the minor child. Larry and Maria Walker ("the Walkers"), the

minor child's paternal grandparents and residents of Illinois, offered to care for the child, and around December 1992, plaintiff placed the minor child with the Walkers. On 7 April 1993, the Circuit Court of Cook County, Illinois ("the Illinois court") entered an order granting guardianship and custody of the minor child to the Walkers. The Walkers have alleged that they have been the minor child's primary caretakers since they were appointed as guardians and that the minor child continued to reside with them until 12 July 2002, when the minor child visited plaintiff in North Carolina and plaintiff refused to return him to the Walkers. Plaintiff has alleged the minor child lived with her from April 1993 until 1996, when the Walkers took him to Illinois for a visit and refused to return him to North Carolina. Plaintiff also has alleged that while the minor child was in the Walkers' custody, she maintained regular contact with him, purchased clothes and other items for him, and sent him cards on special occasions.

Plaintiff has alleged that on 24 July 2001, she was served with a motion for parentage filed in Illinois by defendant, who, according to plaintiff, has spent little time with the minor child, despite acknowledging paternity. Thereafter, according to plaintiff, (1) a hearing was held in Illinois on 7 September 2001; (2) she was granted visitation with the minor child; (3) she visited the minor child in September 2001, but was not allowed to visit in October 2001, notwithstanding the Illinois court's ordering visitations; (4) on 2 November 2001, she went to mediation in Illinois and the Walkers were present at the mediation; and (5) she and defendant reached a partial agreement at the mediation.

On 1 October 2002, plaintiff filed suit in the District Court of New Hanover County, North Carolina ("the North Carolina court"), requesting that the North Carolina court assume jurisdiction and modify the Illinois custody order. In her complaint, plaintiff alleged that the minor child's home state is North Carolina and that Illinois no longer has any connection with the matter except that defendant continues to reside in Illinois.[1] On 30 May 2003, the Illinois court held a hearing on a motion for visitation violation filed by defendant. By order filed 14 July 2003, the Illinois court (1) granted defendant leave to transfer his motion in the pending case to North Carolina; and (2) removed the matter from its calendar. On 15 July 2003, the North

1. The complaint, however, also alleges that "[t]he Defendant is a resident of Puerto Rico," and the North Carolina court found that defendant "is in the military currently stationed in Puerto Rico."

Carolina court granted plaintiff's motion and entered an order (1) asserting jurisdiction as to custody and visitation of the minor child as a result of Illinois' yielding jurisdiction to North Carolina; (2) granting plaintiff custody of the minor child; and (3) expressly retaining jurisdiction for the entry of further orders.

Thereafter, on 26 February 2004, the Illinois court entered an order granting defendant sole temporary custody of the minor child. In its order, the court found "that [defendant] stated that there are no matters pending in any other jurisdiction and that a prior matter in North Carolina had been closed." On 22 April 2004, the Illinois court entered an order finding that the Walkers—the minor child's legal guardians—were not made parties to the North Carolina custody action. The Illinois court presumed that North Carolina had not been made aware of the prior guardianship order granting custody to the Walkers. The Illinois court (1) ordered defendant to assist in securing a copy of the court file in the North Carolina action filed by plaintiff; and (2) continued the case to 25 June 2004.

On 21 July 2004, the Walkers ("intervenors") filed a motion to intervene in the North Carolina court action, alleging that they "were appointed the legal guardians of the minor child in the State of Illinois on April 7, 1993." Intervenors also filed a motion for relief from the North Carolina court's 15 July 2003 order assuming jurisdiction. By order filed 20 August 2004, the North Carolina court granted the motion to intervene. On 6 October 2005, the North Carolina court entered an order concluding that (1) the State of Illinois had neither waived nor yielded jurisdiction to the State of North Carolina; and (2) North Carolina had no jurisdiction over the case. The court granted intervenors' motion for relief and stayed the 15 July 2003 order asserting jurisdiction and granting custody to plaintiff. Plaintiff filed timely notice of appeal.

[1] Plaintiff first contends that the North Carolina court erred in granting intervenors' Rule 60(b) motion because intervenors lacked standing to bring the motion. We disagree.

"On appeal, this Court's review of the trial court's Rule 60(b) ruling 'is limited to determining whether the trial court abused its discretion.' " *Barton v. Sutton*, 152 N.C. App. 706, 709, 568 S.E.2d 264, 266 (2002) (quoting *Moss v. Improved Benevolent & Practice Order of Elks*, 139 N.C. App. 172, 176, 532 S.E.2d 825, 829 (2000)). "Abuse of discretion is shown only when the court's decision 'is manifestly unsupported by reason or is so arbitrary that it could not have been

the result of a reasoned decision.' " *Id.* at 710, 568 S.E.2d at 266 (quoting *State v. McDonald*, 130 N.C. App. 263, 267, 502 S.E.2d 409, 413 (1998)).

In the instant case, plaintiff contends that intervenors had no right under the Uniform Child Custody and Jurisdiction Enforcement Act to bring a Rule 60(b) motion; rather, "the grandparents could only seek visitation under [North Carolina General Statutes, section] 50-13.5(j) by filing a motion in the cause and a showing of changed circumstances." Plaintiff essentially argues that intervenors lacked standing to intervene and thus lacked standing to pursue their Rule 60(b) motion. Plaintiff, however, has not assigned error to the trial court's order granting the motion to intervene, and the record contains no objection by plaintiff to the motion. Therefore, the trial court's order granting the motion to intervene is binding on appeal. *See* N.C. R. App. P. 10(a) (2006).

"After intervention, an intervenor is as much a party to the action as the original parties are and has rights equally as broad. . . . Once an intervenor becomes a party, he should be *a party for all purposes*." *Leonard E. Warner, Inc. v. Nissan Motor Corp.*, 66 N.C. App. 73, 78-79, 311 S.E.2d 1, 4-5 (1984) (emphasis added). The plain language of Rule 60(b) provides that "the court may relieve *a party* . . . from a final judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b) (2005) (emphasis added). An intervening party thus has standing to seek relief from a judgment pursuant to Rule 60(b). *See, e.g.*, *Barton*, 152 N.C. App. 706, 568 S.E.2d 264.[2] Therefore, intervenors in the instant case had standing to seek relief pursuant to Rule 60(b) from the trial court's 15 July 2003 custody order. Accordingly, plaintiff's assignment of error is overruled.

[2] In her second assignment of error, plaintiff contends that intervenors' Rule 60(b) motion was untimely. However, plaintiff has failed to preserve this issue for appellate review.

Rule 60(b) of the North Carolina Rules of Civil Procedure provides that a court may relieve a party from a judgment or order because: (1) of mistake, surprise, or excusable neglect; (2) of newly discovered evidence that could not have been timely discovered by due diligence; (3) of fraud, misrepresentation, or other misconduct; (4) the judgment or order is void; (5) the judgment or order has

2. Much as in the instant case, the intervening party in *Barton* filed its Rule 60(b) motion prior to the trial court's ruling on its motion to intervene. *See Barton*, 152 N.C. App. at 708, 568 S.E.2d at 265.

been satisfied or discharged, or a prior judgment or order upon which it is based has been reversed or vacated; or (6) any other equitable justification for relief from the judgment or order. *See* N.C. Gen. Stat. § 1A-1, Rule 60(b) (2005). Rule 60(b) motions premised on subsections (1), (2), and (3) of Rule 60(b) must be made "not more than one year after the judgment, order, or proceeding was entered or taken." N.C. Gen. Stat. § 1A-1, Rule 60(b) (2005). Rule 60(b) further requires that a motion based upon any of the subsections be made within a reasonable time. *See id.* "What constitutes a 'reasonable time' depends upon the circumstances of the individual case." *Nickels v. Nickels*, 51 N.C. App. 690, 692, 277 S.E.2d 577, 578, *disc. rev. denied*, 303 N.C. 545, 281 S.E.2d 392 (1981).

In the case *sub judice*, the record contains no indication that plaintiff argued the timeliness of intervenors' motion before the trial court. Plaintiff did not contend in her written Opposition to Motion for Relief from Judgment that the Rule 60(b) motion was untimely, and the trial court made no finding or ruling with respect to the issue of timeliness. Accordingly, this issue has not been preserved for our review. *See* N.C. R. App. P. 10(b)(1) (2006).

[3] Finally, plaintiff challenges the North Carolina court's conclusion—as well as the findings supporting its conclusion—that it was without jurisdiction to enter its 15 July 2003 order. Specifically, plaintiff assigns error to the following findings of fact from the North Carolina court's 6 October 2005 order:

> 6. That at the time that Judge Smith heard this matter in North Carolina, there were still matters pending in the State of Illinois and all of Judge Smith's rulings were dependent on whether or not Illinois was going to continue to maintain jurisdiction over the minor child the subject of this action.
>
> . . . .
>
> 8. That there had been some mentioning in one of the Illinois Orders previously of the guardianship, however, the court in Illinois, after having reviewed the guardianship, made the determination at that time that they retained jurisdiction of the case in the State of Illinois.
>
> . . . .
>
> 10. This Court finds that North Carolina has not had jurisdiction over this case, in that the Court in the State of Illinois determined that they never lost jurisdiction . . . .

Based upon these findings, the North Carolina court made the following conclusion of law, to which plaintiff assigns error: "The State of Illinois has neither waived nor yielded jurisdiction to the State of North Carolina, and the State of North Carolina has no jurisdiction to proceed with this matter."

"Subject matter jurisdiction, a threshold requirement for a court to hear and adjudicate a controversy brought before it, is conferred upon the courts by either the North Carolina Constitution or by statute." *In re M.B.*, 179 N.C. App. 572, 574, 635 S.E.2d 8, 10 (2006) (internal quotation marks and citations omitted). North Carolina's jurisdiction over child custody matters is governed by both the federal Parental Kidnapping Prevention Act ("PKPA")[3] and the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") as enacted in North Carolina. *See In re Brode*, 151 N.C. App. 690, 692-94, 566 S.E.2d 858, 860-61 (2002).

> The UCCJEA is a jurisdictional statute, and the jurisdictional requirements of the UCCJEA must be met for a court to have power to adjudicate child custody disputes. The PKPA is a federal statute also governing jurisdiction over child custody actions and is designed to bring uniformity to the application of the UCCJEA among the states.

Foley v. Foley, 156 N.C. App. 409, 411, 576 S.E.2d 383, 385 (2003). "[T]he PKPA is applicable to all interstate custody proceedings affecting a prior custody award by a different state," *In re Van Kooten*, 126 N.C. App. 764, 769, 487 S.E.2d 160, 163 (1997), *appeal dismissed*, 347 N.C. 576, 502 S.E.2d 618 (1998), and "[t]o the extent a state cus-

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3. We note that plaintiff fails to address the PKPA in her brief. Failure to argue the PKPA has been addressed by the Supreme Court of Pennsylvania:

> Distressingly, while both parties address the jurisdictional prerequisites of the UCCJA [the predecessor to the UCCJEA] at Sections 5344 and 5355, neither party addresses the PKPA, a disturbing omission because this statute is a controlling authority regarding whether Pennsylvania has jurisdiction to modify the Texas decree. Ordinarily, this failure would result in our inability to address the matter, as it would be deemed waived. However, while Father does not specifically address the PKPA, he at all times questioned whether the trial court should have declined jurisdiction. In that way, he raised the general issue of whether the trial court had subject matter jurisdiction to hear the Petition. Moreover, since this issue implicates the courts' subject matter jurisdiction to modify a Texas custody and visitation determination, this Court can raise the matter *sua sponte*, as it can not be waived.

In re Adoption of N.M.B., 764 A.2d 1042, 1045 n.1 (Pa. 2000) (internal citation omitted).

tody statute conflicts with the PKPA, the federal statute controls." *Brode*, 151 N.C. App. at 694, 566 S.E.2d at 861.

Pursuant to the PKPA, "every State shall enforce . . . and shall not modify . . . any custody determination or visitation determination made . . . by a court of another State." 28 U.S.C. § 1738A(a). The Act further provides that "[t]he jurisdiction of a court of a State which has made a child custody or visitation determination . . . continues as long as . . . such State remains the residence of the child or of any contestant." 28 U.S.C. § 1738A(d). As the United States Supreme Court has noted, "[o]nce a State exercises jurisdiction consistently with the provisions of the [PKPA], no other State may exercise concurrent jurisdiction over the custody dispute, even if it would have been empowered to take jurisdiction in the first instance, and all States must accord full faith and credit to the first State's ensuing custody decree." *Thompson v. Thompson*, 484 U.S. 174, 176, 98 L. Ed. 2d 512, 518-19 (1988) (internal citation omitted).

In the case *sub judice*, the threshold inquiry with respect to subject matter jurisdiction is whether the North Carolina court's 15 July 2003 order constitutes a modification of a prior order made consistently with the provisions of the PKPA. *See* 28 U.S.C. § 1738A(a). A child custody or visitation determination is consistent with the provisions of the PKPA only if: (1) the court making the determination has jurisdiction under the laws of its state; and (2) one of the following conditions is satisfied:

> (A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;
>
> (B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;
>
> (C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to

> protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse;
>
> (D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or
>
> (E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

28 U.S.C. § 1738A(c). If these conditions are met, the PKPA permits the North Carolina court to modify the original Illinois order only if: (1) North Carolina "has jurisdiction to make such a child custody determination"; and (2) Illinois "no longer has jurisdiction, or it has declined to exercise such jurisdiction." 28 U.S.C. § 1738A(f). If the conditions set forth in section 1738A(c) are not satisfied, however, the UCCJEA, and not the PKPA, governs modification of the Illinois custody order. Given the dearth of evidence in the record concerning the Illinois court's basis for its 7 April 1993 custody order, we cannot determine whether the original Illinois order was made consistently with the PKPA. However, it is clear that the Illinois court relinquished jurisdiction in its 14 July 2003 order to the North Carolina court and that the North Carolina court properly assumed exclusive jurisdiction over custody matters involving the parties' minor child.

First, pursuant to the PKPA, a state court may modify a child custody order if: (1) the modifying state "has jurisdiction to make such a child custody determination"; and (2) the original "[s]tate no longer has jurisdiction, or it has declined to exercise such jurisdiction." 28 U.S.C. § 1738A(f). As explained by one North Carolina federal court, "[a] determination must be made whether the second state court (North Carolina) itself has subject matter jurisdiction to decide custody matters. If the second state lacks jurisdiction to make an initial custody determination, it is axiomatic that it lacks authority to modify the prior decree of another state." *Meade v. Meade*, 650 F. Supp. 205, 209 (M.D.N.C. 1986), *aff'd*, 812 F.2d 1473 (4th Cir. 1987). Here, the North Carolina court had jurisdiction to make such a child custody determination as required by section 1738A(f)(1). In the order granting intervenors' motion for relief, finding of fact number 3, which is not challenged and thus is binding on appeal, states that the minor

child has resided with plaintiff in North Carolina since 12 July 2002. Thus, the minor child resided with a parent for a period of more than six months immediately preceding the commencement of the instant custody proceeding, and as such, North Carolina is properly the minor child's home state pursuant to both the PKPA and the UCCJEA as codified in North Carolina. *See* 28 U.S.C. § 1738A(b)(4); N.C. Gen. Stat. § 50A-102(7) (2005). Therefore, North Carolina had jurisdiction to make such a custody determination. *See* 28 U.S.C. § 1738A(c)(2)(A)(ii); N.C. Gen. Stat. § 50A-201(a)(1) (2005); *see also Meade*, 650 F. Supp. at 209 ("Thus the presence of 'home state' jurisdiction under North Carolina law confers authority on the state court to make a custody determination in this case.").

"However, the existence of jurisdiction in North Carolina to make an initial custody award does not enable the North Carolina court to modify [Illinois'] prior decree unless the requirements of Section 1738A(f)(2) are satisfied . . . ." *Meade*, 650 F. Supp. at 209 (internal quotation marks and citation omitted). By order entered 14 July 2003, the Illinois court "granted [defendant] leave to transfer this case to the pending case in the State of North Carolina" and removed the matter from its calendar. As such, the Illinois court relinquished jurisdiction over the instant custody matter.[4] *Cf. Krier v. Krier*, 676 So. 2d 1335, 1338 (Ala. Civ. App. 1996) (holding that the Alabama court had jurisdiction to modify a prior Kansas custody order pursuant to section 1738A(f) "because the Kansas court had declined to exercise jurisdiction in favor of allowing the Alabama court to decide the issues"). Therefore, when the North Carolina court entered its custody order on 15 July 2003, North Carolina acquired jurisdiction to the exclusion of Illinois. *See Thompson*, 484 U.S. at 176, 98 L. Ed. 2d at 518 (noting that the PKPA prohibits concurrent jurisdiction once one state exercises jurisdiction consistent with the PKPA).

Next, pursuant to the UCCJEA, one of the means by which a North Carolina court may modify a custody determination of another state is if the North Carolina court finds that the court of the other

4. We note that the Illinois court transferred defendant's visitation violation to North Carolina. As such, it could be argued that Illinois only declined to exercise jurisdiction with respect to a visitation determination. *See* 28 U.S.C. § 1738A(h) ("A court of a State may not modify a visitation determination made by a court of another State unless the court of the other State . . . has declined to exercise jurisdiction to modify such determination."). However, the Illinois court expressly granted leave to transfer the case into the North Carolina case, which involved a complaint requesting that the North Carolina court assume jurisdiction over visitation *and custody*. Accordingly, the requirements of section 1738A(f)(2) are satisfied, and section 1738A(h) is inapplicable.

state determines it no longer has exclusive, continuing jurisdiction. *See* N.C. Gen. Stat. § 50A-203 (2005); *see also In re N.R.M.*, 165 N.C. App. 294, 300, 598 S.E.2d 147, 151 (2004). As this Court has noted, " 'the original decree State is the sole determinant of whether jurisdiction continues. A party seeking to modify a custody determination must obtain an order from the original decree State stating that it no longer has jurisdiction.' " *N.R.M.*, 165 N.C. App. at 300, 598 S.E.2d at 151 (quoting N.C. Gen. Stat. § 50A-202 cmt.).

In *N.R.M.*, this Court determined that Arkansas, the original decree state, had not declined jurisdiction and that as a result, North Carolina lacked subject matter jurisdiction. *See id.* Specifically, this Court noted that "there is no Arkansas order in the record stating that Arkansas no longer has jurisdiction" and that Arkansas clearly indicated it was not declining jurisdiction. *See id.* Unlike *N.R.M.*, however, the record in the instant case contains an order filed by the Illinois court on 14 July 2003 relinquishing exclusive jurisdiction over the custody of the minor child. As discussed *supra*, the Illinois court granted defendant leave to transfer his motion for visitation violation to North Carolina, which involved not only visitation but also custody. The Illinois court thus ordered: "This matter is taken off call." Although the Illinois court subsequently held a hearing during which it learned of intervenors' guardianship, the Illinois court's attempt to recapture jurisdiction was ineffectual. After the Illinois court relinquished jurisdiction on 14 July 2003, the North Carolina court possessed exclusive, continuous jurisdiction over the matter, and in its 15 July 2003 order, the North Carolina court expressly retained jurisdiction for the entry of further orders in this matter.

In sum, we hold that the North Carolina court correctly determined on 15 July 2003 that it possessed jurisdiction to grant custody of the minor child to plaintiff. Accordingly, we reverse the North Carolina court's 6 October 2005 order, which stayed its prior 15 July 2003 order.

Plaintiff'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; and Reversed in part.

Judge STEELMAN concurs.

Judge WYNN dissents in a separate opinion.

WYNN, Judge, dissenting.

Although "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 N.R.M.*, 165 N.C. App. 294, 297, 598 S.E.2d 147, 149 (citation omitted), this inherent power should be exercised only "[w]hen the record clearly shows that subject matter jurisdiction is lacking. . . ." *Id.* (quoting *Lemmerman v. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 86 (1986)). Because the record on appeal supports the trial court's conclusion that the State of Illinois, not North Carolina, had jurisdiction over this custody matter, I would affirm the trial court's order.

In this matter, a child was born to a high school mother in 1992. The biological mother, unable to care for the child, consented to the child living in the State of Illinois with his paternal grandparents. Moreover, it appears the biological mother consented to an Illinois order of guardianship for the grandparents.[5]

In July 2002, the grandparents allowed the minor child to visit the biological mother in North Carolina; however, instead of returning the child to Illinois, the biological mother filed a complaint in October 2002 in New Hanover County, North Carolina, seeking an assumption of jurisdiction by North Carolina.

Thereafter, the putative father, who apparently had little involvement with the child, obtained an Illinois order stating:

> THIS MATTER coming to be heard for status and Michael Walker's **Motion for Visitation Violation**;
>
> Michael Walker present and Kendra Williams failing to appear[.] The court being duly advised in the premises IT IS HEREBY ORDERED
>
> 1) Child Representative Ruth R. Watson is discharged instanter.
>
> 2) Michael Walker is **granted leave** to transfer the case into the pending case in the State of North Carolina.
>
> 3) this matter is taken off call.

(Emphasis added).

5. *See Petersen v. Rogers*, 337 N.C. 397, 402-03, 445 S.E.2d 901, 903 (1994) (providing that a parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child).

Acting upon this order obtained by the sole actions of the putative father, on 15 July 2003, District Court Judge John W. Smith of New Hanover County, North Carolina, issued an order asserting jurisdiction over this custody matter. The order made no reference to the Illinois Guardianship Order, nor were the grandparents made parties to the North Carolina action.

Sometime thereafter, the Illinois court apparently discovered that the earlier order issued by Illinois at the behest of the putative father was issued without advisement of the prior order of guardianship. As a result, the Illinois Court ordered the putative father to obtain the North Carolina court file.(Rpp. 18-9).

Subsequently, the grandparents filed a motion to intervene in the pending action in North Carolina, and their motion was granted on 20 August 2004. Judge Smith continued the proceedings concerning the grandparents' motion for relief from the order assuming jurisdiction until completion of the proceedings in Illinois.

Thereafter, District Court Judge Phyllis M. Gorham of New Hanover County, North Carolina, issued an order on 6 October 2005 finding:

> 3. That the Interveners were appointed Guardians for the minor child the subject of this action on April 7, 1993, in an Order in Cook County, Illinois File No.: 1993 P 1023, and that Order of Guardianship has never been set aside; subsequently, there was an action filed by the Defendant in Illinois for custody of the minor child in Cook County, Illinois file no. 01 D 79852; that the minor child was; placed with the Interveners by the Plaintiff and Defendant in December of 1992 when the minor child was approximately three (3) months old, and the minor child continued to reside with the Interveners from April 7, 1993 per the Guardianship Order in Cook County file no. 1993 P 1023 until on or about July 12, 2002 when the minor child came to visit the Plaintiff/Mother in North Carolina; that the Plaintiff has never returned the minor child to the State of Illinois.
>
> 4. That on July 16, 2003, the New Hanover County Court, the Honorable John W. Smith, entered an Order in this action asserting jurisdiction as to custody and visitation of the minor child the subject of this action, and granting the Plaintiff/Mother custody of the minor child upon the State of Illinois's yielding jurisdiction to the State of North Carolina in Illinois file no. 01 D 79852; that

subsequent to the July 16, 2003 Order, and more particularly, on February 26, 2004, the State of Illinois, in the same case file, 01 D 79852, entered an Order by and through the Honorable Allan W. Masters whereby the Defendant, Michael Walker, Sr., was granted the sole temporary custody of the minor child, and all parties were ordered to appear at a hearing on April 22, 2004; that the Honorable Allan W. Masters entered a subsequent Order on April 22, 2004, finding as a fact that the Interveners, legal guardians of the minor child, were never made parties to the custody action in Cook County file no. 01 D 79852, and that the Court presumed that North Carolina was never made aware of the still valid Order of Guardianship granted the Interveners in 1993, and continued the case to June 25, 2004; that on June 25, 2004, a status call hearing was set at which time the custody action in Cook County file no. 01 D 79852 was continued to August 27, 2004; that the Interveners filed this Motion to Intervene and Motion for Relief from Judgment/Order on July 21, 2004; that there have been several court settings and hearings in the custody action in file no. 01 D 79852 since August 27, 2004; that the Honorable John W. Smith granted the Interveners Motion to Intervene on or about August 20, 2004, based on the assumption that at the time the North Carolina action was filed that the Interveners retained a **valid GUARDIANSHIP in the State of Illinois,, (sic) but** the Interveners' **Motion for Relief from "Order Assuming Jurisdiction"** was **CONTINUED** until completion of the proceedings in Illinois, which had previously yielded jurisdiction to this Court.

5. That this Court has reviewed the file in this action, all of the orders in Illinois case files, the Guardianship Order from the state of Illinois, and the Orders entered by Judge John W. Smith here in North Carolina.

6. That at the time that Judge Smith heard this matter in North Carolina, there were still matters pending in the State of Illinois and all of Judge Smith's rulings were dependent on whether or not Illinois was going to continue to maintain jurisdiction over the minor child the subject of this action.

7. That at the time that Judge Smith entered the Order on July 15, 2003 granting the Plaintiff, Ms. Williams, custody of the minor child, there had been an order of May 30, 2003 from the State of Illinois transferring jurisdiction of the case to North Carolina;

> subsequent to that Order, there had also been a court hearing in the State of Illinois which had been brought to the attention of the Illinois Court that there was a guardianship that the . . . [paternal] grandparents, and Interveners in this action, Larry Walker and Maria Walker, had since 1993.
>
> 8. That there had been some mentioning in one of the Illinois Orders previously of the guardianship, however, the court in Illinois, after having reviewed the guardianship, made the determination at that time that they retained jurisdiction of the case in the State of Illinois.
>
> 9. That since that time, and while the minor child . . . was residing in the State of North Carolina, there have been hearings in the State of North Carolina and there have been continuous hearings in the State of Illinois regarding the custody of the child.
>
> 10. This Court finds that North Carolina has not had jurisdiction over this case, in that the Court in the State of Illinois determined that they never lost jurisdiction because there were matters of which they were not aware that the order transferring jurisdiction to North Carolina from Illinois; therefore the Court finds that the Order Assuming Jurisdiction must be stayed.

(Emphasis in original).

In the case at hand, the record on appeal supports the trial court's findings of fact, and in turn the findings of fact support the conclusion of law. Furthermore, the biological mother only assigns error to findings of fact numbers six, eight, and ten. Therefore, the remaining unchallenged findings of fact are binding on appeal. *See State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994), *cert. denied*, 513 U.S. 1096, 130 L. Ed. 2d 661 (1995) (providing that the trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." (citation omitted)); *State v. Howell*, 343 N.C. 229, 239, 470 S.E.2d 38, 43 (1996) ("Conclusions of law that are correct in light of the findings are also binding on appeal.") Accordingly, the trial court order should be affirmed.

STATE OF NORTH CAROLINA v. GEORGE OLIVER FREEMAN

No. COA06-1502

(Filed 21 August 2007)

1. Criminal Law— establishing crime occurred in North Carolina—circumstantial evidence

The trial court did not err by denying defendant's motion to dismiss the charge of possession of cocaine based on an alleged failure to establish the crime occurred in the State of North Carolina, because: (1) an act must have occurred within the territorial boundaries of the state to be punishable as a crime in the state; (2) although there was no testimony that explicitly stated the crime occurred in Charlotte, Mecklenburg County, North Carolina, defendant was indicted by a Mecklenburg County, North Carolina grand jury; the crime was investigated and defendant was arrested by the Charlotte-Mecklenburg Police Department; a North Carolina identification card was seized during defendant's arrest; a forensic chemist employed by the Charlotte-Mecklenburg Police Crime Lab performed the analysis on pills in a bottle dropped by defendant and determined them to be cocaine; and a Charlotte-Mecklenburg police property sheet accompanied the sealed package containing the pills; and (3) defendant did not object to any of this testimony, and when viewed as a whole, the circumstantial evidence presented in this case, together with the reasonable inferences which could be properly drawn therefrom, was sufficient for the jury's consideration and determination.

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

Although defendant contends the trial court erred by denying his motion to dismiss the charge of possession of cocaine based on alleged insufficiency of the evidence, this assignment of error is dismissed because: (1) defendant's motions to dismiss were based specifically on his contention that the State failed to prove that the crime allegedly occurred in North Carolina; and (2) the Court of Appeals will not consider arguments based upon matters not presented to or adjudicated by the trial court.

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

Although defendant contends his Eighth Amendment right against cruel and unusual punishment was violated in a posses-

sion of cocaine case based on the fact that his sentence was grossly disproportionate to the severity of the crime, this assignment of error is dismissed, because: (1) defendant did not object, and constitutional arguments will not be considered for the first time on appeal; and (2) although defendant assigns plain error to this issue, plain error analysis applies only to instructions to the jury and evidentiary matters.

4. Evidence— officer testimony—crack cocaine—lay opinion

The trial court did not abuse its discretion or commit plain error in a possession of cocaine case by allowing an officer to testify that the substance seized was crack cocaine even though defendant contends the testimony constituted inadmissible lay opinion, because: (1) the officer testified based on his extensive training and experience in the field of narcotics, including that he had been with the police department for eight years at the time and he had come into contact with crack cocaine between 500 and 1,000 times; and (2) the officer's testimony was helpful for a clear understanding of his overall testimony and the facts surrounding defendant's arrest.

5. Evidence— prior crimes or bad acts—fake names—fictitious identification card—guilty knowledge—chain of circumstances

The trial court did not commit plain error in a possession of cocaine case by allowing an officer's testimony that defendant provided fake names and possessed a fictitious identification card, because: (1) defendant denied possessing the pertinent pill bottle notwithstanding eyewitness testimony that he removed the bottle from his pocket, dropped it on the ground, and kicked it under a nearby car; (2) defendant similarly gave false information about his identity; (3) the officer's testimony was probative of defendant's guilty knowledge under N.C.G.S. § 8C-1, Rule 404(b); and (4) the testimony served the purpose of establishing the chain of circumstances culminating in defendant's arrest for possession of cocaine.

6. Evidence— hearsay—forensic chemist testimony—testing and conclusions passed review

The trial court did not commit plain error in a possession of cocaine case by allowing a forensic chemist to testify regarding a review of her conclusions even though defendant contends it constituted inadmissible hearsay, because: (1) assuming, without de-

ciding, that the testimony that her testing and conclusions passed review constituted inadmissible hearsay, the admission did not constitute fundamental error so that justice could not be done; (2) the chemist did not describe the contents of the review but simply stated her report passed; and (3) both the chemist and an officer testified without objection that the pills were cocaine.

7. Criminal Law— instruction—interested witnesses

The trial court did not abuse its discretion in a possession of cocaine case by denying defendant's request for a jury instruction on interested witnesses, because: (1) the requested instruction was not in writing; (2) although defendant correctly states that an officer was responsible for the destruction of much of the physical evidence prior to trial, defendant has not offered any explanation as to how the officer could be considered interested; and (3) the trial court's instruction was sufficient to ensure that the jury carefully evaluated the alleged interested witness's testimony.

8. Drugs— possession of cocaine—instruction—State's burden of proof

The trial court did not commit plain error in a possession of cocaine case in instructing the jury on the State's burden of proof by instructing the jury to find defendant not guilty if it did not find defendant knowingly possessed cocaine and had reasonable doubt because the jury instructions taken as a whole adequately advised the jury that the State has the burden of proving its evidence beyond a reasonable doubt.

Judge GEER concurring in part and dissenting in part.

Appeal by defendant from judgments entered 11 June 2006 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 June 2007.

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

Kathleen Arundell Widelski, for defendant-appellant.

JACKSON, Judge.

George Oliver Freeman ("defendant") appeals from judgment entered upon his conviction for possession of cocaine.

On the evening of 11 January 2004, Officer Christopher Miller ("Officer Miller") of the Charlotte-Mecklenburg Police Department responded, along with Officers Lester and Poe, to a report of an armed robbery at the Circle K convenience store at the 2300 block of The Plaza. Officer Miller arrived within two minutes of the call, and upon pulling into the parking lot, Officer Miller observed a white Pontiac in front of the store and believed that the driver "might be a possible accomplice or a get-away driver." He then observed defendant exiting the Circle K through the front door and noted that defendant's hands were in his pockets. After the officers ordered defendant to lie down on the ground, defendant pulled his hands out of his pockets and dropped, along with his car keys, an item that looked like a pill bottle. Just before lying down, defendant kicked the bottle underneath the white Pontiac.

Officer Miller noted that no one else was near the location where the pill bottle landed, and after defendant was secured, Officer Miller recovered the pill bottle. Inside the pill bottle, Officer Miller discovered a variety of white pills and believed that two of them were crack cocaine.

In addition to the pills, Officer Miller also seized a North Carolina identification card from defendant's person. Officer Miller explained that defendant "had given various names and dates of birth as to what his true identity was. We eventually found the I.D. card with a date of birth. The I.D. card was fictitious, and through a couple of different data bases we were able to determine who he was, talk to him a little bit more, and then he told us who he was."

After conducting a brief investigation, the officers learned that no armed robbery had taken place. They placed defendant in custody on suspicion of possession of crack cocaine, and on 18 November 2004, a forensic chemist employed by the Charlotte-Mecklenburg Police Crime Lab determined that two pills recovered from the bottle were cocaine with a combined weight of 0.22 grams.

On 11 July 2006, a jury found defendant guilty of possession of cocaine, and defendant subsequently admitted his habitual felon status. The trial court sentenced defendant as a Prior Record Level VI offender to 135 months to 171 months imprisonment. Defendant gave notice of appeal in open court.

[1] In his first argument, defendant contends that the trial court erred in denying his motion to dismiss for failure of the State to

establish that the crime alleged occurred in the State of North Carolina. We disagree.

" 'In considering a motion to dismiss, the evidence must be considered in the light most favorable to the State and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom.' " *State v. Elliott*, 360 N.C. 400, 412, 628 S.E.2d 735, 744 (quoting *State v. Lowery*, 309 N.C. 763, 766, 309 S.E.2d 232, 236 (1983)), *cert. denied*, — U.S. —, 166 L. Ed. 2d 378 (2006). At the close of the State's evidence, defendant made a motion to dismiss, stating "I don't believe I heard anything about jurisdiction. I heard the 2300 block of The Plaza, but I didn't hear anything about them proving that that event took place in Charlotte, Mecklenburg County." The trial court denied defendant's motion to dismiss.

"It is well settled law that an act must have occurred within the territorial boundaries of the state to be punishable as a crime in the state." *State v. Williams*, 74 N.C. App. 131, 132, 327 S.E.2d 300, 301 (1985). As this Court has explained,

> [w]here a criminal defendant challenges the theory upon which the State claims jurisdiction to try him, the question is a legal question for the court; however, where the defendant challenges the facts upon which jurisdiction is claimed, the question is one for the jury.

State v. Dial, 122 N.C. App. 298, 305, 470 S.E.2d 84, 88-89, *disc. rev. and cert. denied*, 343 N.C. 754, 473 S.E.2d 620 (1996).

In the case *sub judice*, defendant is correct that there was no testimony that explicitly stated the crime occurred in Charlotte, Mecklenburg County, North Carolina. Although the evidence is circumstantial, "this factor alone does not mean that the evidence is deficient in any respect." *State v. Rick*, 342 N.C. 91, 99, 463 S.E.2d 182, 186 (1995). Rather, "circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. The jurors must decide whether the evidence satisfies them beyond a reasonable doubt that the defendant is guilty." *State v. Tirado*, 358 N.C. 551, 582, 599 S.E.2d 515, 536 (2004) (internal quotation marks and citations omitted), *cert. denied sub nom.*, *Queen v. North Carolina*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005).

Here, defendant was indicted by a Mecklenburg County, North Carolina grand jury, and the crime was investigated and defendant

was arrested by the Charlotte-Mecklenburg Police Department. Specifically, Officer Miller testified that he was an officer with the Charlotte-Mecklenburg Police Department and was "so sworn and duly employed" when he encountered defendant on 11 January 2004. Officer Miller further testified that he was on Central Avenue, a few blocks away from the 2300 block of The Plaza, when he received the call concerning a possible armed robbery. In addition to the pill bottle, a North Carolina identification card was seized during defendant's arrest. Finally, Dee Anne Johnson, a forensic chemist employed by the Charlotte-Mecklenburg Police Crime Lab, performed the analysis on the pills, and a Charlotte-Mecklenburg police property sheet accompanied the sealed package containing the pills. Defendant did not object to any of this testimony, and when viewed as a whole, "[w]e believe the circumstantial evidence presented in this case, together with the reasonable inferences which could be properly drawn therefrom, is sufficient for the jury's consideration and determination." *Rick*, 342 N.C. at 99, 463 S.E.2d at 186; *see also State v. Drakeford*, 104 N.C. App. 298, 301, 409 S.E.2d 319, 321 (1991). Accordingly, defendant's assignment of error is overruled.

[2] Defendant next contends that the trial court erred in failing to grant his motion to dismiss due to insufficiency of the evidence. Defendant, however, has failed to preserve this question for appellate review.

"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." N.C. R. App. P. 10(b)(1) (2006). At the close of the State's evidence, defendant made a motion to dismiss, arguing, "*I don't believe I heard anything about jurisdiction.* I heard the 2300 block of The Plaza, but I didn't hear anything about them proving that that event took place in Charlotte, Mecklenburg County. *Other than that, I don't wish to be heard.*" (Emphases added). After denying the motion, the trial court asked if defendant wished to present evidence. Defendant responded, "Your Honor, we will rest and renew our Motion to Dismiss." Defendant's motions to dismiss were based *specifically* on his contention that the State failed to prove that the crime alleged occurred in North Carolina. Defendant's motion to dismiss was not based on insufficiency of the evidence in general. "This Court will not consider arguments based upon matters not presented to or adjudicated by the trial court." *State v. Forte*, 360 N.C. 427, 438, 629 S.E.2d 137, 145 (quoting *State v. Haselden*, 357 N.C. 1, 10, 577

S.E.2d 594, 600, *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003)), *cert. denied*, ––– U.S. –––, 166 L. Ed. 2d 413 (2006). Accordingly, this issue is not properly before this Court, and we dismiss defendant's assignment of error.

[3] Defendant further argues that his sentence is grossly disproportionate to the severity of the crime and violates the Eighth Amendment prohibition against cruel and unusual punishment. Defendant did not object at trial, however, and "constitutional arguments will not be considered for the first time on appeal." *State v. Chapman*, 359 N.C. 328, 360, 611 S.E.2d 794, 819 (2005). Although defendant assigns plain error to this issue, it is well-settled that "plain error analysis applies only to instructions to the jury and evidentiary matters." *State v. Greene*, 351 N.C. 562, 566, 528 S.E.2d 575, 578, *cert. denied*, 531 U.S. 1041, 148 L. Ed. 2d 543 (2000). Defendant has failed to preserve his Eighth Amendment argument, and we dismiss defendant's assignment of error.

[4] Defendant also contends that the trial court committed plain error in allowing Officer Miller to testify that the substance seized was crack cocaine on the grounds that the testimony constituted inadmissible lay opinion. We disagree.

Pursuant to Rule 701 of the North Carolina Rules of Evidence, "[i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2005). "As long as the lay witness has a basis of personal knowledge for his opinion, the evidence is admissible." *State v. Bunch*, 104 N.C. App. 106, 110, 408 S.E.2d 191, 194 (1991) (holding that an officer's testimony concerning practices of drug dealers was admissible lay opinion as it was based on personal knowledge and helpful to the jury).

Officer Miller testified that two of the pills in the pill bottle seized during defendant's arrest were crack cocaine and that he based his identification of the pills as crack cocaine on his extensive training and experience in the field of narcotics. Officer Miller, who had been with the police department for eight years at the time, testified that he had come into contact with crack cocaine between 500 and 1000 times. As Officer Miller's testimony on this issue was helpful for a clear understanding of his overall testimony and the facts surrounding defendant's arrest, the trial court did not abuse its discretion,

much less commit plain error, in permitting Officer Miller to testify as to his opinion that the pills were crack cocaine. Defendant's argument, therefore, is overruled.

[5] Additionally, defendant argues that the trial court committed plain error in allowing Officer Miller's testimony that defendant provided fake names and possessed a fictitious identification card on the grounds that such testimony was inadmissible pursuant to Rule 404(b) of the North Carolina Rules of Evidence. We disagree.

Although "[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," Rule 404(b) also provides that such evidence "may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005). It is well-settled that Rule 404(b) is a general rule of inclusion of relevant evidence of a defendant's other crimes or acts, "subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphases in original). Therefore, "[e]vidence of other crimes committed by a defendant may be admissible under Rule 404(b) if it establishes the chain of circumstances or context of the charged crime . . . [or] serves to enhance the natural development of the facts or is necessary to complete the story of the charged crime for the jury." *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 853 (internal citations omitted), *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995).

Here, defendant denied possessing the pill bottle, notwithstanding eyewitness testimony that he removed the bottle from his pocket, dropped it on the ground, and kicked it under a nearby car. Defendant similarly gave false information about his identity, as demonstrated by Officer Miller's testimony that defendant provided fake names and possessed a fictitious identification card. Such testimony was probative of defendant's guilty knowledge, one of the grounds for admissibility pursuant to Rule 404(b). Additionally, the testimony "served the purpose of establishing the chain of circumstances" culminating in defendant's arrest for possession of cocaine. *State v. Agee*, 326 N.C. 542, 550, 391 S.E.2d 171, 175-76 (1990). Accordingly, Rule 404(b) did not require exclusion of Officer Miller's testimony concerning the false names and identification card. Defendant's argument is overruled.

[6] Defendant next argues that the trial court committed plain error in allowing Dee Anne Johnson ("Johnson"), a forensic chemist, to testify regarding a review of her conclusions because the evidence constituted inadmissible hearsay.[1] We disagree.

After Johnson testified that she analyzed the pills and determined that they were cocaine, the following colloquy took place:

> PROSECUTOR: Now, are your conclusions reviewed by anybody else?
>
> JOHNSON: They are.
>
> PROSECUTOR: And did you submit this testing and conclusion for review?
>
> JOHNSON: I did.
>
> PROSECUTOR: Did they pass review?
>
> JOHNSON: They did.

Defendant did not object at trial, but now contends that this testimony constituted inadmissible hearsay.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-l, Rule 801(c) (2005). Although hearsay generally is inadmissible, "[i]t is well settled that the erroneous admission of hearsay, like the erroneous admission of other evidence, is not always so prejudicial as to require a new trial." *State v. Locklear*, 349 N.C. 118, 149, 505 S.E.2d 277, 295 (1998) (internal quotation marks and citations omitted), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999). By not objecting at trial, defendant has the "heavy burden" of demonstrating plain error. *State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 61 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001).

Assuming, without deciding, that Johnson's testimony that her testing and conclusions passed review constituted inadmissible hearsay, we decline to hold that the admission of this testimony constituted "*fundamental* error, something so basic, so prejudicial, so

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1. Although defendant also contends that Johnson's testimony violated his Sixth Amendment right to confrontation, defendant has failed to offer any argument on this issue. Defendant, therefore, has abandoned this assignment of error. *See* N.C. R. App. P. 28(b)(6) (2006); *State v. Theer*, 181 N.C. App. 349, 367-68 n.5, 639 S.E.2d 655, 667 (2007).

lacking in its elements that justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir. 1982) (emphasis in original)). Johnson did not describe the contents of the review; she simply stated her report "passed." Furthermore, both Johnson and Miller testified, without objection, that the pills were cocaine. As such, we cannot say that Johnson's testimony that her report passed review had "a probable impact on the jury's finding that . . . defendant was guilty." *Id.* (quoting *McCaskill*, 676 F.2d at 1002). Defendant has failed to demonstrate that the trial court committed plain error, and defendant's argument, therefore, is overruled.

[7] In his next assignment of error, defendant argues that the trial court erred in denying defendant's request for a jury instruction on interested witnesses. We disagree.

A request for special instructions must be in writing, entitled in the cause, and signed by counsel; otherwise, the trial court has the discretion to give or refuse such instruction. *See State v. Mewborn*, 178 N.C. App. 281, 291-92, 631 S.E.2d 224, 231, *appeal dismissed and disc. rev. denied*, 360 N.C. 652, 637 S.E.2d 187 (2006). Defendant concedes that his requested instruction was not in writing. Therefore, we review the trial court's decision under an abuse of discretion standard, and "defendant is entitled to a new trial only if there is a reasonable probability that, had the abuse of discretion not occurred, a different result would have been reached at trial." *Id.*

The pattern jury instruction for interested witnesses states:

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

N.C.P.I. Crim. 104.20 (1970). When such an instruction is justified by the evidence, a trial court, upon request, must give it. *See State v. Williams*, 98 N.C. App. 68, 73, 389 S.E.2d 830, 833 (1990). When "there is nothing in the record to cast doubt upon the truthfulness and objectivity of the witness," an interested witness instruction would be inappropriate. *State v. Williams*, 333 N.C. 719, 733, 430 S.E.2d 888, 895 (1993).

In the case *sub judice*, defendant contends that Officer Miller was an interested witness because Officer Miller was responsible for the

destruction of the cocaine, the pill bottle, and the identification cards. Although defendant is correct that Officer Miller was responsible for the destruction of much of the physical evidence, defendant has offered no explanation as to how Officer Miller could be considered "interested." Defendant makes the conclusory statement that Officer Miller "was negligent in requesting the evidence be destroyed prior to trial," but defendant does not explain why or how that makes Officer Miller interested in the outcome of defendant's trial.

The trial court instructed the jury:

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

This Court recently held that "[s]uch an instruction was sufficient to ensure that the jury carefully evaluated [the alleged interested witnesses'] testimony." *State v. Locklear*, 180 N.C. App. 115, 126, 636 S.E.2d 284, 291 (2006). Accordingly, the trial court did not abuse its discretion in denying defendant's request for the instruction, and defendant's argument, therefore, is overruled.

[8] In his final argument, defendant contends that the trial court committed plain error in instructing the jury. We disagree.

The trial court instructed the jury that

> if you find from the evidence beyond a reasonable doubt that on or about the alleged date, the Defendant knowingly possessed cocaine, a controlled substance, it would be your duty to return a verdict of guilty. *If you do not so find and have a reasonable doubt*, it would be your duty to return a verdict of not guilty.

(Emphasis added). Defendant contends that the trial court unconstitutionally lowered the standard of proof by instructing the jury

that they could find defendant not guilty *only* if they (1) did not find defendant knowingly possessed cocaine and (2) had a reasonable doubt.

Although defendant acknowledges that he did not object to the instructions at trial, he nonetheless contends that the trial court's instruction constituted plain error. However, "[t]he burden upon the defendant is to show more than a possibility that the jury applied the instruction in an unconstitutional manner." *State v. Smith*, 360 N.C. 341, 347, 626 S.E.2d 258, 261-62 (2006). Further, "[w]here the instructions to the jury, taken as a whole, present the law fairly and clearly to the jury, we will not find error even if isolated expressions, standing alone, might be considered erroneous." *State v. Morgan*, 359 N.C. 131, 165, 604 S.E.2d 886, 907 (2004), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005).

In the case *sub judice*, the jury instructions taken as a whole adequately advise the jury that the State has the burden of proving its evidence beyond a reasonable doubt. *See Morgan*, 359 N.C. at 163-64, 604 S.E.2d at 906 ("Moreover, the trial court unquestionably instructed the jury correctly elsewhere as to the burden of proof."). At the beginning of the jury instructions, the trial court advised the jury that defendant pled not guilty and that

> when a defendant pleads not guilty he is not required to prove his innocence, he is presumed to be innocent. *The State must prove to you that the Defendant is guilty beyond a reasonable doubt.* A reasonable doubt is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented or the lack or insufficiency of the evidence, as the case may be.

(Emphasis added). Later, the trial court again advised the jury, "if you're not convinced of the guilt of the Defendant beyond a reasonable doubt, you must find him not guilty." When the jury instructions are viewed as a whole, it is clear that the trial court did not unconstitutionally lower the State's burden of proof. Accordingly, defendant's argument is overruled.

For the foregoing reasons, we hold that defendant received a fair trial free from prejudicial error.

No Error.

Judge CALABRIA concurs.

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

GEER, Judge, concurring in part and concurring in the result in part.

I cannot agree with the majority opinion's determination that defendant waived any claim of cruel and unusual punishment. Nonetheless, because I would hold that defendant's sentence did not violate the Eighth Amendment, I concur in the result with respect to that assignment of error. I concur fully with the remainder of the majority opinion.

I recognize that I previously authored an opinion reaching the same conclusion as the majority in this case. *See State v. McGee*, 175 N.C. App. 586, 590, 623 S.E.2d 782, 785, *appeal dismissed and disc. review denied*, 360 N.C. 542, 634 S.E.2d 891 (2006). On the other hand, I have also authored opinions reaching the merits of such an argument without considering whether the contention had been raised below. *See State v. Legrand*, 181 N.C. App. 760, 640 S.E.2d 869, 2007 N.C. App. LEXIS 380, *12-15, 2007 WL 509322, *5 (2007) (unpublished); *State v. McCleave*, 161 N.C. App. 349, 588 S.E.2d 585, 2003 N.C. App. LEXIS 2064, *5-6, 2003 WL 22705376, *2-3 (2003) (unpublished).

Upon further reflection and in light of the flurry of decisions under *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004), in which Sixth Amendment issues relating to sentencing were addressed regardless whether raised below, I believe this issue is controlled by the Supreme Court's decision in *State v. Canady*, 330 N.C. 398, 410 S.E.2d 875 (1991). In *Canady*, the Supreme Court held that Rule 10(b)(1) of the Rules of Appellate Procedure did not preclude a defendant from challenging on appeal a trial court's finding of an aggravating factor despite a failure to object to the finding before the trial court. The Court explained:

> [Rule 10(b)(1)] does not have any application to this case. It is directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal. The purpose of the rule 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.

Id. at 401, 410 S.E.2d at 878.

In short, in *Canady*, the Supreme Court distinguished between matters occurring "at trial" and matters occurring during "sentencing." This Court has since repeatedly applied *Canady* to reject contentions that a challenge to a sentence on appeal is precluded by a failure to object below. *See, e.g*, *State v. Chivers*, 180 N.C. App. 275, 278, 636 S.E.2d 590, 593 (2006) ("Our Supreme Court has held that an error at sentencing is not considered an error at trial for the purpose of Appellate Rule 10(b)(1)."), *disc. review denied*, 361 N.C. 222, 642 S.E.2d 709 (2007); *State v. Curmon*, 171 N.C. App. 697, 704, 615 S.E.2d 417, 422-23 (2005) ("[D]efendant was not required to object at sentencing to preserve this issue for appellate review."); *State v. Hargett*, 157 N.C. App. 90, 92, 577 S.E.2d 703, 705 (2003) ("Our Supreme Court has held that an error at sentencing is not considered an error at trial for the purpose of N.C. Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure.").

This principle has further been applied to permit review of constitutional issues arising out of sentencing such as those governed by *Blakely*. *See, e.g.*, *State v. McQueen*, 181 N.C. App. 417, 420-21, 639 S.E.2d 131, 133, *appeal dismissed and disc. review denied*, 361 N.C. 365, ––– S.E.2d ––– (2007); *State v. Harris*, 175 N.C. App. 360, 362-63, 623 S.E.2d 588, 590, *vacated in part on other grounds*, 361 N.C. 154, ––– S.E.2d –––, *disc. review denied*, 361 N.C. 174, 641 S.E.2d 308 (2006). I see no meaningful basis for distinguishing *Canady* or the host of cases arising out of *Blakely*.

As recognized in *Canady*, the requirement of an objection to a sentence is not consistent with "the way our judicial system works." *Canady*, 330 N.C. at 402, 410 S.E.2d at 878. Whether a defendant were to challenge a finding of fact encompassed in the sentence, as in *Canady*, or the sentence as a whole, as here, it would be an odd requirement—"a near impossibility" according to *Canady*, *id.*—to insist upon an objection "after a trial is completed and a judge is preparing a judgment," *id.* Indeed, an Eighth Amendment challenge to a sentence could not in fact be asserted until the sentence was imposed and judgment already entered.

Moreover, such a rule would require counsel effectively to stand up and say "I object" in response to the ruling of the trial court. Our Supreme Court long ago eliminated the requirement that counsel "except" to a trial court's ruling. I see no reason to revive "exceptions," especially since the appropriate forum for objecting to a trial court's ruling is the appeal.

Although I believe that the Eighth Amendment issue is properly before this Court, I would hold that defendant has failed to demonstrate any constitutional violation. Defendant contends that the trial court erred in enhancing his sentence under the habitual felon statute because the resulting sentence was disproportionate to the crime of possessing .2 grams of cocaine.

Contrary to defendant's argument, he was not sentenced to a term of 135 to 171 months for possessing a small amount of cocaine. He received the lengthy sentence because he had attained the status of a habitual felon. "Habitual felon laws have withstood scrutiny under the Eighth Amendment to the United States Constitution in our Supreme Court and in the United States Supreme Court." *State v. Cates*, 154 N.C. App. 737, 741, 573 S.E.2d 208, 210 (2002) (citing *Rummel v. Estelle*, 445 U.S. 263, 63 L. Ed. 2d 382, 100 S. Ct. 1133 (1980), and *State v. Todd*, 313 N.C. 110, 326 S.E.2d 249 (1985)), *disc. review denied*, 356 N.C. 682, 577 S.E.2d 897, *cert. denied*, 540 U.S. 846, 157 L. Ed. 2d 84, 124 S. Ct. 121 (2003); *see also State v. Quick*, 170 N.C. App. 166, 170, 611 S.E.2d 864, 867 (2005) ("[N]othing in the Eighth Amendment prohibits our legislature from enhancing punishment for habitual offenders."). Indeed, "[o]nly in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment." *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983).

Defendant here fails to show that his sentence of 135 to 171 months is either "exceedingly unusual" or "grossly disproportionate" in light of his status as a habitual felon. Indeed, this Court has previously upheld a 14-year sentence for possession of a "small amount" of cocaine when the defendant was a habitual felon. *See State v. Hodge*, 112 N.C. App. 462, 468, 436 S.E.2d 251, 255 (1993). *See also State v. Hensley*, 156 N.C. App. 634, 639, 577 S.E.2d 417, 421 (holding that sentence, under habitual felon statute, of 90 to 117 months did not offend Eighth Amendment even though triggering felony involved pawning a tool for twenty dollars), *disc. review denied*, 357 N.C. 167, 581 S.E.2d 64 (2003).

Defendant directs our attention to *State v. Starkey*, 177 N.C. App. 264, 628 S.E.2d 424, *cert. denied*, ––– N.C. –––, 636 S.E.2d 196 (2006). In *Starkey*, the State attempted to appeal a superior court's decision *sua sponte* granting its own motion for appropriate relief and vacating, pursuant to the Eighth Amendment, a defendant's sentence as a habitual felon for possession of .004 ounces of cocaine. Because this

Court held that the State had no right to appeal the superior court's decision and additionally refused to grant the State's petition for writ of certiorari, the Court never addressed the merits of the Eighth Amendment issue. *Starkey*, therefore, provides no authority for disturbing defendant's sentence as a habitual felon. Accordingly, given *Hodge*, I would decline to find that defendant's sentence violates the Eighth Amendment.

STATE OF NORTH CAROLINA v. RANDY GREENSBURY RIDGEWAY, DEFENDANT

No. COA06-1162

(Filed 21 August 2007)

1. Appeal and Error— correction of judgment after appeal—authority of trial court

The trial court was without jurisdiction to change the original judgment, even to correct a clerical error, while the matter was pending on appeal. A motion for appropriate relief was granted and the amended judgments were vacated and remanded for correction of the clerical error.

2. Venue— pretrial publicity—denial of change

The trial court properly denied defendant's motion to change venue or for a special venire in a prosecution for murder, rape and sexual offenses against his girlfriend's daughter. The jury selection process effectively screened out any jurors who might have been influenced by pretrial publicity, and defendant indicated that he was satisfied with the jury. He did not demonstrate such widespread and pervasive prejudice in the community that he could not receive a fair trial before the jurors who were selected.

3. Constitutional Law— right to counsel—resumption of questioning after request

Defendant's right to counsel was protected when officers resumed questioning defendant after he inquired about an attorney. The unchallenged findings support the conclusion that defendant never unequivocally requested an attorney during his early custodial interrogation and that none of his state or federal constitutional rights had been violated.

4. Confessions and Incriminating Statements— spontaneous statement—admissible

The trial court correctly admitted a spontaneous incriminating statement defendant made to officers while en route to have dental impressions made where the unchallenged findings were that no questions were posed, no threats or promises induced the statement, and defendant seemed to understand what he was doing.

5. Appeal and Error— preservation of issues—failure to cite authority—contention abandoned

Defendant did not cite authority on appeal and abandoned his contention that his written statement should not have been admitted because officers provided the means and opportunity for him to make the statement before he was advised of his rights.

6. Evidence— defendant in jail during trial—admission not plain error

There was no plain error in allowing testimony to the fact that defendant had been incarcerated on the charges in this case. His strategy was to admit multiple Class B felonies versus first-degree murder; any reference to defendant being in jail during the trial could not have caused the jury to convict when they otherwise would not have.

7. Evidence— items found at scene—supportive of reasonable inference

The trial court did not err by admitting a knife and a condom found at the scene of a sexual assault and murder where the evidence supported a reasonable inference that defendant had decided that he had little to lose by acting on his impulses toward the victim, and defendant stated that he had initially intended to use the condom when he assaulted the victim and intended to use the knife to kill the victim's mother when she got home.

8. Rape; Sexual offenses— murder-single transaction

There is sufficient evidence to support sex offense convictions even if it is not clear that the victim was alive when the sex offenses were committed when the crimes were part of a continuous chain of events. Here, there was sufficient evidence to support a conclusion that defendant's physical abuse, rape, and sexual offenses against his girlfriend's daughter occurred as part of a single transaction, and his motion to dismiss for insufficient evidence was properly denied.

9. Rape; Sexual Offenses— statutory and forcible theories—consolidated judgments—arrest of judgment on one count

Judgment was arrested on one count of first-degree rape and one count of first-degree sexual offense where the jury found defendant guilty of rape on theories of statutory and forcible rape and found defendant guilty of sexual offense on theories of statutory and forcible sexual offense, even though the trial court consolidated the convictions for statutory and forcible rape in a single judgment and consolidated the convictions for statutory and forcible sexual offense in a single judgment, because separate convictions for those offenses, even when consolidated in a single judgment, have potentially severe adverse collateral consequences.

10. Rape; Sexual Offenses— assault to gratify desire—evidence sufficient

There was sufficient evidence that defendant assaulted his victim for the purpose of arousing or gratifying sexual desire.

11. Appeal and Error— preservation of issues—assignment of error—supporting authority required

An assignment of error was deemed abandoned where defendant did not cite authority to support his argument.

12. Homicide— felony murder—multiple underlying felonies—one arrested

There was no plain error where the trial court arrested judgment on one of five felonies supporting felony murder. Where the trial court's jury instructions did not specify which of the multiple felonies were to be considered as the underlying felony for purposes of the felony murder conviction, it was within the trial court's discretion to select which felony conviction would serve as the underlying felony.

Defendant appeals from judgments dated 6 October 2005 by Judge Michael E. Beale in Davie County Superior Court. Heard in the Court of Appeals 5 June 2007.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

McCotter, Ashton, & Smith, P.A., by Rudolph A. Ashton, III, and Kirby H. Smith, III, for defendant.

BRYANT, Judge.

Randy Greensbury Ridgeway appeals from judgments dated 6 October 2005 consistent with jury verdicts finding him guilty of first degree (felony) murder, first degree rape, statutory rape, first degree sex offense, statutory sex offense, sex offense in a parental role, indecent liberties with a minor and felony child abuse. For the murder conviction, defendant was sentenced to life imprisonment without parole. The remaining charges were consolidated and defendant was sentenced to a minimum of six hundred five months and a maximum of seven hundred fifty-four months imprisonment to run consecutively.

D.K. (Debi)[1] was a fourteen-year-old high school student who was raped, sodomized and murdered by defendant, her mother's live-in boyfriend. Defendant admitted that he murdered Debi by repeatedly hitting her in the head with a hammer. The State's evidence tended to show defendant was having sexual feelings toward Debi in the months prior to murdering Debi. Defendant told investigators Debi had "come on" to him in the past, that she had a certain way of flirting, that she had talked to him about her breasts and wanting to sleep in the same bed with him. Defendant's relationship with Debi's mother had deteriorated to the point that defendant slept on the living room sofa and had planned to move out.

On 21 September 2004, Debi's mother returned home from work at about 11:20 p.m. to find defendant lying on the couch and he appeared to be sleeping. Upon entering Debi's room, her mother found Debi unresponsive, her body felt cold and her blonde hair was completely red with blood. After attempting to resuscitate Debi, her mother called 911. EMS responded and transported Debi to the hospital where she was pronounced dead.

An autopsy was performed on Debi, documenting her significant injuries. There were multiple human bite marks all over her body, including her pubic area, chin, upper right thigh, and between her breasts. According to experts for both defendant and the State, Debi was alive at the time she was bitten by defendant. Debi's vaginal area and rectum were severely bruised and torn. DNA evidence extracted from Debi's vagina and rectum matched defendant's and a soft tissue analysis revealed Debi was alive when she sustained these injuries. Although the State's evidence indicated Debi was alive when she sustained the injuries to her vagina and rectum, defendant claimed he

1. Initials and pseudonyms are used to protect the identity of minor child victim.

sexually assaulted Debi after she was dead in an attempt to make it look as though someone else had committed the crime. After sustaining multiple injuries, Debi died of blunt force trauma to the head.

At the crime scene, investigators found evidence indicating an attempt to sanitize the scene. Evidence found in the master bedroom included a hammer, a large knife and a partially unrolled condom. Defendant gave several statements, confessing that he murdered Debi with a hammer. Additionally, defendant admitted he left a knife in the master bedroom because he intended to kill Debi's mother when she got home.

At trial, defendant was acquitted of first degree murder based upon premeditation and deliberation, but convicted of first degree murder under the felony murder rule. The jury further convicted defendant of all remaining charges and recommended sentencing defendant to life imprisonment without parole on the first degree murder conviction. The trial court sentenced defendant on the first degree murder conviction, and arrested judgment on the felonious child abuse with a deadly weapon conviction pursuant to the felony murder rule. As to the remaining convictions, defendant stipulated he was a prior record level II for sentencing purposes. The trial court consolidated the statutory rape and forcible rape convictions and sentenced defendant to 288 to 355 months imprisonment on those charges. The trial court consolidated the statutory sexual offense and forcible sexual offense convictions and sentenced defendant to an additional 288 to 355 months imprisonment. The trial court ordered both the sexual offense and murder convictions to run at the expiration of the sentence in the rape cases. The sexual offense in a parental role and indecent liberties charges were consolidated and defendant was sentenced to twenty-nine to forty-four months imprisonment, to run at the expiration of the sentence on the sexual offenses. Defendant appeals.

Defendant argues the trial court erred by: (I) denying his motion for change of venue or special venire; (II) denying his motion to suppress statements to law enforcement; (III) admitting testimony that defendant was in jail on these charges; (IV) admitting evidence that a knife and condom were found at the crime scene; (V) denying defendant's motions to dismiss; and (VI) arresting judgment on only one of the felony convictions used to support his felony murder conviction.

[1] Defendant has filed a motion for appropriate relief (MAR) with this Court, and states the original judgments appearing in the record

on appeal for second degree rape (04 CRS 3370) and for second degree sex offense (04 CRS 3372) were correct. Defendant states the amended copies that later became an exhibit to the record upon the State's motion, are in error. The State, in its response to defendant's MAR, concedes that while the transcript indicates defendant was found guilty and convicted of first degree rape and first degree sex offense, the trial court's attempt to correct its clerical error *after this matter was pending on appeal* with this Court was error. We agree. The trial court was clearly without jurisdiction to change the original judgment, even to correct a clerical error, while this matter was pending appeal. *See In re J.L.B.M.*, 176 N.C. App. 613, 628, 627 S.E.2d 239, 248 (2006) ("Once the record on appeal has been filed with an appellate court, the trial court is divested of jurisdiction to correct a clerical error."). Accordingly, we allow defendant's MAR and vacate the amended judgments in 04 CRS 3370 and 04 CRS 3372 and remand for correction of the clerical error. *Id.*

I

[2] Defendant argues the trial court erred by denying his motion for change of venue or special venire. In support of his argument defendant states there had been six news articles in area newspapers about the case and a local lawyer had been involved in a discussion about the case with some of her church members who felt defendant was obviously guilty.

A trial court must either transfer the case to another county or order a special venire from another county if there exists so great a prejudice against the defendant in the county in which he is charged that he cannot obtain a fair and impartial trial. N.C. Gen. Stat. § 15A-957 (2005); *State v. Bonnett,* 348 N.C. 417, 502 S.E.2d 563 (1998), *cert. denied*, 525 U.S. 1124, 142 L. Ed. 2d 907 (1999). Defendant must establish that "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." *Bonnett*, 348 N.C. at 428, 502 S.E.2d at 571 (citations and quotations omitted). Moreover, even when "it is clear that a large number of potential jurors was exposed to information about the case through the media," our Supreme Court "has consistently held that factual news accounts of the crimes and pretrial proceedings are not sufficient to establish prejudice against a defendant." *State v. Wallace*, 351 N.C. 481, 512, 528 S.E.2d 326, 346 (2000). Defendant must establish specific and identifiable prejudice against him as a result of

pretrial publicity by showing, *inter alia*, that jurors with prior knowledge decided the case, that he exhausted his peremptory challenges, and that a juror objectionable to him sat on the jury. *Id.* The determination of whether a defendant has carried his burden is within the sound discretion of the trial court, and absent a showing of abuse of discretion, its ruling will not be overturned on appeal. *State v. Madric*, 328 N.C. 223, 226-27, 400 S.E.2d 31, 33-34 (1991).

In this case, the jury selection process effectively screened out any jurors who might have been influenced by pretrial publicity. Juror questionnaires were utilized and each potential juror was questioned about media exposure and potential prejudice. The record reflects that every juror among those ultimately selected either indicated that they had no prior knowledge of the case or, if they had prior knowledge, expressly stated that they could decide the case solely on the evidence presented at trial. During jury selection, potential jurors were excused for cause each time they indicated any possibility that they might be influenced by something they had seen or heard about the case. Jurors were asked if they could keep an open mind about considering second degree murder and were dismissed for cause if they indicated that they would have a hard time considering second degree murder, rather than first degree. *See Wallace*, 351 N.C. at 511, 528 S.E.2d at 345 (Our Supreme Court "has repeatedly emphasized that the best and most reliable evidence as to whether existing community prejudice will prevent a fair trial can be drawn from prospective jurors' responses to questions during the jury selection process.") (citations and quotations omitted). The record reflects that a fair and impartial jury was selected in this case. Defendant indicated he was satisfied with the jury at the conclusion of the jury selection process and did not renew his motion. Defendant has not demonstrated such "widespread and pervasive prejudice in the community" that defendant could not receive a fair trial before jurors selected from that jurisdiction. The trial court properly denied defendant's motion to change venue or for special venire. This assignment of error is overruled.

II

Defendant argues the trial court erred by denying his motion to suppress three statements made to law enforcement: defendant's inquiry about an attorney; statements made while en route to the dentist; and a written statement.

"It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's

findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (quotation omitted). Conclusions of law which are supported by findings of fact are binding on appeal. *State v. Golphin*, 352 N.C. 364, 409, 533 S.E.2d 168, 201 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). The trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found. *Id.* Where the trial court's findings of fact are supported by the evidence and in turn support its conclusions of law, defendant's assignments of error should be overruled. *See State v. Jones*, 161 N.C. App. 615, 589 S.E.2d 374 (2003), *appeal dismissed and disc. rev. denied*, 358 N.C. 379, 597 S.E.2d 770 (2004).

Inquiry About an Attorney

[3] Defendant contends his right to counsel was not protected where officers purportedly did not make sufficient inquiry before resuming questioning after defendant inquired about an attorney. In the order on defendant's motion to suppress, the trial court made detailed findings of fact based on evidence presented at the suppression hearing. The trial court also made "findings of ultimate facts relating to the ultimate issues in these Motions." The findings pertinent to this issue were:

> That the defendant was fully advised of his Fifth Amendment Miranda rights by Agent Lloyd Terry and freely, voluntarily and understandingly waived those rights. That the defendant's inquiry about a public defender during the interview was not an unambiguous, unequivocal request to talk to an attorney; that despite being advised that talking to an attorney was his decision and being given an opportunity by Agent Terry to make an unequivocal request, the defendant voluntarily continued the interview. That all of the defendant's statements during the interview were made freely, voluntarily, understandingly, without any promises, threats, coercions or inducement by Agent Terry or Detective Stephens.

None of the trial court's findings of fact have been challenged by defendant or assigned as error on appeal; these findings of fact are conclusive on appeal. *See Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826. The trial court's findings of fact in turn support its conclusion of law that defendant never unequivocally requested an attorney during his early custodial interrogation and that none of defendant's state or

federal statutory or constitutional rights had been violated. This conclusion of law is legally correct and reflects a correct application of applicable legal principles to the facts found; therefore, it, too, is binding on appeal. *See Golphin*, 352 N.C. at 409, 533 S.E.2d at 201 (a suspect must unambiguously request counsel to warrant the cessation of questions and must sufficiently and clearly articulate his desire to have counsel present such that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney).

Statement En Route to the Dentist

[4] Defendant argues the trial court should have suppressed the brief spontaneous statement defendant made to officers while en route to have dental impressions made. The trial court's unchallenged finding of facts as to this statement were:

> 77. On the way to the dentist's office the defendant, without any questions being posed of him by Detective Stephens or Special Agent Terry stated, "I do not know why you are doing this, I told you that I did it."
>
> 78. At the time that the defendant made this statement in the presence of Detective Stephens and Special Agent Terry, the defendant appeared to be acting normally and to understand what he was doing and no promises or threats were made to induce the defendant's statement. These unchallenged findings of fact support the trial court's conclusion of law that none of defendant's state or federal statutory or constitutional rights were violated when the statement was made.

The trial court properly concluded that defendant's spontaneous statement was admissible. *See State v. Penley*, 318 N.C. 30, 47, 347 S.E.2d 783, 793 (1986) (finding an assignment of error to be feckless where the evidence in the record showed the defendant's statement was spontaneous and that no interrogation in any form occurred at that time); *State v. Duers*, 49 N.C. App. 282, 286, 271 S.E.2d 81, 83 (1980) (holding appellate court bound by the trial court's findings, which were supported by the evidence, that defendant's custodial statement was spontaneously and voluntarily made by the defendant and therefore admissible), *disc. rev. denied*, 302 N.C. 220, 276 S.E.2d 917 (1981).

Written Statement

[5] Defendant was advised and expressly waived his rights prior to giving officers the statement at issue here. Defendant argues, however, the statement should have been suppressed because the detectives "provided the means and opportunity for said statement to be written prior to the defendant being advised of his rights." Defendant maintains that because the officers provided defendant with writing instruments and put him in a single cell, they should not have been allowed to accept his written statement, even though they fully advised defendant of his rights before he turned it over to them. Defendant cites no authority to support this contention; the issue therefore is deemed abandoned. *See State v. Alston*, 341 N.C. 198, 224, 461 S.E.2d 687, 700 (1995) (holding that an assignment of error is deemed abandoned if the appellant does not "cite reasonable authority in its support"), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996). These assignments of error are overruled.

III

[6] Defendant argues the trial court committed plain error in allowing witness testimony and references during trial to the fact that defendant had been incarcerated on these charges. We disagree.

Defendant must show the alleged error caused the jury to convict defendant when they otherwise would not have. *See State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987) (explaining that "plain error" is error "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached"), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). At trial, defendant admitted he had committed acts sufficient to constitute second degree murder, rape, sexual offense, and indecent liberties. Defendant's strategy here was an admission that he should be convicted of multiple Class B felonies versus first degree murder. In light of this strategy, any reference to defendant being in jail during trial could not have amounted to plain error. This assignment of error is overruled.

IV

[7] Defendant argues the trial court erred by admitting evidence of a knife and a condom found at the crime scene. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. N.C.

Gen. Stat. § 8C-1, Rule 401 (2005). "We have interpreted Rule 401 broadly and have explained on a number of occasions that in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible." *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994). The evidence tended to show defendant's relationship with Debi's mother was ending badly, that defendant had recently been experiencing sexual tension with Debi and had been asked to leave the home. The evidence supported a reasonable inference that defendant decided that he had little to lose by acting on his impulses toward Debi, and by murdering both Debi and her mother. This theory was supported by defendant's statements that he had initially intended to use the condom when he assaulted Debi, and that he had left the knife in the master bedroom because he intended to kill Debi's mother when she got home. The knife further tended to corroborate the State's evidence that the victim's bra was cut in the front. Defendant has failed to establish prejudice that the admission of such evidence found at the crime scene was in error. These assignments of error are overruled.

V

[8] Defendant argues the trial court erred in denying his motion to dismiss for insufficiency of the evidence. When determining the sufficiency of the evidence to support a charged offense, we must view the evidence "in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). If the evidence supports a reasonable inference of defendant's guilt based on the circumstances, then it is for the jurors to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty. *State v. Trull*, 349 N.C. 428, 447, 509 S.E.2d 178, 191 (1998), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999). When a defendant commits sex offenses in conjunction with a murder as part of a continuous chain of events, forming one continuous transaction, there is sufficient evidence to support the defendant's sex offense convictions even if it is unclear whether the victim was alive or dead when the sex offenses were committed. *See State v. Wilkinson*, 344 N.C. 198, 215-16, 474 S.E.2d 375, 384-85 (1996). "This Court, on numerous occasions, has held that to support convictions for a felony offense and related felony murder, all that is required is that the elements of the underlying offense and the murder occur in a time frame that can be perceived as a single transaction." *State v. Thomas*, 329 N.C. 423, 434-35, 407 S.E.2d 141, 149 (1991).

In the light most favorable to the State the evidence tended to show defendant attacked Debi over a period of hours. Defendant's expert testified various wounds were inflicted while Debi was alive. The evidence showed defendant raped Debi vaginally and anally while she was alive, leaving semen inside both her vagina and anus. Defendant's expert indicated the evidence from Debi's lung tissue showed Debi was alive for a substantial period of time after the brain injury was inflicted. After hitting Debi in the head, defendant walked around thinking about how to cover up the crime, attempted to clean Debi up, and then sexually assaulted her body—all part of the same episode. There was sufficient evidence to support a conclusion the physical abuse, rape, and sexual offense occurred as part of a single transaction. The trial court properly allowed the jury to review the evidence of defendant's commission of the crimes of rape and sexual offense under both a theory of statutory rape/sexual offense and forcible rape/sexual offense. These are alternative theories under which the jury could find defendant guilty of rape and sexual offense. *See State v. Millsaps*, 356 N.C. 556, 560, 572 S.E.2d 767, 770 (2002) ("The crime is first-degree murder. Premeditation and deliberation and felony murder are theories which the State may use, pursuant to N.C.G.S. § 14-17, to convict a defendant of first-degree murder. However, a defendant is convicted of the crime, not of the theory."). The prosecutor argued to the trial court that the State should be allowed to present both theories to the jury and that "any issues as to double jeopardy and merger should be considered after the jury has spoken with regard to the elements which it found on the statutory and forcible sexual offense and rape charges." The trial court properly submitted both theories for the jury's consideration.

[9] However, upon the jury's verdicts of guilty under both theories, judgment must be arrested on one count of first degree rape and on one count of first degree sexual offense. In *Etheridge*, the North Carolina Supreme Court stated:

> Where, as here, a single criminal transaction constitutes a violation of more than one criminal statute, the test to determine if the elements of the offenses are the same is whether each statute requires proof of a fact which the others do not . . . . If neither crime constitutes a lesser included offense of the other, the convictions will fail to support a plea of double jeopardy.

State v. Etheridge, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987) (holding that convictions of three separate offenses all arising out of

the "same criminal transaction" did not violate double jeopardy and upholding defendant's convictions of statutory rape, incest, and taking indecent liberties with a child for each episode of intercourse with his daughter) (internal citations omitted). Under the original statutes for rape and sexual offense, a plain reading of the statutes shows the legislative intent was to provide alternate methods by which the State can prove the crimes of rape or sexual offense: intercourse or a sexual act with a child under 13 or intercourse or a sexual act with any person by force and against the will. *See* N.C.G.S. §§ 14-27.2, 14-27.4 (2005). In 1995, the legislature adopted a new statute extending protection to children between the ages of 13 and 15 from sexual acts or intercourse by older persons. N.C. Gen. Stat. § 14-27.7A (2005).

Separate convictions for these offenses, even though consolidated for a single judgment, "have potentially severe adverse collateral consequences." *State v. Speckman*, 326 N.C. 576, 580, 391 S.E.2d 165, 168 (1990) (citation omitted). "Therefore, consolidating the two convictions and entering a single judgment did not reduce the trial court's error to harmless error." *Id.* We remand for judgment to be arrested on one count of rape and one count of sexual offense.

[10] Defendant next argues that there was insufficient evidence defendant took any actions against Debi for the purposes of arousing or gratifying his sexual desire. "[T]hat the action was for the purpose of arousing or gratifying sexual desire, may be inferred from the evidence of the defendant's actions. This is sufficient evidence to withstand a motion to dismiss the charge of taking indecent liberties with a child." *State v. Rhodes*, 321 N.C. 102, 105, 361 S.E.2d 578, 580 (1987).

In the present case, the victim had bite marks all over her body and extensive trauma to both her vagina and rectum. A reasonable inference, based upon the physical evidence alone, is that defendant had a sexual purpose in assaulting Debi. Moreover, defendant told police that he did not remember biting Debi, but acknowledged that it was possible because he had bitten another woman before while "making love" with her. There was sufficient evidence that defendant assaulted Debi for the purpose of arousing or gratifying sexual desire.

[11] Defendant cites no authority to support his argument that the felonious child abuse charges should have been dismissed at the close of the State's evidence. If there is no citation of authority in support of an argument, the assignment of error upon which the argument is based is therefore deemed abandoned. *See State v. Lloyd*, 354

N.C. 76, 87, 552 S.E.2d 596, 607 (2001) (Even if a defendant raises a constitutional issue at trial and makes that issue the subject of an assignment of error on appeal, he must cite authority in support of an alleged constitutional violation.); N.C. R. App. P. 28(b)(6).

VI

[12] Defendant argues the trial court erred by arresting judgment on one of the felony convictions used to support his felony murder conviction. Defendant asserts that it was plain error for the trial court to arrest judgment on one but not all of the felonies that the jury found could support defendant's felony murder conviction. Defendant did not object on this basis or raise this issue at trial.

Our Supreme Court stated the felony murder merger rule requires the trial court to arrest judgment on at least one (but not all) of the underlying felony convictions if multiple convictions supported the conviction for felony murder. *State v. Barlowe*, 337 N.C. 371, 381, 446 S.E.2d 352, 358-59 (1994). In *Barlowe*, the Supreme Court indicated only one felony is necessary to support a felony murder conviction, and further that under the facts of that case, the record was clear that the jury found that two separate felonies supported the first degree murder conviction. *Id.* Although in *Barlowe* there was error in the submission to the jury of a first degree burglary charge, which also was one of the felonies supporting the first degree murder conviction, the Supreme Court stated that "[h]ad there been no error in submission of the first degree burglary charge, the trial court would have been required to arrest judgment on one of the underlying felony convictions but could have elected either the discharging a firearm into occupied property or the first-degree burglary conviction." *Id.* The Supreme Court further stated:

> To the extent *dicta* in the second opinion in *State v. Pakulski*, 326 N.C. 434, 437, 390 S.E.2d 129, 130 (1990), suggests the conviction for more than one underlying felony, if found, merges with the murder conviction thereby mandating that judgment on the multiple underlying felonies be arrested, that *dicta* is expressly disavowed.

Id. This Court has since followed *Barlowe* in addressing a situation in which the trial court sentenced defendant for first degree felony murder as well as for the two potential underlying felonies supporting the felony murder conviction. *See State v. Dudley*, 151 N.C. App. 711, 566 S.E.2d 843, *appeal dismissed and disc. rev. denied*, 356 N.C. 684, 578 S.E.2d 314 (2003). In *Dudley*, this Court noted that the merger rule

requires the trial court to arrest judgment on "at least one of the underlying felony murder convictions if two separate convictions supported the conviction for felony murder." *Id.* at 716, 566 S.E.2d at 847 (remanded the case with instructions to arrest one of the two felonies supporting the felony murder conviction). Where the trial court's jury instructions did not specify which of the multiple felonies were to be considered as the underlying felony for purposes of the felony murder conviction, it was within the trial court's discretion to select which felony conviction would serve as the underlying felony. *State v. Coleman*, 161 N.C. App. 224, 236, 587 S.E.2d 889, 897 (2003) (no error where trial court elected to arrest judgment on the attempted armed robbery conviction as the underlying felony for the felony murder conviction and to sentence defendant for three armed robbery convictions).

In the present case, the record was clear that the jury found that five felonies could support the felony murder charge: forcible rape, statutory rape, forcible sex offense, statutory sex offense, and felony child abuse with a deadly weapon. The trial court elected to arrest judgment on the felonious child abuse with a deadly weapon conviction. Following *Barlow*e, *Dudley*, and *Coleman*, we find no error.

In conclusion, for the reasons stated herein, we find no error at trial; the first degree rape and the first degree sex offense convictions are vacated and remanded.

No error in part; Vacated and remanded in part.

Judges WYNN and HUNTER concur.

STATE OF NORTH CAROLINA v. PATRICE M. PARKER AND RAMALLE D. HOLLOWAY

No. COA06-870

(Filed 21 August 2007)

1. Child Abuse and Neglect— sufficiency of evidence— defendants as perpetrators

In a prosecution for felony child abuse, there was sufficient evidence that defendants inflicted the injuries where the uncontradicted evidence was that the injuries could not have occurred accidentally and that the injuries occurred when the child was

under the sole care and supervision of defendants. Additionally, there was evidence that defendants had each altered the accounts they gave to doctors and investigators.

2. Criminal Law— prosecutor's argument—defendants not testifying—comment only on circumstantial evidence

The trial court did not err by not intervening ex mero motu in a prosecution for felony child abuse where the prosecutor argued that only three people knew what happened on the morning of the injury and that the parents had not testified. Taken in context, the prosecutor was arguing that the jury was left to consider only circumstantial evidence and did not suggest that defendants must be guilty because they did not testify. Moreover, the judge instructed the jury on the privilege of not testifying.

3. Criminal Law— equitable estoppel—not applicable

Equitable estoppel was not extended into a criminal case in which defendants argued that the State should be barred from presenting inconsistent theories of guilt.

4. Criminal Law— sufficiency of evidence—motion to dismiss and motion to set aside verdict

Where there was sufficient evidence to survive motions to dismiss, there was sufficient evidence to deny motions to set aside the verdicts for insufficient evidence.

5. Constitutional Law— unanimity of verdict—not raised by consistency of verdict and evidence

The question of whether a guilty verdict was consistent with the evidence did not raise the constitutional question of whether the verdict was unanimous.

6. Child Abuse and Neglect— alternate theories—not mutually inconsistent

The State did not argue mutually inconsistent theories in a felony child abuse prosecution where defendants were tried together, the evidence showed that they had sole custody of the child when he suffered his injury, both had the opportunity to commit the crime, and the State's position throughout was that both defendants had a hand in injuring the child. Furthermore, the State did not use objectively false evidence or make misrepresentations to the jury.

7. Criminal Law— mistrial denied—cross-examination ended and then continued

The trial court did not abuse its discretion by denying a mistrial after the court ended a cross-examination for badgering a witness, heard arguments out of the presence of the jury on the motion for a mistrial, and denied the motion but allowed the cross-examination to continue. The propriety of counsel's examination was not an issue for the jury to determine, and it is clear that the judge made a reasoned decision.

Appeal by Defendants from judgments entered 17 November 2005 by Judge Cy A. Grant, Sr. in Beaufort County Superior Court. Heard in the Court of Appeals 15 March 2007.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

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

Nora Henry Hargrove for Defendant Patrice M. Parker.

Sofie W. Hosford for Defendant Ramalle D. Holloway.

STEPHENS, Judge.

Ramalle Nayshawn Holloway ("Nayshawn") was born on 1 November 2002. On 25 December 2002, at approximately 11:00 a.m., Nayshawn's parents, Patrice Parker ("Defendant Parker") and Ramalle Holloway ("Defendant Holloway") (collectively "Defendants"), noticed that Nayshawn's breathing was labored and that his eyes were not bilateral or focused. Defendants eventually took Nayshawn to the Beaufort County Hospital, registering him at 2:29 p.m. Nayshawn was immediately treated by hospital staff and given oxygen, IV fluids, and antibiotics. At 4:50 p.m. Nayshawn was transferred by air to the pediatric intensive care unit at East Carolina University. The treating physicians determined that Nayshawn had severe brain damage and that his skull, ribs, collarbone, and femur were fractured. Overall, doctors believed that Nayshawn's injuries were intentionally inflicted, not accidental, and that Nayshawn suffered from "battered child syndrome." Nayshawn remains in a permanent vegetative state, is capable only of rudimentary gagging and swallowing functions, and is placed at a facility that cares for physically and developmentally challenged children.

On 10 November 2003, Defendants were indicted on charges of felony child abuse. Defendants were tried by a jury before the Honorable Cy A. Grant, Sr. during the 14 November 2005 session of Beaufort County Superior Court. The jury found both Defendants guilty as charged. Based on Defendant Holloway's prior record level of II, Judge Grant sentenced him to a prison term of 90 months minimum and 117 months maximum. Defendant Parker was sentenced to a minimum term of 44 months and a maximum term of 62 months imprisonment. Defendants appeal. For the reasons set forth below, we hold Defendants received a fair trial, free of error.

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[1] By their first arguments,[1] Defendants contend the trial court erred in denying their motions to dismiss because the State failed to present substantial evidence that either Defendant Parker or Defendant Holloway inflicted Nayshawn's injuries. We disagree.

"On a defendant's motion for dismissal on the ground of insufficiency of the evidence, the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996) (citing *State v. Vause*, 328 N.C. 231, 400 S.E.2d 57 (1991)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990) (citation omitted).

> If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

State v. Scott, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002) (quotation marks and citations omitted). "In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence." *State v. Thaggard*, 168 N.C. App. 263, 281, 608 S.E.2d 774, 786 (2005) (citation omitted). "Any contradictions or discrepancies arising from the evidence are properly left for the jury to

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1. Although Defendants filed separate briefs, because their first three arguments allege the same errors, we will address them together.

resolve and do not warrant dismissal." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996) (citation omitted). "If there is more than a scintilla of competent evidence to support the allegations . . . it is the court's duty to submit the case to the jury." *State v. Horner*, 248 N.C. 342, 344-45, 103 S.E.2d 694, 696 (1958) (citation omitted).

Our Supreme Court has held that

> [w]here an adult has exclusive custody of a child for a period of time and during such time the child suffers injuries which are neither self-inflicted nor accidental, the evidence is sufficient to create an inference that the adult inflicted an injury.

State v. Perdue, 320 N.C. 51, 63, 357 S.E.2d 345, 353 (1987) (citations omitted). Furthermore, upon a finding that the child suffered from "battered child syndrome," a logical presumption is raised "that someone 'caring' for the child was responsible for the injuries." *State v. Byrd*, 309 N.C. 132, 138, 305 S.E.2d 724, 729 (1983), *overruled on other grounds by State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987). Additionally, decisions from our Supreme Court have established "that false, contradictory or conflicting statements made by an accused concerning the commission of a crime may be considered as a circumstance tending to reflect the mental processes of 'a person possessed of a guilty conscience seeking to divert suspicion and to exculpate [himself].' " *State v. Myers*, 309 N.C. 78, 86, 305 S.E.2d 506, 511 (1983) (quoting *State v. Redfern*, 246 N.C. 293, 297-98, 98 S.E.2d 322, 326 (1957)).

Here, both Defendants were charged with felony child abuse in violation of N.C. Gen. Stat. § 14-318.4. That provision provides in relevant part that:

> A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious bodily injury to the child or who intentionally commits an assault upon the child which results in any serious bodily injury to the child, or which results in permanent or protracted loss or impairment of any mental or emotional function of the child, is guilty of a Class C felony. "Serious bodily injury" is defined as bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.

N.C. Gen. Stat. § 14-318.4(a3) (2001). Neither Defendant Parker nor Defendant Holloway contest the seriousness of Nayshawn's injuries. Rather, both assert that because Nayshawn had several caretakers and suffered injuries that could have occurred while Nayshawn was not in the care of Defendants, the State failed to establish that either Defendant Parker or Defendant Holloway perpetrated the abuse. We are not persuaded.

At trial, Dr. Russell Cooke, a board-certified pediatrician who treated Nayshawn at Beaufort County Hospital, testified that, based on the infant's "vitals, [and] given the blood loss, the onset of the traumatic event" would have been "a matter of hours, most likely, not days." Dr. Cooke testified further that the time lapse between the trauma and the manifestation of the injuries could have been "a matter of a few minutes, depending upon how severe the [blood] loss was." Dr. Ira Adler, a board-certified radiologist qualified in pediatric radiology, testified that he examined Nayshawn's medical scans and was of the opinion that the trauma which led to the swelling of Nayshawn's brain occurred within "six to 24 hours" of 8:00 p.m. on 25 December 2002. Dr. Adler testified further that "because of the findings of the blood in between the two hemispheres of the brain[,]" the injury was "very indicative of a shaking or an acceleration—deceleration injury." Additionally, Dr. Adler testified that, in his opinion, Nayshawn suffered from "battered child syndrome."

Hillary Parks ("Parks") and Russell Ball ("Ball"), friends of Defendants, described their visit with Defendants and Nayshawn on 24 December 2002. Parks stated that she spent the late afternoon and evening with Defendants, Nayshawn, and Ball, and that she and Ball left Defendants' house at approximately 11:00 p.m. Parks testified further that while she was there, Nayshawn "looked fine" and was not crying, moaning, or grunting. Likewise, Ball stated that during the evening, Nayshawn "was fine. There was nothing wrong with him at all." Statements that Defendants provided to investigators established that after Parks and Ball left their house, Defendants and Nayshawn went to sleep. Both Defendants alleged they then discovered Nayshawn's injuries the next day.

This evidence is sufficient to establish that the event which caused Nayshawn's brain injury occurred between 11:00 p.m. on 24 December 2002 and 2:29 p.m. on 25 December 2002, when he was admitted to Beaufort County Hospital. During this time, Nayshawn was under the sole care and supervision of Defendants. Furthermore,

the uncontradicted evidence established that Nayshawn's injuries could not have occurred accidentally.

Additionally, evidence was presented that Defendant Parker and Defendant Holloway each altered the accounts they provided to investigators and the doctors treating Nayshawn. For example, Defendant Holloway informed investigators that he was up for two hours while he fed Nayshawn and changed the baby's diaper during the early morning hours of Christmas Day. However, Defendant Holloway told the doctors treating Nayshawn "that this whole episode, meaning the feeding/diaper change, lasted about 45 minutes[;]" then he and Nayshawn went back to sleep. Similarly, Defendant Parker first claimed that she did not know what caused Nayshawn's injuries, but in April 2003, she informed investigators that Nayshawn was injured when, as she was carrying him, she "tripped over a toy . . . [and] Nayshawn fell out of [her] arms and hit the floor." Furthermore, each Defendant provided a different description of where Nayshawn was sleeping during Christmas morning. Defendant Holloway stated that Nayshawn was in his swing when he woke up at 11:00 a.m. Defendant Parker, on the other hand, informed investigators that she retrieved Nayshawn from his swing at 9:00 a.m. and that he slept in bed with her until 11:30 a.m. Additionally, after Nayshawn was injured, Defendant Holloway informed Ball that the baby was getting medical treatment because he had a cold. The inconsistencies between and the changes in each Defendant's account are clearly relevant and tend to show a guilty conscience and Defendants' efforts to divert suspicion from themselves. *See Myers*, *supra*.

While the evidence does not clearly demonstrate that either Defendant Parker or Defendant Holloway or both inflicted Nayshawn's injuries, from the substantial circumstantial evidence a reasonable inference is raised that Defendant Parker and Defendant Holloway committed the crime. This inference is strengthened by the undisputed expert testimony establishing that Nayshawn suffered from "battered child syndrome."

All of this evidence, taken in the light most favorable to the State, was sufficient to survive Defendants' motions to dismiss and to submit the case to the jury. Accordingly, Defendants' assignments of error related to the sufficiency of the evidence are overruled.

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[2] Next, Defendants argue the trial court erred by failing to intervene *ex mero motu* when, during closing arguments, the prosecutor made reference to each Defendant's failure to testify. We disagree.

Under the United States and North Carolina constitutions, a defendant has the right to refuse to testify at trial. *State v. Mitchell*, 353 N.C. 309, 543 S.E.2d 830, *cert. denied*, 534 U.S. 1000, 151 L. Ed. 2d 389 (2001). Therefore, "any reference by the State regarding [a defendant's] failure to testify is violative of his constitutional right to remain silent." *State v. Baymon*, 336 N.C. 748, 758, 446 S.E.2d 1, 6 (1994) (citation omitted). "A prosecutor violates [this rule] if 'the language used [was] manifestly intended to be, or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.' " *State v. Rouse*, 339 N.C. 59, 95-96, 451 S.E.2d 543, 563 (1994) (quoting *United States v. Anderson*, 481 F.2d 685, 701 (4th Cir. 1973), *aff'd*, 417 U.S. 211, 41 L. Ed. 2d 20 (1974)), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995), *overruled on other grounds by State v. Hurst*, 360 N.C. 181, 624 S.E.2d 309, *cert. denied*, ––– U.S. –––, 166 L. Ed. 2d 131 (2006). "However, in closing argument, the prosecutor 'may properly bring to the jury's attention the failure of a defendant to produce exculpatory evidence or to contradict evidence presented by the State.' " *State v. Campbell*, 359 N.C. 644, 680, 617 S.E.2d 1, 24 (2005) (quoting *State v. Parker*, 350 N.C. 411, 431, 516 S.E.2d 106, 120 (1999), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681 (2000)), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006).

Defendants concede that their trial counsel did not object to the allegedly improper statements of the prosecutor. When a defendant fails to object to a closing argument, this Court must determine whether the challenged comment was "so grossly improper" that the trial court should have intervened *ex mero motu*. *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364 (quotation marks and citation omitted), *cert. denied*, 540 U.S. 971, 157 L. Ed. 2d 320 (2003). "Only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693 (citation omitted), *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996). On appeal,

> the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offend-

> ing attorney; and/or (2) instructed the jury to disregard the improper comments already made.

State v. Jones, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002).

In the case *sub judice*, the prosecutor made the following statements that Defendants assert constitute reversible error:

> Ladies and gentlemen, the only thing I'm going to say about this is *Mr. Holloway did not testify*, and because he did not testify you can't guess or speculate about what he would have said.
>
> His plea of not guilty . . . is basically him saying the State has to prove its case, and that's what we're going to do in this case, and that's what we have done is this case.
>
> Now, let's talk about possibilities. Remember three people, three people know what happened to Nayshawn on Christmas morning 2002. One is Patrice Parker, one is Ramalle Holloway, and one is Nayshawn.
>
> *And you haven't heard testimony from the defendants*, and really you haven't heard testimony[2] from Nayshawn in a way, but I think you have. I think he tells you who did this. He doesn't tell you it in his own voice. He has the voice of the doctors.
>
> In a sense he has the voice of his parents, because they kind of tell you who did this. They don't tell you who did it, but they only leave you to one conclusion that they did it, and that's his testimony in this case and that's why we're here. That's what justice is about.

(Emphasis added). While the prosecutor's closing argument pushes the boundaries of what is proper, we hold it was not such an extreme impropriety that the trial court should have been compelled to act. Taken in the context in which it was made, the prosecutor's statement does not allege or even suggest that Defendants must be guilty because they did not testify. Rather, the statement explains that because of the absence of direct evidence and Defendants' failure to provide exculpatory evidence, the jury is left to consider only circumstantial evidence to reach their decision. Furthermore, in his instructions to the jury, Judge Grant directed that although "neither

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2. Each Defendant's assignment of error limits review of the prosecutor's closing argument at this point. To understand the context in which the statement was made and to promote thorough appellate review, we have included additional portions of the argument in this opinion.

defendant in this case has testified[,] . . . [t]he law give a defendant this privilege. This same law also assures a defendant that this decision not to testify creates no presumption against the defendant. Therefore the silence of the defendant is not to influence your decision in any way." In this case, based on the circumstantial evidence upon which the State was forced to rely, the trial court did not err in failing to intervene. Accordingly, this argument is overruled.

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[3] Defendants next contend that the trial court erred in failing to set aside the jury's verdicts. Defendants argue that the State was barred by equitable estoppel from arguing inconsistent theories of guilt to the jury, that the evidence did not support each Defendant's conviction, and that the State violated each Defendant's constitutional rights by presenting inconsistent theories of guilt to the jury. We cannot agree.

"Equitable estoppel prevents one party from taking inconsistent positions in the same or different judicial proceedings, and 'is an equitable doctrine designed to protect the integrity of the courts and the judicial process.' " *State v. Taylor*, 128 N.C. App. 394, 400, 496 S.E.2d 811, 815 (quoting *Medicare Rentals, Inc. v. Advanced Servs.*, 119 N.C. App. 767, 769, 460 S.E.2d 361, 363, *disc. review denied*, 342 N.C. 415, 467 S.E.2d 700 (1995)), *aff'd per curiam*, 349 N.C. 219, 504 S.E.2d 785 (1998). While this doctrine has a long and storied history in civil cases, this Court has recognized that " 'as far as we can tell, th[e] obscure doctrine [of judicial estoppel] has never been applied against the government in a criminal proceeding[.]' " *Taylor*, 128 N.C. App. at 400, 496 S.E.2d at 815 (quoting *United States v. Kattar*, 840 F.2d 118, 129-30 n. 7 (1st Cir. 1988)). Defendants provide no authority to support the application of this doctrine to the criminal context and our research reveals none. We thus decline to extend the reach of this principle into the criminal arena. Accordingly, Defendants' arguments based on equitable estoppel are overruled.

[4] Defendants further contend the trial court erred in failing to set aside the verdicts against them because there was insufficient evidence to support the convictions. As with their motions to dismiss, Defendants assert that because there was no direct evidence that either Defendant Parker or Defendant Holloway inflicted Nayshawn's injuries, the motions to set aside the verdicts should have been granted. Again, we disagree.

"The standard of review of a trial court's denial of a motion to set aside a verdict for lack of substantial evidence is the same as review-

ing its denial of a motion to dismiss . . . ." *State v. Duncan*, 136 N.C. App. 515, 520, 524 S.E.2d 808, 811 (2000) (citation omitted). Since we have held that the State presented sufficient evidence to survive each Defendant's motion to dismiss, it follows that Defendants' motions to set aside the verdicts based on the alleged lack of substantial evidence should also be denied. Accordingly, this argument is overruled.

[5] Finally, both Defendants contend the trial court's denial of their motions to set aside the verdicts violated their constitutional rights. Relying on the North Carolina Constitution, Defendant Holloway argues that the trial court's denial of his motion violated his right that any criminal conviction "shall be . . . by the unanimous verdict of a jury in open court." This constitutional argument is not properly before us. In making his motion to set aside the verdict to the trial court, Defendant Holloway's attorney argued that "the guilty verdict [was] . . . inconsistent with the evidence." This argument raised only the sufficiency of the State's evidence to support Defendant Holloway's conviction. It did not present for the trial court's consideration any alleged constitutional violation in Defendant Holloway's case. Because this constitutional argument was not raised before the trial court, we will not consider it on appeal. *See State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) (holding that "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal") (citation omitted).

[6] Defendant Parker asserts that the trial court's denial of her motion to set aside the verdict violated her due process rights because the State impermissibly proceeded under two alternative theories of guilt by which it sought to convict both Defendant Parker and Defendant Holloway. We disagree.[3]

In *State v. Leggett*, 135 N.C. App. 168, 519 S.E.2d 328 (1999), *appeal dismissed and disc. review denied*, 351 N.C. 365, 542 S.E.2d 650 (2000), this Court held that it was not improper for the State to argue different theories at two different trials when the evidence presented was not inconsistent. In so holding, the Court relied on the fact

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3. In its brief, the State contends that Defendant Parker did not preserve her due process argument because she did not specifically argue a due process violation to the trial court. However, a review of the transcript reveals that Judge Grant was aware of a potential due process objection based on the State's arguing inconsistent theories of guilt to the jury. Therefore, although Defendant Parker's motion to the trial judge to set aside the verdict did not specifically utilize the term "due process," we conclude that her argument that the motion should be granted because there were "alternative and totally inconsistent theories presented as to the guilt" was sufficient to preserve her due process issue on appeal.

that there was "no indication that [the] evidence was objectively false or that any knowing misrepresentations were made to the jury." *Id.* at 175, 519 S.E.2d at 333. Additionally, the *Leggett* Court determined that "[b]ecause only the co-defendants know who actually fired the fatal shots at each victim, it was appropriate for the State to argue alternative but not mutually inconsistent theories at different trials." *Id.* at 176, 519 S.E.2d at 334.

Here, although both Defendants were tried together, it was not a violation of Defendant Parker's due process rights for the prosecution to argue alternative but not mutually inconsistent theories. The evidence before the trial court tended to show that both Defendants had sole custody of Nayshawn at the time he suffered his brain injury and femur and skull fractures, and that both had the opportunity to commit the crime. Additionally, the State did not argue mutually inconsistent theories. In his closing argument, the prosecutor stated "if you decide [Defendant Holloway] did it, and he did it alone, find her not guilty. If you decide [Defendant Parker] did it, and she did it alone, find him not guilty. But you have evidence to conclude beyond a reasonable doubt that they're both guilty." From this argument, it is clear that the State's position throughout the case was that both Defendants had a hand in injuring Nayshawn. Furthermore, as in *Leggett*, the prosecutor did not use objectively false evidence against Defendants or make misrepresentations to the jury. On the contrary, like the defendants in *Leggett*, because Defendant Parker and Defendant Holloway are the only ones who know what happened to Nayshawn, it was not improper for the State to argue alternative but not mutually inconsistent theories of Defendants' guilt to the jury. This assignment of error is overruled.

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[7] Defendant Holloway additionally assigns as error the trial court's failure to grant a mistrial for making allegedly improper statements in the presence of the jury. We disagree.

Under North Carolina law, a trial judge "must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2005). Our Supreme Court has recognized that a "[m]istrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict." *State v. Stocks*, 319 N.C. 437, 441, 355 S.E.2d 492, 494 (1987) (citation omitted). On appeal, this Court

reviews a trial court's failure to grant a mistrial for an abuse of discretion. *State v. Hagans*, 177 N.C. App. 17, 628 S.E.2d 776 (2006). A trial court abuses its discretion if the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision. *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985).

At trial, Defendant Holloway moved for a mistrial when, during his trial counsel's cross-examination of Dr. Michael E. Reichel, one of the pediatricians who treated Nayshawn, the trial court interjected and the following exchange occurred:

THE COURT: Wait a minute, I'm not going to let you sit here and badger argue with the witness—

MR. KING: —but Judge, he's not responsive to my question.

THE COURT: Keep arguing with me [and] you're not going to ask any more questions.

MR. KING: Judge I ask—

THE COURT: —step down. End cross-examination.

After this exchange, out of the presence of the jury, Defendant's attorney moved for a mistrial. After hearing arguments from counsel, Judge Grant denied the motion, but allowed Mr. King to continue his cross-examination.

Defendant Holloway argues that Judge Grant's action in stopping cross-examination and his statement that Defendant Holloway's attorney was "badger[ing]" the witness constituted an impermissible expression of an opinion in violation of the Criminal Procedure Act. *See* N.C. Gen. Stat. § 15A-1222 (2005) (stating that a "judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury"). However, the courts of our State have "long held that the scope and manner of examination of witnesses are matters which are ordinarily governed by the trial judge who may take appropriate measures to restrict improper questioning by counsel." *State v. Searles*, 304 N.C. 149, 157, 282 S.E.2d 430, 435 (1981) (citation omitted). In *State v. Alverson*, 91 N.C. App. 577, 579, 372 S.E.2d 729, 730 (1988), this Court held that a trial court did not violate N.C. Gen. Stat. § 15A-1222 when the judge stated that the defendant's attorney was " 'badgering the witness' and 'arguing' on cross-examination" because "[a]ll of the comments were routinely made in the course of the right and duty the trial judge had to control examination and cross-examination of witnesses[.]"

Here, Judge Grant's actions and comments were directed solely at counsel's conduct during cross-examination and therefore were proper under *Alverson*. Furthermore, the plain language of section 15A-1222 prohibits the trial court from expressing an opinion on a "fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222. Because the propriety of counsel's cross-examination was not an issue of fact for the jury to determine, Judge Grant's actions or comments in no way violated section 15A-1222 of the Criminal Procedure Act. Moreover, because the trial court discussed the matter and heard argument from Defendant's counsel outside the presence of the jury before making his decision to deny the motion for a mistrial, it is clear that Judge Grant made a reasoned decision and did not abuse his discretion. Accordingly, this assignment of error is overruled.

For the reasons stated, we hold Defendants received a fair trial, free of error.

NO ERROR.

Judges McGEE and ELMORE concur.

RODNEY ROW, PLAINTIFF v. LEIGH ROW (DEESE), DEFENDANT

No. COA06-1692

(Filed 21 August 2007)

1. Appeal and Error— untimely notice of appeal

Defendant's attempt to appeal from the 12 January 2006 contempt order by filing a notice of appeal on 27 June 2006 is dismissed, because: (1) N.C. R. App. P. 3(c)(1) allows a party thirty days after entry of judgment to file and serve a notice of appeal; and (2) the notice of appeal in the instant case was filed more than five months after the entry of the 12 January 2006 contempt order which was a final rather than an interlocutory order. On those same grounds, plaintiff's attempt to appeal from the 12 January 2006 contempt order and 13 January 2006 child custody order by filing a notice of appeal on 20 June 2006 is dismissed. The only appeal properly before the Court of Appeals is plaintiff's 20 June 2006 notice of appeal from the 30 May 2006 order to modify child support and uphold the constitutionality of the child support guidelines.

2. Child Support, Custody, and Visitation— Supremacy Clause—child support guidelines

The trial court did not err in a modification of child support and custody case by concluding the child support guidelines are not violative of the Supremacy Clause of the U.S. Constitution based on an alleged failure to comply with the congressional standard under 45 C.F.R. § 302.56 which requires the State to consider and analyze case data on the cost of raising children when performing its four-year review of the guidelines.

3. Child Support, Custody, and Visitation— child support guidelines—Equal Protection

The trial court did not err in a modification of child support and custody case by concluding the child support guidelines are not violative of the Equal Protection Clause of the United States Constitution because not only do noncustodial and custodial parents not fall within the definition of a suspect class, but neither the United States Supreme Court nor our Supreme Court has ever held that a suspect class includes noncustodial and custodial parents.

4. Child Support, Custody, and Visitation— child support guidelines—Procedural Due Process

The trial court did not err in a modification of child support and custody case by concluding the child support guidelines are not violative of Procedural Due Process rights, because: (1) not only did plaintiff file a motion concerning the constitutionality of the guidelines and request for deviation from the guidelines, but the trial court conducted a two day hearing on the matter; and (2) plaintiff was afforded the opportunity to put on witnesses, cross-examine witnesses, and admit evidence.

5. Child Support, Custody, and Visitation— child support guidelines—Substantive Due Process

The trial court did not err in a modification of child support and custody case by concluding the child support guidelines are not violative of Substantive Due Process rights, because: (1) the State has a compelling state interest in regulating child support obligations to ensure that parents support their children so that children will not become wards of the State; and (2) the guidelines establish a rebuttable presumption, and thus the State has narrowly drawn the act to express only the legitimate state interests.

6. Child Support, Custody, and Visitation— modification of support—findings of fact—calculation of expenses

The trial court did not err in a modification of child support and custody case by allegedly failing to consider the evidence presented when making its findings of fact, including consideration of expenses for the children totaling $2,650.85 per month, because: (1) the affidavits were competent evidence on which the trial court was allowed to rely in determining the costs of raising the parties' children; (2) the trial court did not err in its calculation of medical insurance when the evidence showed that defendant provided necessary medical coverage through her job for the children since the military did not cover all of her daughter's medical expenses; and (3) if plaintiff wanted the trial court to consider the amount of $2,472 which plaintiff stated was the amount of the tuition for the two months the children are in Hawaii for the summer, he should have increased his monthly expenses for tuition accordingly.

7. Child Support, Custody, and Visitation— child support guidelines—deviation

The trial court did not err or abuse its discretion in a modification of child support and custody case by its application and deviation from the child support guidelines, because: (1) the trial court relied on plaintiff's financial affidavit to determine his monthly expense for his children; and (2) based on the evidence before the trial court, the slight deviation was not manifestly unsupported by reason.

Appeal by Plaintiff and Defendant from judgments entered 12 January 2006, 13 January 2006, and 30 May 2006 by Judge William C. Lawton in District Court, Cumberland County. Heard in the Court of Appeals 5 June 2007.

Mast, Schulz, Mast, Johnson & Wells, P.A., by George Mast, Bradley N. Schulz, and Ron L. Trimyer, Jr., for Plaintiff-Appellant.

Armstrong & Armstrong, P.A., by Marcia H. Armstrong, for Defendant-Appellant.

Attorney General Roy A. Cooper III, by Special Duty Attorney General Gerald K. Robbins, for the State.

WYNN, Judge.

"The Supremacy Clause of the United States Constitution provides that federal laws supercede state laws in conflict with federal laws."[1] In this case, Plaintiff Rodney Row contends, *inter alia*, that federal provisions under the Aid to Families with Dependent Children Act (AFDC) pre-empt parts of the North Carolina Child Support Guidelines. Because Congress has not positively required by direct enactment that state law be pre-empted in the area of child support enforcement, we hold that federal law does not pre-empt certain portions of the North Carolina Child Support Guidelines.

Plaintiff Rodney Row ("Plaintiff") and Defendant Leigh Row ("Defendant")[2] married in 1991 and had two children, born in 1991 and 1995. The parties separated in 1999 and on 24 January 2001, the trial court entered an order awarding the parties joint custody, with primary physical custody given to Defendant and ordered Plaintiff to pay child support in the amount of $700.00 per month. Thereafter, the parties filed several motions to modify custody and child support resulting in the first appeal to this Court in which we affirmed in part, vacated in part, and remanded. *See Row v. Row*, 158 N.C. App. 744, 582 S.E.2d 80 (2003) (holding the trial court did not abuse its discretion in finding the best interest of the children require the continuation of primary physical custody with defendant and secondary custody with plaintiff and the trial court failed to make sufficient findings of fact and conclusions of law for this Court to determine whether the Guidelines were followed.).

On 2 February 2004, Plaintiff moved to modify child support and requested a determination of the legality of the 2002 North Carolina Child Support Guidelines ("guidelines").[3] The trial court modified Plaintiff's child support obligation to $1331.80 and denied review of the legality of the Child Support Guidelines. On 22 March 2005, Plaintiff filed a motion for modification of child support and custody, followed by a motion for contempt against Defendant for failing to abide by the 13 November 2001 custody order. On 26 July 2005, Plaintiff filed a supplemental amended motion in the cause to set child support, modification of child support, and determination of

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1. *Boynton v. Esc Medical System, Inc.*, 152 N.C. App. 103, 109, 566 S.E.2d 730, 733 (2002).

2. Defendant has since remarried and her surname is now Deese.

3. Subsequently, this motion was modified on 5 February 2004.

whether North Carolina Child Support Guidelines comply with the law.

On 12 January 2006, the trial court found Defendant in contempt for failing to make flight arrangements for the Thanksgiving 2003 visitation, as required by the child custody order. A permanent child custody order was entered by the trial court on 13 January 2006. On 30 May 2006, the trial court entered an order which concluded: that the 2002 North Carolina Child Support Guidelines are constitutional, that there was no substantial change of circumstances warranting a modification of Plaintiff's child support; that each party is allowed one dependent exemption as long as Plaintiff pays child support at or above the level he was ordered to pay under the previous order, and that Plaintiff is allowed to claim the older child as a dependent exemption on his federal and state income tax returns.

[1] Preliminarily, we dismiss Defendant's attempt to appeal from the 12 January 2006 contempt order by filing a notice of appeal on 27 June 2006. Rule 3(c)(1) of the North Carolina Rules of Appellate Procedure allows a party thirty days after entry of judgment to file and serve a notice of appeal. Here, the notice of appeal was filed more than five months after the entry of the 12 January 2006 contempt order which was a final rather than an interlocutory order. Accordingly, Defendant's appeal must be dismissed. On those same grounds, we dismiss Plaintiff's attempt to appeal from the 12 January 2006 contempt order and 13 January 2006 child custody order by filing a notice of appeal on 20 June 2006. Thus, the only appeal properly before this Court is Plaintiff's 20 June 2006 notice of appeal from the 30 May 2006 order to modify child support and uphold the constitutionality of the guidelines.

In his appeal, Plaintiff contends that the trial court committed error by: (I) upholding the constitutionality of the guidelines; (II) failing to accurately consider the evidence presented in making its findings of fact in regard to the parent's expenses; and (III) failing to deviate from the child support guidelines.

I.

The standard of review for questions concerning constitutional rights is de novo. *Stetser v. TAP Pharm. Prods. Inc.*, 165 N.C. App. 1, 14, 598 S.E.2d 570, 588-89 (2004) (citation omitted). Furthermore, when considering the constitutionality of a statute or act there is a "presumption . . . in favor of constitutionality, and all doubts must be

resolved in favor of the act." *Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 55 N.C. App. 134, 144-45, 285 S.E.2d 110, 117 (1981) (citation omitted), *appeal dismissed and disc. review denied*, 305 N.C. 300, 291 S.E.2d 150 (1982).

[2] Plaintiff first argues that the guidelines "are violative of the supremacy clause of the U.S. Constitution." Plaintiff contends that the guidelines are null and void under the Supremacy Clause for its failure to comply with the congressional standard under 45 C.F.R. § 302.56 which requires the State, when performing its four-year review of the Guidelines, to consider and analyze case data on the cost of raising children.

To understand the basis for Plaintiff's appeal, we must understand the origin of our child support guidelines. North Carolina participates in the federal aid to Families with Dependent Children program ("AFDC"), which provides benefits to certain needy families under the Social Security Act. *See* 42 U.S.C. § 601 et. seq. (2006). As a part of this act, and to qualify for federal funds, North Carolina's child support program must conform with the requirements set forth in Title IV, Part D of the Social Security Act. *See* 42 U.S.C. § 651-669b (2006). Under the federal act, North Carolina must establish child support guidelines for child support amounts and review these guidelines "at least once every 4 years to ensure that their application results in determination of appropriate child support award amounts." 42 U.S.C. § 667(a) (2006). Under Title 45, Section 302.56(h) of the Code of Federal Regulations, which codifies the administrative interpretation of this requirement:

> a State must consider economic data on the cost of raising children and analyze case data, gathered through sampling or other methods, on the application of, and deviations from, the guidelines. The analysis of the data must be used in the State's review of the guidelines to ensure that deviations from the guidelines are limited.

45 C.F.R. § 302.56(h) (2006).

"The Supremacy Clause of the United States Constitution provides that federal laws supercede state laws in conflict with federal laws." *Boynton v. Esc Medical System, Inc.*, 152 N.C. App. 103, 109, 566 S.E.2d 730, 733 (2002). When considering the issues surrounding the Supremacy Clause, the United States Supreme Court has expressed that:

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.
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> . . .
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> The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law.

Pearson v. C.P. Buckner Steel Erection Co., 348 N.C. 239, 244, 498 S.E.2d 818, 821 (1998) (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69, 90 L. Ed. 2d 369, 381-82, (1986)).

Here, there is no indication that Congress pre-empted the State in this area. The federal statute prescribed minimal requirements and encourages the State to act in accordance with the statutes, in order to receive federal funding. Furthermore, the United States Supreme Court has consistently recognized that

> the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States. . . . On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has positively required by direct enactment that state law be pre-empted. . . . Before a state law governing domestic relations will be overridden, it must do major damage to clear and substantial federal interests.

Rose v. Rose, 481 U.S. 619, 625, 95 L. Ed. 2d 599, 607 (1987) (internal quotations and citations omitted).

At trial, Plaintiff's expert admitted, on cross-examination by the State, that North Carolina's child support guidelines comply with the

federal regulation, 45 C.F.R. § 302.56, but continued to aver, throughout the State's cross-examination, that the guidelines are not economically sound. Based upon this testimony, Plaintiff argues that use of the incomes shares model by our guidelines is not the best way to determine a parent's child support amount. However, this alone does not make the guidelines unconstitutional. Indeed, at a minimum, North Carolina guidelines: "(1)[t]ake into consideration all earnings and income of the noncustodial parent[,] (2) [are] . . . based on specific descriptive and numeric criteria and result in a computation of the support obligation; and (3) [p]rovide for the child(ren)'s health care needs, through health insurance coverage or other means." 45 C.F.R. §§ 302.56(c)(1)-(3) (2005).

Additionally, North Carolina's guidelines were reviewed by Policy Studies, Inc. ("PSI") in 2002. PSI updated the schedule in order "to consider more current economic factors. . . . [T]he economic factors considered in the update are changes to price levels; measurements of child rearing costs based on more recent data; changes in the federal poverty guidelines; and changes in federal and state tax rates and FICA." Plaintiff's characterization that North Carolina "merely updated the cost tables based on the same assumptions" is somewhat misleading. The review conducted by PSI took into account "current economic data on the costs of raising children[,]" however, North Carolina decided to remain with the income shares model. 56 Fed. Reg. 22335-01 (May 15, 1991). Furthermore, the guidelines were approved by the Secretary of the United States Department of Health and Human Services[4] ("the secretary") and the secretary has taken no action to reduce or suspend the State's federal funds.

Accordingly, we hold that the trial court did not error in determining that the North Carolina Child Support Guidelines are not unconstitutional based on the Supremacy Clause of the United States Constitution.

[3] Plaintiff next argues that the guidelines violate the Equal Protection Clause of the United States Constitution. The Fourteenth Amendment of the United States Constitution guarantees that no state "shall deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. Traditionally, courts employ a two-tiered scheme of analysis when an equal protection claim is made. *Texfi Industries, Inc. v. Fayetteville*, 301 N.C. 1, 10,

4. Apart of the secretary's duties is to review and approve the State plans. 42 U.S.C. § 652(a)(3) (2006).

269 S.E.2d 142, 149 (1980) (citations omitted). If the governmental or legislative act disadvantages a fundamental right or a suspect class, the upper tier or strict scrutiny of equal protection analysis is employed. *Id.* at 11, 269 S.E.2d at 149. "[A] class is deemed suspect when it is saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command particular consideration from the judiciary." *Id.* (internal quotations and citations omitted). If the equal protection does not involve a fundamental right or a suspect class, then the lower tier or rational basis of equal protection analysis applies. *Id.*

In this case, Plaintiff contends that non-custodial parents versus custodial parents constitute a suspect class and is analogous to heightened scrutiny afforded gender-based discriminatory statutes. We disagree. Not only do non-custodial and custodial parents not fall within the definition of a suspect class, neither the United States Supreme Court nor our Supreme Court has ever held that a suspect class includes non-custodial and custodial parents. Hence, the trial court did not error by holding that Plaintiff failed to show that the guidelines as applied to Plaintiff violate his Equal Protection Rights.[5]

[4] Next, Plaintiff argues that the guidelines violate his Procedural Due Process rights. We disagree.

Our Supreme Court has noted that "[t]he fundamental premise of procedural due process protection is notice and the opportunity to be heard. . . at a meaningful time and in a meaningful manner." *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998) (internal quotations and citations omitted).

Here, not only did Plaintiff file a motion concerning the constitutionality of the guidelines and a request for deviation from the guidelines, the trial court conducted a two day hearing on the matter. Plaintiff was afforded the opportunity to put on witnesses, cross-examine witnesses, and admit evidence. It is apparent that Plaintiff had ample opportunity and did in fact exercise his Procedural Due Process Rights; thus, we find no error.

[5] Plaintiff next argues that the guidelines violated his Substantive Due Process rights. We disagree.

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5. Plaintiff did not set forth an argument with regards to a fundamental right under the Equal Protection Clause, nor did he argue that the State lacked a rational basis to implement the guidelines.

Under Substantive Due Process, "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. The U.S. Supreme Court has "recognized that one aspect of liberty protected by Due Process Clause of the Fourteenth Amendment is a right of personal privacy." *Carey v. Population Services Int'l*, 431 U.S. 678, 684, 52 L. Ed. 2d 675, 684 (1977) (internal quotations and citations omitted). This protected right of personal privacy includes activities "relating to marriage, procreation, contraception, family relationships[,] . . . child rearing[,] and education." *In re Truesdall*, 63 N.C. App. 258, 268, 304 S.E.2d 793, 800 (1983), *modified*, 313 N.C. 421, 329 S.E.2d 630 (1985) (citation omitted). "Where certain fundamental rights are involved, the Court has held that regulation limiting these rights may be justified only by a compelling state interest . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Id.* at 269, 304 S.E.2d at 800 (internal quotes and citation omitted).

Here, the State has a compelling state interest in regulating child support obligations. The State wants to ensure that parents support their children, so that the children will not become wards of the State. Furthermore, the guidelines establishes a rebuttable presumption and

> [i]f, after considering the evidence, the Court finds by the greater weight of the evidence 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 Court may vary from the guidelines

N.C. Gen. Stat. § 50-13.4(c) (2005). By allowing for a rebuttable presumption the State has "narrowly drawn the act to express only the legitimate state interests." *Truesdall*, 313 N.C. at 269, 304 S.E.2d at 800.

Accordingly, the trial court did not err by concluding that Plaintiff's Substantive Due Process Rights were not violated.

II.

[6] Plaintiff further argues that the trial court committed reversible error because it failed to accurately consider the evidence presented when it made its findings of fact. Specifically, Plaintiff challenges the trial court's consideration of expenses for the children and avers

that the trial court miscalculated the monthly expenses at $2,650.85 per month.

The standard of review for findings made by a trial court sitting without a jury is "whether any competent evidence exists in the record to support" said findings. *Hollerbach v. Hollerbach*, 90 N.C. App. 384, 387, 368 S.E.2d 413, 415 (1988). Findings of fact are conclusive if supported by competent evidence, irrespective of evidence to the contrary. *Heating & Air Conditioning Associates*, *Inc. v. Myerly*, 29 N.C. App. 85, 89, 223 S.E.2d 545, 548, *appeal dismissed and disc review denied*, 290 N.C. 94, 225 S.E.2d 323 (1976).

Here, Plaintiff contends that some expenses credited to Defendant were either incorrect or not calculated for him. However, Plaintiff did not claim certain expenses on his financial affidavit and Defendant did claim certain expenses on her affidavit. Thus, the trial court considered the information as presented by the parties. For example, in Plaintiff's financial affidavit he failed to attribute any part of his mortgage, home tax, insurance, electricity, heat, telephone, grocery, eating out, car payment, gas, transportation for visitation, or maintenance for his vehicle to the children. However, in reviewing Defendant's financial affidavit she attributed part of her expenses for these items to her children.

Now, Plaintiff wants this Court to consider information outside the financial affidavit, *i.e.* expert testimony, in order determine his expenses. But, we refuse to do so. Plaintiff, upon signing his financial affidavit, duly swore "to the truthfulness and completeness of [his] Financial Affidavit." The affidavits were competent evidence in which the trial court was allowed to rely on in determining the cost of raising the parties' children.

Plaintiff also contends that the trial court miscalculated the children medical expenses because the military provides coverage at no charge. However, Defendant presented evidence to show that she provides medical coverage through her job for the children and that this medical coverage was necessary, because the military did not cover all of her daughter's medical expenses. Based on the evidence submitted at the hearing, the trial court did not err in its calculation of the medical insurance.

Furthermore, Plaintiff argues that the trial court failed to consider the tuition he incurred for private school during the summer months. However, based on the information provided by Plaintiff, via

his financial affidavit, his monthly expense for tuition was only $103.00 per child. Considering he has the children for approximately two to two and half months, the trial court correctly determined Plaintiff's total expense for both children at $1,505.25 per year. If Plaintiff wanted the trial court to consider the amount of $2,472.00, which Plaintiff states is the amount of the tuition for the two months the children are in Hawaii for the summer, he should have increased his monthly expenses for tuition accordingly. Based on the financial affidavit submitted to the trial court, we find no error in the findings of fact regarding the children's expenses.

III.

[7] Finally, Plaintiff argues that the trial court committed reversible error and an abuse of discretion in its application and deviation from the guidelines. Specifically, Plaintiff contends that the trial court erroneously applied unconstitutional guidelines to set child support and deviated "insignificantly" from the guidelines. We disagree.

In order to deviate from the guidelines, the trial court: (1) shall hear evidence; (2) make findings of fact relating to the reasonable needs of the child for support and the relative ability of each parent to provide support; (3) if the trial court determines by a "greater weight of the evidence 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 Court may deviate[;]" and (4) if the trial court deviates from the guidelines then it "shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered." N.C. Gen. Stat. § 50-13.4(c) (2005).

"A trial court's deviation from the Guidelines 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). The trial court's "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.' " *Id.* (quoting *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 868 (1985)).

We have determined that the guidelines are constitutional, therefore, we reject Plaintiff's argument concerning the constitutionality of the guidelines. Furthermore, the trial court relied on the Plaintiff's financial affidavit to determine his monthly expense for his children.

After considering both parties affidavits, the trial determined that: ". . . A) $1,505.25/yr. while in plaintiffs primary custody[;] B) $22,610.00/yr. while in defendant's primary custody (10 months of the year), represented $2,261 per month exclusive of costs of school where the children have always attended[;] C) $7,695.00/yr. costs of school."

Based on all the evidence that was before the trial court, we cannot say that its slight deviation was "manifestly unsupported by reason." *Id.* Accordingly, we find no error.

In sum, we hold that the trial court did not error by determining that the 2002 North Carolina Child Support Guidelines were constitutional. Furthermore, we hold that the trial court did not err in its consideration of the evidence and its deviation from the guidelines.

Affirmed in part, dismissed in part.

Judges HUNTER and BRYANT concur.

THOMAS E. McCLURE, JAMES ROWELL AND ELDRIDGE PAINTER, PLAINTIFFS v. THE COUNTY OF JACKSON, THE JACKSON COUNTY BOARD OF COMMISSIONERS, THE JACKSON COUNTY AIRPORT AUTHORITY, GARY BUCHANAN, EDWIN H. MADDEN, JR., AND EDWARD RILEY, DEFENDANTS

No. COA06-867
No. COA06-938

(Filed 21 August 2007)

1. Appeal and Error— appealability—mootness—attorney fees

Plaintiff's motion to dismiss defendants' appeal from the 14 February 2006 judgment determining that defendants improperly removed plaintiff from his position as a member and chairman of the Airport Authority is granted, because: (1) plaintiff's term of office in the Airport Authority has expired, and any analysis by the Court of Appeals of the legality of the proceedings below cannot have any practical effect on the existing controversy; (2) both parties conceded during oral argument that the appeal of plaintiff's status as a member of the Airport Authority was moot, and that the only issue to be resolved was the question of attorney

fees; (3) an interest in attorney fees is insufficient to create a case or controversy; (4) the issue of attorney fees is thereafter determinable under the court's continuing equitable jurisdiction and is most appropriately determined in the first instance by the district court on remand; and (5) the trial court's award of attorney fees does not stave off the mootness of the nonattorney fees portion of defendant's appeal.

2. Costs— attorney fees—jurisdiction

The trial court did not have jurisdiction to enter an award of attorney fees after defendants had filed notice of appeal from the judgment of 14 February 2006, and the entry of an award of attorney fees is remanded to the trial court, because: (1) the rationale under *Surles*, 113 N.C. App. 32 (1993), is not applicable under the present version of N.C.G.S. § 1A-1, Rule 58 since the amended rule now provides that a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court; (2) the trial court's purported reservation of attorney fees did not allow it to retain jurisdiction of that issue since a court cannot create jurisdiction where none exists; and (3) N.C.G.S. § 1-294 specifically divests the trial court of jurisdiction unless it is a matter not affected by the judgment appealed from, and the exception under N.C.G.S. § 1-294 is inapplicable when the attorney fees were based upon plaintiff being the prevailing party in the proceedings.

Appeal by defendant from judgment entered 14 February 2006 and order entered 21 April 2006 by Judge Zoro J. Guice, Jr. in Jackson County Superior Court. Heard in the Court of Appeals 20 February 2007.

McGuire, Wood & Bissette, P.A., by Joseph P. McGuire, for plaintiffs-appellees.

Rose Rand Attorneys, P.A., by Jeffrey P. Gray and J. Yancey Washington, for defendants-appellants.

STEELMAN, Judge.

When the questions originally in controversy between the parties are no longer at issue, the case is moot and should be dismissed. After the trial court enters a written judgment and notice of appeal has been given, the trial court is *functus officio* and without jurisdiction to enter an award of attorney's fees. The better practice is for the trial

court to enter its written judgment only after all issues, including attorney's fees, have been decided.

The Jackson County Airport Authority was established by Jackson County for the operation and maintenance of airport facilities. The Economic Development Commission ("EDC") of Jackson County was created pursuant to N.C. Gen. Stat. § 158-8. Thomas E. McClure ("plaintiff") was appointed by the Board of Commissioners to serve as a member of the Airport Authority in August 2000. Thereafter, plaintiff was elected as chairman of the Airport Authority, serving in that capacity until 12 January 2005. Plaintiff's term as a member of the Airport Authority was to expire in August 2006. Plaintiff was appointed to the EDC by Western Carolina University, which employed Plaintiff as the director of the University's Office of Regional Affairs, and was subsequently elected chairman of the EDC.

On 12 January 2005, the Jackson County Board of Commissioners, in closed session, discussed the "qualifications, competence, performance, [and] fitness" of plaintiff in these positions. The commissioners then reconvened in open session, voting to remove plaintiff from all county committees and appointments. The commissioners also voted that plaintiff return all "records, books, bank statements, documents, and minutes" pertaining to the EDC and the Airport Authority. The Board of Commissioners did not provide plaintiff with advance notice or an opportunity to be heard prior to his removal from these positions.

On 12 January 2005, the sheriff of Jackson County arrived at plaintiff's office, demanding that McClure return all records, books, bank statements, minutes, and other documents related to the EDC. On 14 January 2005, Gary Buchanan ("Buchanan"), a member of the Airport Authority, accompanied by a deputy sheriff, seized from plaintiff all records and other documents related to his position as a member and chairman of the Airport Authority.

On 23 March 2005, plaintiff filed a verified complaint against Jackson County, the Jackson County Board of Commissioners, the Jackson County Airport Authority, Buchanan, Edwin H. Madden, Jr. (Jackson County Commissioner), and Edward Riley (person appointed by Commission to plaintiff's seat on the Airport Authority) (hereinafter, "defendants"), seeking a declaration that defendants acted unlawfully in removing plaintiff from the EDC and the Airport Authority, and also seeking reinstatement to the positions by way of a temporary restraining order, preliminary injunction, and permanent

injunction. James Rowell and Eldridge Painter, members of the Airport Authority, joined the lawsuit as additional plaintiffs.

On 31 March 2005, the trial court entered a temporary restraining order, directing that the Airport Authority was enjoined from meeting or conducting business pending the court's hearing of plaintiff's motion for a preliminary injunction. On 13 April 2005, the trial court entered a preliminary injunction, restoring plaintiff as a member and chairman of the Airport Authority. The court found as a fact that the Board of Commissioners "provided McClure with neither advance notice nor any opportunity to be heard to contest the removal[,]" and concluded that plaintiff "[has] a likelihood of success on the merits of [his] claim that the action of the Board of Commissioners to remove McClure as a member of the Airport Authority without notice or opportunity to be heard was contrary to law."

On 27 April 2005, plaintiff filed a verified amended complaint, alleging that by convening in closed session to discuss the removal of plaintiff from his appointed positions, defendants violated the North Carolina Open Meetings Law, N.C. Gen. Stat. § 143-318.11(a)(3). Plaintiff further alleged that the Board of Commissioners denied plaintiff due process of law by failing to provide plaintiff with notice or an opportunity to be heard before his removal from the appointed positions. In his amended complaint, plaintiff sought a declaration that "[d]efendants' actions [complained of were] . . . unlawful[,]" and that McClure was improperly removed from the EDC and the Airport Authority. Plaintiff also sought injunctive relief, restoring plaintiff to his office as a member and chairman of the Airport Authority.

This case went to trial on 8 February 2006, and a jury was empaneled. However, counsel for plaintiff asserted that the action was one seeking declaratory relief and there was no issue for the jury to decide. Counsel for defendants did not dispute this contention. The trial judge ruled that there were no issues of fact to be submitted to the jury, discharged the jury, and heard the matter without a jury.

On 14 February 2006, the trial court entered judgment in favor of plaintiff, declaring the removal of McClure from the Airport Authority to be "null and void" and ordering him to be "restored and reinstated as a member and chair of the Airport Authority." The court concluded that the Board of Commissioners violated N.C. Gen. Stat. § 143.318.11(a)(3) by "considering in closed session the qualifications, competence, performance, fitness, and/or removal of McClure as a member of the [Airport Authority]." The court further concluded

that "[b]y summarily removing McClure from the Airport Authority, without notice or opportunity to be heard, the Board of Commissioners denied McClure due process of law."

The trial court stated in its 14 February 2006 judgment that "[t]he Court will retain jurisdiction over this matter to hear any motions by the Plaintiff[] to recover their costs and attorney fees." On 23 February 2006, plaintiff filed a motion for costs and attorney's fees pursuant to N.C. Gen. Stat. § 6-1, 6-20, 6-19.1 and 7A-314. Plaintiff also moved for attorney's fees pursuant to the Open Meetings Law, N.C. Gen. Stat. § 143-318.16B. On 16 March 2006, defendants filed notice of appeal from the trial court's 14 February 2006 judgment. On 3 April 2006, the trial court heard plaintiff's motion for costs and attorney's fees. On 21 April 2006, the trial court granted plaintiff's motion, entering an order awarding costs and attorney's fees in the amount of $36,347.75. On 5 May 2006, defendants filed notice of appeal from the trial court's order awarding attorney's fees.

This case comes before this Court on two separate appeals, COA 06-867, which is the appeal of the 14 February 2006 judgment, and COA 06-938, which is the appeal of the 21 April 2006 order awarding costs and attorney's fees. On 11 September 2006, plaintiff filed a motion to dismiss the appeal as moot, because plaintiff's term as a member and chairman of the Airport Authority expired in August 2006. Because the background of these appeals is identical and the issues presented are completely intertwined, we address them in a single opinion.

I: Mootness

[1] We first consider plaintiff's motion to dismiss defendants' appeal as being moot. We conclude that defendants' appeal is moot and dismiss the appeal, with the exception of defendants' appeal of the attorney's fees awarded to plaintiff.

The North Carolina Supreme Court has stated that "[a] case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison County Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996). In the opinion of *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), the North Carolina Supreme Court stated:

> Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in

> controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.

"Unlike the question of jurisdiction, the issue of mootness is not determined solely by examining facts in existence at the commencement of the action. If the issues before a court . . . become moot at any time during the course of the proceedings, the usual response should be to dismiss the action." *Id.* at 148, 250 S.E.2d at 912; *see also McKinney v. Board of Comm'rs*, 278 N.C. 295, 179 S.E.2d 313 (1971) (holding that plaintiff's action seeking an injunction to restrain the defendants from preparing for and holding an election was moot when the election had actually been held, and therefore, plaintiff's appeal was properly dismissed).

In the instant case, the trial court ruled that defendants improperly removed plaintiff from his position as a member and chairman of the Airport Authority. In their appeal, defendants assert that the trial court erred as follows: (1) failing to submit questions of fact to the jury; (2) failing to conduct a *de novo* bench trial and relying upon evidence presented at the preliminary injunction hearing; (3) disregarding evidence presented at the bench trial; (4) holding that plaintiff had a due process right in his position in the Airport Authority; and (5) refusing to allow defendants to amend their answer to assert a statute of limitations defense. All of these arguments go to the merits of "questions originally in controversy between the parties[,] [which] are no longer at issue[.]" *Peoples*, 296 N.C. at 147, 250 S.E.2d at 912. Since plaintiff's term of office in the Airport Authority has expired, any analysis by this Court of the legality of the proceedings below "cannot have any practical effect on the existing controversy." *Roberts*, 344 N.C. at 398-99, 474 S.E.2d at 787. At oral argument, both counsel conceded that the appeal of plaintiff's status as a member of the Airport Authority was moot, and that the only issue to be resolved is the question of attorney's fees.

Defendants, however, contend that while the dispute over the removal of plaintiff as a member of the Airport Authority is itself moot, this Court must still resolve these issues since they have a direct bearing on whether the trial court erred in awarding attorney's fees to plaintiff.

In the federal courts, "[a] great deal of ink has been spilled . . . addressing the question whether plaintiffs' demand for attorneys' fees staves off mootness." *Gates v. Towery*, 430 F.3d 429, 430 (7th Cir.

2005). In North Carolina courts, the specific question of whether a claim for attorney's fees, in and of itself, prevents the mootness of related claims has not been addressed. Decisions of lower federal courts may be persuasive in our courts, but they are not binding authority. *In re Truesdell*, 313 N.C. 421, 428-29, 329 S.E.2d 630, 634-35 (1985) (stating that "[a]lthough we recognize that this Court is not bound by the decision from the Federal court, we are nevertheless mindful of the legal maxim, *ratio est legis amina*, reason is the soul of the law").

In *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480, 110 S. Ct. 1249, 1255 (1990), the United States Supreme Court concluded that an "interest in attorney's fees is, of course, insufficient to create [a] case or controversy[.]" *See also United States v. Ford*, 650 F.2d 1141, 1143-44 (9th Cir. 1981), *cert. denied*, 455 U.S. 942, 71 L. Ed. 2d 654 (1982).

The Fourth Circuit concluded in *S-1 & S-2 v. Spangler*, 832 F.2d 294, 297 n.1 (4th Cir. 1987), that an appeal was moot despite a party's assertion of attorney's fees and costs claims, observing that, "[a]ny other rule would largely nullify the mootness doctrine with respect to cases brought under the myriad federal statutes that authorize fee awards." *Id.* (citing *Flesch v. Eastern Pa. Psychiatric Inst.*, 472 F. Supp. 798, 802 (E.D. Pa. 1979)).

If a claim for attorney's fees does not stave off mootness, we must next consider whether this Court must examine the merits of the mooted question to decide whether plaintiff was entitled to attorney's fees. We are persuaded by the logic of *Spangler*. In *Spangler*, the court stated that the "[t]he issue [of attorney's fees] is thereafter determinable under the court's continuing equitable jurisdiction, . . . and is most appropriately determined in the first instance by the district court on remand." *Spangler*, 832 F.2d at 297 (citing *Doe v. Marshall*, 622 F.2d 118, 119 (5th Cir. 1980)). We conclude that, although the examination of the merits of the mooted question would be merely an exercise in "determin[ing] [an] abstract proposition[] of law[,]" *Peoples*, 296 N.C. at 147, 250 S.E.2d at 912, the issue of attorney's fees here is "most appropriately determined . . . by the [trial] court on remand." *Spangler*, 832 F.2d at 297.

We hold that defendants' claims with regard to the appropriateness of the trial court's award of attorney's fees does not stave off the mootness of the non-attorney's fees portion of defendant's appeal. This portion of defendant's appeal is moot and is dismissed.

B: Jurisdiction of Trial Court to Enter Attorney's Fees Order

[2] We next address whether the trial court had jurisdiction to enter an award of attorney's fees after the defendant had filed notice of appeal from the judgment of 14 February 2006.

The issue of jurisdiction over the subject matter of an action may be raised at any time during the proceedings, including on appeal. *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006). This Court is required to dismiss an appeal *ex mero motu* when it determines the lower court was without jurisdiction to decide the issues. *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 86 (1986).

The question of whether the trial court had jurisdiction to decide the issue of attorney's fees is addressed by N.C. Gen. Stat. § 1-294, the pertinent portion of which reads:

> When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

"[T]he general rule has been that a timely notice of appeal removes jurisdiction from the trial court and places it in the appellate court." *Parrish v. Cole*, 38 N.C. App. 691, 693, 248 S.E.2d 878, 879 (1978). Pending appeal, "the trial judge is [generally] *functus officio*, subject to two exceptions and one qualification, none of which are applicable to the instant case." *Kirby Bldg. Systems, Inc. v. McNiel*, 327 N.C. 234, 240, 393 S.E.2d 827, 831 (1990) (citations omitted).

This Court has dealt in a number of cases with the question of whether a trial court has jurisdiction to enter an award of attorney's fees following the filing of notice of appeal. In *Brooks v. Giesey*, 106 N.C. App. 586, 590-91, 418 S.E.2d 236, 238 (1992), this Court stated that:

> Under a statute such as section 6-21.5, which contains a "prevailing party" requirement, the parties should not be required to litigate fees when the appeal could moot the issue. Furthermore, upon filing of a notice of appeal, a trial court in North Carolina is divested of jurisdiction with regard to all matters embraced within or affected by the judgment which is the subject of the appeal. N.C. Gen. Stat. § 1-294 (1983).

This logic was followed in the case of *Gibbons v. Cole*, 132 N.C. App. 777, 782, 513 S.E.2d 834, 837 (1999). In that case, the trial court entered an order, dismissing plaintiff's complaint. At the time of the hearing, defendants moved for an award of attorney's fees and filed affidavits in support of the motion. The trial court in the written order of dismissal set a hearing on the motion for attorney's fees for a later date, in order to allow plaintiffs an opportunity to review and respond to the affidavits. Prior to the hearing on attorney's fees, plaintiffs filed notice of appeal. A hearing was subsequently held, and attorney's fees were awarded to defendants. We held that "the appeal by plaintiffs from the judgment on the pleadings deprived the superior court of the authority to make further rulings in the case until it returns from this Court." *Id.*

There are several cases which appear to indicate a contrary result but are distinguishable. In *In re Will of Dunn*, 129 N.C. App. 321, 500 S.E.2d 99 (1998), this Court held that in a will caveat case, the trial court could enter an award of attorney's fees after the filing of notice of appeal, because the "decision to award costs and attorney's fees was not affected by the outcome of the judgment from which caveator appealed[.]" *Id.* at 329, 500 S.E.2d at 104-05. This holding is restricted to caveat proceedings where the trial court has the discretion to award attorney's fees as costs to attorneys for both sides. *Id.* at 330, 500 S.E.2d at 105. In the case of *Surles v. Surles*, 113 N.C. App. 32, 437 S.E.2d 661 (1993), the trial court orally announced its judgment in a child custody case in open court, expressly reserving the issue of attorney's fees. Prior to the entry of a written judgment, one of the parties gave notice of appeal. Subsequently, the trial court conducted a hearing on a motion for attorney's fees. Written orders on the custody matter and attorney's fees were entered after the notice of appeal was filed. This Court held that the trial court "retained the authority to consider the issue since attorney's fees were within the court's 'oral announcements' " and the written orders "conformed substantially" to those "oral announcements." *Id.* at 43, 437 S.E.2d at 667.

We note that *Surles* was decided in 1993, and dealt with orders entered on 31 October 1991. This was a time of great confusion in the law of North Carolina as to whether an order or judgment was "entered" at the time of an oral pronouncement from the bench or upon the filing of a written judgment. This issue was finally resolved by the enactment of Chapter 594 of the 1993 Session Laws. This statute, applicable to judgments entered on or after 1 October 1994,

amended Rule 58 of the North Carolina Rules of Civil Procedure to provide that "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." Thus, the fact situation set forth in *Surles* cannot occur under the present law, since prior to the filing of a written judgment, there would have been nothing from which to appeal. We hold that the rationale of *Surles* is not applicable under the present version of Rule 58 of the North Carolina Rules of Civil Procedure.

We next address whether the trial court's purported "reservation" of the attorney's fees issue allowed it to retain jurisdiction of that issue. It is fundamental that a court cannot create jurisdiction where none exists. *See In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003). N.C. Gen. Stat. § 1-294 specifically divests the trial court of jurisdiction unless it is a matter "not affected by the judgment appealed from." When, as in the instant case, the award of attorney's fees was based upon the plaintiff being the "prevailing party" in the proceedings, the exception set forth in N.C. Gen. Stat. § 1-294 is not applicable.

While we understand that the interests of judicial economy would clearly be better served by allowing the trial court to enter an order on attorney's fees and then having the matter come up to the appellate courts as a single appeal, we cannot create jurisdiction for the trial court to enter the award of attorney's fees in violation of N.C. Gen. Stat. § 1-294. Further, the facts in *Gibbons* are indistinguishable from the instant case. One panel of the Court of Appeals cannot overrule another panel that has previously decided the identical issue. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). When faced with the possibility of an award of attorney's fees, the better practice is for the trial court to defer entry of the written judgment until after a ruling is made on the issue of attorney's fees, and incorporate all of its rulings into a single, written judgment. This will result in only one appeal, from one judgment, incorporating all issues in the case.

We reverse the entry of an award of attorney's fees by the trial court and remand this matter to the trial court for entry of an appropriate order, containing findings of fact and conclusions of law pertinent to the statutory provisions under which plaintiff seeks attorney's fees. As noted in the portion of the opinion dealing with mootness, even though the case in chief is moot, the trial court may, under appropriate circumstances, award attorney's fees and costs, pursuant to its equitable jurisdiction.

II: Conclusion

For the reasons discussed above, we dismiss the appeal of the trial court's order of 14 February 2006 for mootness, reverse the trial court's order awarding plaintiff attorney's fees for lack of jurisdiction, and remand the case to the superior court for consideration of the question of attorney's fees consistent with this opinion.

DISMISSED IN PART, REVERSED AND REMANDED IN PART.

Judges WYNN and JACKSON concur.

STATE OF NORTH CAROLINA v. STEVEN CHARLES PRUSH

No. COA06-1213

(Filed 21 August 2007)

1. Sexual Offenses— first-degree sexual offenses—two acts of fellatio—sufficiency of evidence

The State presented sufficient evidence to support defendant's conviction on two counts of first-degree sexual offense against a child where the child testified at trial that defendant performed two acts of fellatio on him, although the child also gave inconsistent testimony as to whether a second act of fellatio occurred; and corroborating evidence from a detective and a forensic interviewer was presented that the child had stated that defendant performed fellatio on him once in defendant's garage and once behind a shed.

2. Sentencing— calculation of prior record level—elements of prior convictions—stipulation

The trial court erred in calculating defendant's prior record level where defendant was sentenced for several sexual offenses against a child, including first-degree sexual offense; none of defendant's prior convictions included all of the elements of first-degree sexual offense; and the judge erred by adding an additional point pursuant to N.C.G.S. § 15A-1340(b)(6), which raised his prior record level. Defendant's stipulation to that prior record level is ineffective because comparison of the elements of criminal offenses does not require the resolution of disputed facts.

Appeal by Defendant from judgments entered 22 March 2006 by Judge Edwin G. Wilson, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 23 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General David Gordon, for the State.

Jarvis John Edgerton, IV, for Defendant.

STEPHENS, Judge.

Defendant was sentenced to two consecutive terms of 433 to 529 months in prison after a jury convicted him of two counts of first-degree sexual offense, N.C. Gen. Stat. § 14-27.4(a) (2005), two counts of indecent liberties with a minor, N.C. Gen. Stat. § 14-202.1 (2005), and one count of disseminating obscenity, N.C. Gen. Stat. § 14-190.1 (2005). On appeal, Defendant argues that the trial court erred in (1) denying his motion to dismiss one of the first-degree sexual offense charges for insufficient evidence and (2) sentencing him at prior record level V instead of prior record level IV. For the reasons stated herein, we find no error in Defendant's conviction but remand for resentencing.

FACTS

The State's evidence at trial tended to show that "Diane" lived with her two sons, "Charlie" and "Chad," a few houses down from Defendant.[1] On 17 May 2005, Diane discovered pornographic magazines behind a shed in her backyard. Diane asked Charlie what he knew about the magazines, and Charlie told her that he had been given them by Defendant. At that time, Charlie was six years old and Defendant was in his forties. Diane called the police, and a Winston-Salem Police Department officer responded to her call. Charlie told the police officer that Defendant had "touched" him. Thereupon, the Winston-Salem Police Department commenced an investigation.

Detective K.D. Israel was assigned to investigate the case. As part of his investigation, Detective Israel arranged to have Charlie interviewed by Susan Vaughn, a forensic interviewer. During an interview with Ms. Vaughn on 5 July 2005, Charlie told Ms. Vaughn that Defendant had committed two acts of fellatio on him: once in Defendant's garage and once behind the shed in Charlie's backyard. On 7 July 2005, Detective Israel confronted Defendant with Charlie's allegations, but Defendant denied ever inappropriately touching

1. Pseudonyms will be used throughout the opinion to protect the child's privacy.

Charlie. On 8 July 2005, Detective Israel interviewed Charlie, and Charlie described two times that Defendant had performed fellatio on him: once in Defendant's garage and once behind the shed. Defendant was subsequently arrested, indicted, and convicted.

SUFFICIENCY OF THE EVIDENCE

[1] Defendant first argues that the trial court erred in denying his motion to dismiss the charge of first-degree sexual offense in case number 05 CRS 58325 because there was insufficient evidence "that a second sexual act of fellatio occurred beyond the one [Defendant] was convicted for in case number 05 CRS 58324." We disagree.

Our standard of review of a trial court's ruling on a motion to dismiss for insufficient evidence " 'is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense.' " *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Scott*, 356 N.C. at 597, 573 S.E.2d at 869 (citing *State v. Mann*, 355 N.C. 294, 560 S.E.2d 776, *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002)). The evidence must be viewed " 'in the light most favorable to the State, giving the State the benefit of all reasonable inferences.' " *Scott*, 356 N.C. at 596, 573 S.E.2d at 869 (citation omitted). " 'Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.' " *Id.*

Under North Carolina law, a person is guilty of a first-degree sexual offense if the person engages in a "sexual act" with a child under the age of thirteen, the person being at least twelve years old and at least four years older than the child. N.C. Gen. Stat. § 14-27.4(a)(1) (2005); *see also State v. Griffin*, 319 N.C. 429, 355 S.E.2d 474 (1987) (listing the elements of first-degree sexual offense). "Sexual act" is defined as cunnilingus, fellatio, analingus, and anal intercourse, as well as any penetration, however slight, by any object into the genital or anal opening of the child's body. N.C. Gen. Stat. § 14-27.1(4) (2005).

In this case, it is undisputed that at the time of the events in question Charlie was under the age of thirteen and Defendant was at least twelve years old and at least four years older than Charlie. It is similarly undisputed that Defendant performed one act of fellatio on Charlie. Defendant's argument is that there was insufficient evidence of a second act of fellatio.

At trial, Charlie, then age seven, first testified that Defendant put his mouth on Charlie's penis five times: three times in the woods, once in Defendant's garage, and once behind Charlie's shed:

> Q. Okay. We're talking about if anybody—if anybody ever touched you on your private parts, okay?
>
> A. Okay.
>
> Q. Who touched you on your private part?
>
> A. Steve.
>
> Q. And when he touched you, where were you?
>
> A. Woods first.
>
> Q. Okay. And was there a second time?
>
> A. Three times.
>
> Q. So, can we do it one at a time?
>
> A. Yes.
>
> Q. So, the first time [Defendant] touched you, where did it happen?
>
> A. Woods.
>
> . . . .
>
> Q. And . . . when you were in the woods, is that the only thing—well, what did—did [Defendant] touch your front part with?
>
> A. His hand.
>
> Q. And was that the only thing he touched your front part with?
>
> A. No.
>
> Q. What other part of [Defendant] touched your body? Do you remember your body parts?
>
> A. Yes.
>
> . . . .
>
> Q. So—you said he used another part to touch you?
>
> A. Uh-huh.
>
> Q. What part was it?
>
> A. His mouth.

Q. And what did he touch on your body with his mouth?

A. My front part.

. . . .

Q. What else happened in the woods?

A. He touched me on my bottom.

. . . .

Q. So, did all this happen on the first time?

A. No.

Q. When did all of this happen?

A. I forgot.

Q. All right. Did—you said something happened three times?

A. Yes.

Q. Was it the first time this happened?

A. It happened five times.

Q. Okay.

A. It happened three times in the woods and it happened—it happened one time in the garage and one time in the back of my shed.

When asked more particularly about the incident in the garage, however, Charlie contradicted his earlier testimony that Defendant put his mouth on Charlie's penis on that occasion:

Q. And on—on the—in the—in the garage, did all three things happen that you just said?

A. No.

Q. What happened in the garage?

A. He felt my bottom.

. . . .

Q. And anything else happen?

A. He touched my front part.

Q. Okay. And what else happened?

A. That's all.

Likewise, when asked more particularly about the incident behind the shed, Charlie contradicted his earlier testimony that Defendant put his mouth on Charlie's penis on that occasion:

> Q. Okay. What happened in the shed—I mean—behind the shed?
>
> A. He touched me in my—in my—he touched me at my front part.
>
> Q. With what?
>
> A. His hands.
>
> Q. Anything else?
>
> A. He rubbed my bottom.
>
> Q. And anything else?
>
> A. That's all.

Finally, Charlie testified as follows:

> Q. Now, how many times did [Defendant] put his mouth on your private part?
>
> A. One.
>
> Q. And where did that take place?
>
> A. In the woods.
>
> Q. And how many times did he touch you with his hand on your private part?
>
> A. Three.
>
> Q. And how many times did he touch your bottom with his private—I mean—with his hand?
>
> A. Three.
>
> Q. Okay. But he only touched you with your [sic] mouth at—in the woods?
>
> A. Yes.

Corroborating Charlie's initial testimony,[2] Detective Israel testified, without defense objection, that Charlie told him Defendant had twice performed fellatio on him: once in Defendant's garage and once

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2. The State's contention that Detective Israel's testimony and the videotaped interview with Ms. Vaughn constitute substantive evidence is without merit. In his instructions to the jury, the trial judge properly limited this evidence to corroborative purposes.

behind Charlie's shed. Again without objection, the State published Ms. Vaughn's videotaped interview with Charlie to the jury in which Charlie stated that Defendant twice performed fellatio on him: once in Defendant's garage and once behind Charlie's shed. Such evidence corroborates Charlie's initial testimony that Defendant performed fellatio on him more than one time. Viewing the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences, and recognizing that contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve, we conclude that the State presented substantial evidence that more than one sexual act occurred. Defendant's argument is overruled.

SENTENCING

[2] In his final argument, Defendant contends that the trial court erred in sentencing him at prior record level V instead of prior record level IV despite Defendant's express stipulation to his prior record level:

> [PROSECUTOR]: . . . Your Honor, for purposes of sentencing, the defendant is a record Level V.
>
> Mr. Ferguson, [defense counsel,] do you wish to stipulate to his level of being a Level V?
>
> MR. FERGUSON: I will stipulate.

Defendant so stipulated after the State introduced Defendant's prior record level worksheet which assigned fourteen points for prior convictions and one point pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(6) (2005) because "all the elements of the present offense are included in any prior offense[.]" Defendant does not now dispute that the trial court correctly assigned fourteen points for prior convictions. *See State v. Alexander*, 359 N.C. 824, 616 S.E.2d 914 (2005) (finding trial court's imposition of felony sentence proper where defense counsel stipulated to defendant's prior record level which was calculated based solely on the existence of one prior conviction). Defendant argues that since the crime of first-degree sexual offense "contains an element not found in any of [Defendant's] prior convictions," the trial court erred in assigning the fifteenth point which, pursuant to N.C. Gen. Stat. § 15A-1340.14(c), increased his prior record level from IV to V. We agree.

"If an offender is convicted of more than one offense at the same time, the court may consolidate the offenses for judgment and im-

pose a single judgment for the consolidated offenses." N.C. Gen. Stat. § 15A-1340.15(b) (2005). Such a judgment "shall contain a sentence disposition specified for the class of offense and *prior record level of the most serious offense*[.]" *Id.* (Emphasis added.)

"[T]he court shall determine the prior record level for the offender pursuant to G.S. 15A-1340.14." N.C. Gen. Stat. § 15A-1340.13(b) (2005). "The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions . . . ." N.C. Gen. Stat. § 15A-1340.14(a) (2005).

> Points are assigned as follows:
>
> . . . .
>
> (3) For each prior felony Class E, F, or G conviction, 4 points.
>
> . . . .
>
> (5) For each prior misdemeanor conviction as defined in this subsection, 1 point. . . .
>
> (6) If all the elements of the present offense are included in any prior offense for which the offender was convicted, whether or not the prior offense or offenses were used in determining prior record level, 1 point.

N.C. Gen. Stat. § 15A-1340.14(b) (2005). "[I]f an offender is convicted of more than one offense in a single superior court during one calendar week, only the conviction for the offense with the highest point total is used" to calculate a prior record level. N.C. Gen. Stat. § 15A-1340.14(d) (2005). "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists . . . ." N.C. Gen. Stat. § 15A-1340(f) (2005). Prior convictions shall be proved by, *inter alia*, "[s]tipulation of the parties." N.C. Gen. Stat. § 15A-1340(f)(1) (2005).

In this case, the trial court consolidated the convictions in case number 05 CRS 58324 (first-degree sexual offense, indecent liberties with a child, and disseminating obscenity) and the convictions in case number 05 CRS 58325 (first-degree sexual offense and indecent liberties with a child) for sentencing. The "most serious" offense in each consolidated judgment is first-degree sexual offense, a Class B1 felony. N.C. Gen. Stat. § 14-27.4(b) (2005). Pursuant to N.C. Gen. Stat. § 15A-1340.15(b), then, the trial court was required to sentence Defendant according to his prior record level for that offense.

Under the circumstances of this case, the elements of first-degree sexual offense are (1) the defendant engaged in a sexual act, (2) the victim was at the time of the act twelve years old or less, and (3) the defendant was at that time at least twelve years old and four or more years older than the victim. N.C. Gen. Stat. § 14-27.4(a)(1); *Griffin*, 319 N.C. 429, 355 S.E.2d 474. The prior offenses for which Defendant was assigned points included two misdemeanors and the Class F felonies of indecent liberties with a minor on 11 July 1983, failure to register as a sex offender and felonious restraint on 13 May 1988, and indecent liberties with a minor on 13 July 1988. None of Defendant's prior convictions include all of the elements of first-degree sexual offense. *See, e.g.*, *State v. Fuller*, 166 N.C. App. 548, 603 S.E.2d 569 (2004) (listing elements of indecent liberties with a minor). Thus, the trial court erred in adding the fifteenth point.

In *State v. Hanton*, 175 N.C. App. 250, 623 S.E.2d 600 (2006), this Court held that the determination of whether the elements of an out-of-state criminal offense were substantially similar to the elements of a North Carolina criminal offense " 'does not require the resolution of disputed facts.' " *Id.* at 254, 623 S.E.2d at 604 (quoting *State v. Van Buren*, 98 P.3d 1235, 1241 (Wash. Ct. App. 2004)). Rather, the Court held, such a determination "involves statutory interpretation, which is a question of law." *Id.* at 255, 623 S.E.2d at 604 (citing *Dare County Board of Educ. v. Sakaria*, 127 N.C. App. 585, 492 S.E.2d 369 (1997)). Similarly, the comparison of the elements of two North Carolina criminal offenses does not require the resolution of disputed facts, but is a matter of law. " 'Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate . . . .' " *Id.* at 253, 623 S.E.2d at 603 (quoting *State v. Prevette*, 39 N.C. App. 470, 472, 250 S.E.2d 682, 683, *appeal dismissed and disc. review denied*, 297 N.C. 179, 254 S.E.2d 38 (1979)). Thus, Defendant's stipulation is ineffective in determining whether "all the elements of the present offense are included in any prior offense." This case is remanded for resentencing.

NO ERROR IN TRIAL; REMANDED FOR RESENTENCING.

Chief Judge MARTIN and Judge STEELMAN concur.

STATE OF NORTH CAROLINA v. BRODERICK TERRELL MORRIS

No. COA06-1316

(Filed 21 August 2007)

Kidnapping— amendment of indictment—purpose of confinement, restraint, or removal—substantial alteration

The trial court's amendment of a kidnapping indictment that removed an allegation that the victim was seriously injured and changed the alleged purpose of defendant's confinement, restraint or removal of the victim from "facilitating the commission of a felony" to "facilitating inflicting serious injury" constituted a substantial alteration of the charge against defendant and prejudiced defendant's ability to prepare for trial.

Judge HUNTER concurring in part and dissenting in part.

Appeal by defendant from judgment entered 11 January 2006 by Judge J. Gentry Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General V. Lori Fuller, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant.

ELMORE, Judge.

On 9 January 2006, a jury found Broderick Terrell Morris (defendant) guilty of second-degree kidnapping and assault inflicting serious injury. On 11 January 2006, the trial court entered judgment against defendant, consolidated defendant's convictions for sentencing, and sentenced defendant to twenty to thirty-three months in prison. Defendant now appeals, contending that the trial court's amendment of the indictment against him substantially altered the charge and unfairly prejudiced his defense. Because we hold that the trial court's amendment of the indictment was in error, we vacate defendant's kidnapping conviction, grant him a new trial on that charge, and remand for resentencing.

On 26 November 2004, defendant allegedly broke into his girlfriend's home, argued with her, and beat her severely. His girlfriend, Freda, called her mother, Berta, the next day, requesting that Berta

take her to the hospital. When Berta asked Freda why, Freda told her that she and defendant "got into it, that he had broke in that night."

As Berta was not able to leave work, Berta and Freda called Freda's sister, Misty. Misty took Freda to the hospital, where Freda repeated her story to doctors and police, stating that defendant broke into her home, held her against her will, and beat her.

At trial, however, Freda recanted her former statements, claiming that on the night in question, she let defendant into her home; that they argued, in part, over defendant's involvements with other women; that defendant attempted to leave several times; that as defendant attempted to leave, Freda tried to kick him in the back, and in the process fell, thus sustaining injuries; that defendant was concerned for her health and asked to take her to the hospital but that Freda refused; and that in response to Freda yelling at him as he left, defendant punched and broke the window on his way out. Freda explained her claimed prior lack of honesty by stating that her family did not approve of defendant and that she feared that they would be angry and cease helping her financially if she admitted to having consented to seeing defendant.

Freda's testimony was contradicted by the testimony given by Berta, Misty, Officer Robert A. Murfitt, Detective Veda Strother, and Doctor Michael Thomason. Defendant offered no evidence in his defense.

On appeal, defendant first contends that the trial court erred in amending the kidnapping indictment. We agree.

The original bill of indictment alleges that:

> [O]n or about and between the 26th day of November, 2004, and the 27th day of November, 2004, in Mecklenburg County, Broderick Terrell Morris did unlawfully, willfully and feloniously kidnap Freda . . ., a person who had attained the age of sixteen (16) years, by unlawfully confining her, restraining her, and removing her from one place to another, without her consent, and for the purpose of facilitating the commission of a felony. Freda . . . was seriously injured.

At trial, the judge amended the indictment, stating, "Given the State's position [that it announced at the beginning of trial its intention to proceed on a second-degree, rather than first-degree, kidnapping theory], and the Defendant's lack of objection . . . this bill of

indictment should be amended to reflect the charge that the State's proceeding on . . . ." Accordingly, the trial judge made the following changes: "The last sentence, Freda . . . , was seriously injured would be stricken. The last sentence, therefore, would read confining, restraining her, and removing her from one place to the other without her consent for the purpose of facilitating inflicting serious injury."

Our Supreme Court recently stated,

> In enacting Chapter 15A of the General Statutes, the Criminal Procedure Act, the General Assembly provided that a bill of indictment may not be amended. This Court has interpreted that provision to mean a bill of indictment may not be amended in a manner that substantially alters the charged offense. In determining whether an amendment is a substantial alteration, we must consider the multiple purposes served by indictments, the primary one being to enable the accused to prepare for trial.

State v. Silas, 360 N.C. 377, 379-80, 627 S.E.2d 604, 606 (2006) (quotations, citations, and alterations omitted).

Our General Statutes define the crime of kidnapping, in pertinent part, as follows:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is *for the purpose of*:
>
> ***
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person
>
> ***
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped . . . had been seriously injured . . ., the offense is kidnapping in the first degree and is punishable as a Class C felony.

N.C. Gen. Stat. § 14-39 (2005) (emphasis added).

Defendant contends that by changing the alleged purpose of the "confinement, restraint or removal," the State substantially altered the indictment, to the detriment of his ability to prepare for trial. The State counters that the change in the indictment merely specified on which of the two purposes listed in the original indictment the State chose to proceed.

Contrary to the State's suggestion, it is clear from reading the original indictment that the State originally alleged that defendant confined, restrained, or removed Freda "for the purpose of facilitating the commission of a felony." Likewise, the inclusion of the allegation that she "was seriously injured" was obviously intended to elevate the crime to the first degree. The change was a substantial alteration.

This conclusion is consistent with our prior holdings in analogous cases. *See*, *e.g.*, *State v. Brown*, 312 N.C. 237, 247-48, 321 S.E.2d 856, 862-63 (1984) (granting a new kidnapping trial where a judge instructed that the defendant could be found guilty if he removed, restrained or confined the alleged victim for the purpose of terrorizing her, rather than for the purpose of facilitating the commission of a felony, as alleged in the indictment); *State v. Bailey*, 97 N.C. App. 472, 478-79, 389 S.E.2d 131, 134 (1990) (granting a new trial for a kidnapping charge on the basis of a variance between the indictment, which alleged that the victim was not released in a safe place, and the jury instruction, which alleged infliction of serious bodily harm).

We therefore hold that the trial court erred in its amendment of the indictment. Defendant's second and third assignments of error, claiming ineffective assistance of counsel, are not properly before this Court.[1] Accordingly, we remand for a new trial on the kidnapping charge and resentencing, and find no error in defendant's assault inflicting serious injury conviction.

No error in part, new trial in part.

Judge GEER concurs.

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

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1. As defendant notes in his brief, "[m]ost ineffective assistance claims are properly brought in a motion for appropriate relief rather than on direct appeal." This is not the rare case in which an ineffective assistance claim can properly be litigated on the face of the record. We therefore decline to address the merits of this issue.

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

The majority has concluded that the trial court's amendment of defendant's indictment substantially altered the charge against him and therefore vacated defendant's kidnapping conviction and granted him a new trial on that charge. Because I disagree with the majority's holding I respectfully dissent on this issue, but agree with the majority that the issue of ineffective assistance of counsel is not properly before this Court.

In this case, the original bill of indictment alleged that:

> [O]n or about and between the 26th day of November, 2004, and the 27th day of November, 2004, in Mecklenburg County, [defendant] did unlawfully, willfully and feloniously kidnap Freda . . . , a person who had attained the age of sixteen (16) years, by unlawfully confining her, restraining her, and removing her from one place to another, without her consent, and for the purpose of facilitating the commission of a felony. Freda . . . was seriously injured.

The last sentence of the indictment alleged that defendant committed a first degree kidnapping. *See* N.C. Gen. Stat. § 14-39(b) (2005) (defining one type of first degree kidnapping as a kidnapping in which the victim "had been seriously injured"). The language regarding "[f]acilitating the commission of a[] felony" alleged that defendant committed a second degree kidnapping. N.C. Gen. Stat. § 14-39(a)(2) and (b).

Before the jury was selected, the State announced in open court that insofar as the kidnapping indictment was concerned, it would only be proceeding on the theory of second degree kidnapping. At the close of the evidence, the judge amended the indictment to conform with the State's charge of second degree kidnapping. Thus, the last sentence of the indictment was stricken. The next to last sentence was amended to reflect the particular felony with which the State presented evidence—intent to inflict serious injury. Accordingly, that sentence read "confining, restraining her, and removing her from one place to the other without her consent for the purpose of facilitating inflicting serious injury." Thus, the only charge submitted to the jury relating to the alleged kidnapping was one of second degree.

Under N.C. Gen. Stat. § 15A-923(e) (2005), "[a] bill of indictment may not be amended." Our Supreme Court has interpreted this language "to mean a bill of indictment may not be amended in a manner that substantially alters the charged offense." *State v. Silas*, 360 N.C.

377, 380, 627 S.E.2d 604, 606 (2006). To determine whether an amendment constitutes a substantial alteration the reviewing court "consider[s] the multiple purposes served by indictments, the primary one being ' "to enable the accused to prepare for trial." ' " *Silas*, 360 N.C. at 380, 627 S.E.2d at 606 (citations omitted).

Defendant contends that by changing the purpose of the alleged kidnapping, the State substantially altered the indictment, to the detriment of this ability to prepare for trial. The State argues that the amendment merely reflected which of the two offenses, first degree or second degree, listed in the original indictment the State chose to pursue. At trial, the State chose to pursue the lesser included second degree offense.

In *State v. Bailey*, 97 N.C. App. 472, 389 S.E.2d 131 (1990), this Court found a substantial variance and ordered a new trial on the first degree kidnapping charge because "the trial court instructed the jury on serious bodily injury . . . while the indictment alleged as the basis for first-degree kidnapping that the victim was not released in a safe place." *Id.* at 478, 389 S.E.2d at 134. Similarly, our Supreme Court has granted a new trial where the defendant's indictment charged him with first degree kidnapping for failure to release the victim in a safe place under N.C. Gen. Stat. § 14-39(b) because the trial court instructed that "the jury must find that [defendant] 'removed, restrained and confined' the victim 'for the purpose of terrorizing' her, a theory under N.C.G.S. § 14-39(a)(3) totally distinct from the theory alleged in the indictment under (a)(2)[.]" *State v. Brown*, 312 N.C. 237, 247, 321 S.E.2d 856, 862 (1984).

Both *Bailey* and *Brown*, however, are distinguishable from the case at bar. In this case, the State proceeded on a theory of second degree kidnapping that was included in the original bill of indictment. This is not a case where the trial court instructed on a theory of kidnapping that was "totally distinct from the theor[ies] alleged in the indictment[.]" *See id.* Instead, the initial indictment alleged that the victim was "seriously injured." Accordingly, when the trial court amended the indictment to read, "for the purpose of facilitating inflicting serious injury" there was not a substantial alteration of the original indictment because the first indictment contained an allegation of serious injury. *See State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986) ("[t]he indictment in a kidnapping case must allege the purpose or purposes upon which the State intends to rely, and the State is restricted at trial to proving the purposes alleged in the indictment").

In *Silas*, the Supreme Court held that "[i]f the State seeks an indictment which contains specific allegations of the intended felony, the State may not later amend the indictment to alter such allegations." *Silas*, 360 N.C. at 383, 627 S.E.2d at 608. Such is not the case here. In this case, the State did not allege a specific felony. Instead, the portion of the indictment relating to the second degree charge merely stated that defendant intended to commit a felony within the course of the kidnapping. When the indictment was amended at the end of the trial it stated more specifically the felony (intent to inflict serious injury) of which the State presented evidence.

Additionally, there is no requirement that an indictment contain specific allegations that the defendant intended to commit a specific felony. *Id.* Although the *Silas* Court was addressing an amendment of an indictment for felonious breaking or entering, I would apply the same reasoning to this case. *See State v. Freeman*, 314 N.C. 432, 435, 333 S.E.2d 743, 745 (1985) (second degree kidnapping indictments need not allege which specific felony the defendant intended to commit; a general allegation that defendant intended to commit any felony is sufficient). In the instant case, the original indictment met the standard set out in *Silas* by alleging that defendant committed a felony in the course of confining, restraining, or removing the victim.[2] *See Silas*, 360 N.C. at 383, 627 S.E.2d at 608. Thus, defendant could rely on the allegations in the original indictment when preparing for trial because it contained an allegation that defendant intended to commit a felony. *Silas*, 360 N.C. at 380, 627 S.E.2d at 606 (the primary purpose of an indictment is to allow the accused to prepare for trial).

There being no need to amend the indictment under either *Silas* or *Freeman*, I fail to see how defendant can claim that he was prejudiced when the jury was submitted instructions regarding an intent to inflict serious injury. If anything, such an amendment and instruction could only aid defendant as the jury was thus limited to finding that specific felony rather than being able to find an intent to commit any felony.

For the foregoing reasons, I would hold that the amendment to defendant's indictment did not constitute a substantial alteration to the original indictment and would therefore find no error as to this issue.

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2. In fact, under *Freeman*, there was no need to amend the indictment. The general allegation that defendant attempted to commit a felony in the original indictment would have been sufficient.

[185 N.C. App. 488 (2007)]

WAYNE AUSTIN, EMPLOYEE, PLAINTIFF-APPELLEE v. CONTINENTAL GENERAL TIRE, EMPLOYER, SELF-INSURED, (GALLAGHER BASSETT, SERVICING AGENT), DEFENDANT-APPELLANT

No. COA06-1390

(Filed 21 August 2007)

1. Workers' Compensation— remand—new hearing

The Industrial Commission's remand of a workers' compensation case to a deputy commissioner for a hearing did not violate a remand from the Supreme Court which ordered the Commission to conduct "proceedings not inconsistent with this opinion and [the] dissent below." The authority cited by defendant for the proposition that the Commission was prohibited from conducting an evidentiary hearing on remand was based on language which was dicta and which did not address the Commission's authority to conduct such a hearing.

2. Workers' Compensation— remand—disability—not an issue in first hearing

Plaintiff's disability was not a contested issue in a prior Industrial Commission hearing, and the Commission was not barred from taking new evidence on remand. Even if the Commission had addressed the issue at the first hearing, defendant cites no authority for the proposition that the Commission would have been barred from reconsideration of the issue.

3. Workers' Compensation— remand—new evidence

The Industrial Commission was not barred from taking new evidence following remand; defendant cited no authority for the propositions that the Commission's authority was limited to newly discovered evidence, that plaintiff's failure to present disability evidence at the first hearing bars him from doing so on remand, or that the Commission's authority to take new evidence is limited to those issues on which plaintiff presented evidence.

4. Workers' Compensation— remand—res judicata

Plaintiff did not show prejudice (assuming error) from an Industrial Commission finding on remand that the findings from the first hearing were res judicata.

5. Workers' Compensation— disability—retirement before claim filed

The Industrial Commission did not err by awarding plaintiff disability benefits where defendant argued that plaintiff had retired voluntarily and not due to pulmonary problems. Defendant cited no authority for the proposition that a claimant cannot recover for an occupational disease if he voluntarily retired before filing a claim, and long-established precedent is to the contrary.

Appeal by defendant from Opinion and Award entered 30 May 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 May 2007.

Wallace & Graham, PA, by Mona L. Wallace, Cathy Williams, and Edward Pauley, for plaintiff-appellee.

Hedrick Eatman Gardner & Kincheloe, L.L.P., by J. A. Gardner, for defendant-appellant.

ELMORE, Judge.

Continental General Tire (defendant) appeals a 30 May 2006 Opinion and Award by the Full Commission of the North Carolina Industrial Commission (Full Commission), which awarded workers' compensation benefits to Wayne Austin (plaintiff). We affirm.

Plaintiff "was employed by defendant for over twenty years, during which time the record shows he was repeatedly exposed to asbestos dust and fibers. . . . Plaintiff retired on 1 June 1987 for reasons unrelated to asbestos exposure." *Austin v. Continental Gen. Tire*, 141 N.C. App. 397, 399-00, 540 S.E.2d 824, 826 (2000), *rev'd on other grounds*, 354 N.C. 344, 553 S.E.2d 680 (2001) (*Austin I*).

In 1989, plaintiff filed a Form 18 notice of accident, seeking workers' compensation benefits for asbestosis; in 1995 he filed a Form 33 request for hearing. Defendant denied liability, and a hearing was conducted before a Deputy Commissioner in May, 1996. In July, 1998 the Deputy Commissioner entered an Opinion and Award

> making thorough and extensive findings of fact and concluding that plaintiff had contracted asbestosis, entitling him to 104 weeks of compensation pursuant to N.C. Gen. Stat. § 97-61.5(b) (1991) at the rate of $30.00 per week. Plaintiff appealed to the Commission, which . . . determined that plaintiff suffered

> from asbestosis and was entitled to 104 weeks of compensation pursuant to N.C.G.S. § 97-61.5(b), but at the rate of $308.00 per week . . . .

Austin I at 402, 540 S.E.2d at 828.

Defendant appealed, and in *Austin I* this Court affirmed the Full Commission. *Austin I* at 414, 540 S.E.2d at 834. Judge Greene dissented on the basis that "because plaintiff was not employed by defendant at the time of his diagnosis and, therefore, was not 'removed' from his employment pursuant to section 97-61.5(b), section 97-64 provides plaintiff's sole remedy for his alleged asbestos-related disorder." *Id.* at 416, 540 S.E.2d at 836 (Greene, J., dissenting). The North Carolina Supreme Court reversed in a *per curiam* opinion stating that:

> For the reasons stated in the dissenting opinion by Judge Greene, we reverse the decision of the Court of Appeals and remand this case to that court for further remand to the North Carolina Industrial Commission for proceedings not inconsistent with this opinion and Judge Greene's dissent below.

Austin v. Continental Gen. Tire, 354 N.C. 344, 553 S.E.2d 680 (2001) (*Austin II*).

On remand, the Full Commission remanded to the Deputy Commissioner for an evidentiary hearing to determine plaintiff's eligibility for workers' compensation benefits under N.C. Gen. Stat. § 97-64. Defendants objected, arguing that it would be more appropriate to convene a panel of the Full Commission to determine plaintiff's disability based on only the existing record. Following a hearing in June, 2004, the Deputy Commissioner issued an Opinion and Award on 16 December 2004, from which defendant appealed. The Full Commission vacated the Opinion and Award of the Deputy Commissioner and issued its own Opinion and Award on 30 May 2006. The Full Commission found that plaintiff was diagnosed with asbestosis in 1994, and had been totally disabled by February 1998. The Full Commission awarded "permanent total disability benefits to plaintiff at the rate of $308.00 per week beginning February 2, 1998 and continuing throughout plaintiff's lifetime." The Full Commission also ordered defendant to pay for all medical expenses arising from plaintiff's asbestosis. From this Opinion and Award, defendant appeals.

> The 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. 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) (citations and quotations omitted). "The Commission's findings of fact are conclusive on appeal if supported by competent evidence, notwithstanding evidence that might support a contrary finding. Further, the Commission is the sole judge regarding the credibility of witnesses and the strength of evidence." *Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 435, 571 S.E.2d 860, 862 (2002) (citations omitted). "The Commission's findings of fact may only be set aside when 'there is a complete lack of competent evidence to support them.' " *Evans v. Wilora Lake Healthcare/Hilltopper Holding Co.*, 180 N.C. App. 337, 339, 637 S.E.2d 194, 195 (2006) (quoting *Click v. Freight Carriers*, 300 N.C. 164, 166, 265 S.E.2d 389, 390 (1980)). "However, the Commission's conclusions of law are reviewable *de novo* by this Court." *Hawley v. Wayne Dale Constr.*, 146 N.C. App. 423, 427, 552 S.E.2d 269, 272 (2001) (citations omitted).

[1] Defendant argues first that the Full Commission's Opinion and Award must be reversed because the Industrial Commission failed to comply with the order of remand from the North Carolina Supreme Court. Defendant asserts that the Full Commission's remand to a Deputy Commissioner for a hearing on the issue of plaintiff's disability violated the remand order from the North Carolina Supreme Court. We disagree.

Defendant's assertion, that the mandate of the North Carolina Supreme Court prohibited the Full Commission from conducting an evidentiary hearing on remand, is based on the following language from *Crump v. Independence Nissan*:

> Following an appeal to this Court if the case is remanded to the Commission, the full Commission must strictly follow this Court's mandate without variation or departure. Ordinarily upon remand the full Commission can comply with this Court's mandate without the need of an additional hearing, but upon the rare occasion that this Court requires an additional hearing upon remand the full Commission must conduct the hearing without further remand to a deputy commissioner.

112 N.C. App. 587, 590, 436 S.E.2d 589, 592 (1993). We conclude that *Crump* is not, as asserted by defendant, "a mandatory directive that no further evidence or hearing is to be conducted unless the appellate court reviewing the matter on rare occasion orders the same." The above quoted language does not address the authority of the Full Commission to conduct an evidentiary hearing upon remand. Rather, it specifies that when this Court orders a hearing, such hearing shall be conducted by the Full Commission rather than being remanded to a Deputy Commissioner. Further, this language is *dicta*; the issue raised by the appellant in *Crump* was whether the Full Commission erred by adopting the Deputy Commissioner's Opinion and Award as its own. *Id.* at 588-89, 436 S.E.2d at 592-93. The appeal in *Crump* did not present any issue of the proper procedure to be followed by the Industrial Commission upon remand from an appellate court.

In the instant case, the North Carolina Supreme Court simply ordered the Commission to conduct "proceedings not inconsistent with this opinion and Judge Greene's dissent below." *Austin II* at 345, 553 S.E.2d at 680. As the sole basis for the dissent was that plaintiff was required to seek workers' compensation benefits under N.C. Gen. Stat. § 97-64 rather than N.C. Gen. Stat. § 97-61.5, the Commission's remand for determination of plaintiff's entitlement to benefits under § 97-64 was consistent with the Court's opinion and the dissent. This assignment of error is overruled.

[2] Defendant also argues that as a matter of law the Full Commission was barred from taking new evidence, on the grounds that the issue of plaintiff's disability was an issue in the first hearing. The issue at the first hearing was plaintiff's entitlement to benefits under N.C. Gen. Stat. § 97-61.1 through 61.7. Under these statutes, "a diagnosis of asbestosis, for purposes of determining eligibility to receive benefits, is the equivalent of a finding of actual disability." *Roberts v. Southeastern Magnesia and Asbestos Co.*, 61 N.C. App. 706, 710, 301 S.E.2d 742, 744 (1983). Accordingly, the issue of plaintiff's disability was not a contested issue at the first hearing, and no evidence was presented on the subject. However, on remand the Commission was directed to determine whether plaintiff was entitled to benefits under N.C. Gen. Stat. § 97-64, which provides that "in case of disablement or death from silicosis and/or asbestosis, compensation shall be payable in accordance with the provisions of the North Carolina Workers' Compensation Act." N.C. Gen. Stat. § 97-64 (2005). Thus, plaintiff's disability was clearly at issue on remand. Moreover, recent opinions of this Court addressing this situation clearly contemplate an eviden-

tiary hearing on remand. *See*, *e.g.*, *Abernathy v. Sandoz Chems./ Clariant Corp.*, 151 N.C. App. 252, 257, 565 S.E.2d 218, 221 (2002) ("[T]hough plaintiff does not qualify for compensation pursuant to G.S. § 97-61.5, he is nevertheless entitled to pursue a claim for compensation pursuant to G.S. § 97-64. That statute provides . . . 'in case of disablement . . . from . . . asbestosis, compensation shall be payable in accordance with the provisions of the North Carolina Workers' Compensation Act.' . . . *If*, *on remand*, *plaintiff establishes his disablement from asbestosis*, and his entitlement to compensation pursuant to G.S. § 97-64, the Commission must determine his average weekly wage.") (Emphasis added). Moreover, even if the Commission *had* addressed plaintiff's disability at the first hearing, defendant cites no authority for the proposition that the Full Commission would have been barred from reconsideration of the issue. This assignment of error is overruled.

[3] Defendant argues next that the Commission erred by taking new evidence following remand because the evidence regarding plaintiff's disability "was available at the time of the first hearing . . . ." Defendant contends that new evidence "would have to constitute newly discovered evidence under [N.C. Gen. Stat. § 1A-1,] Rule 60(b)(2)." We disagree.

First, defendant cites no pertinent authority for the propetition that the Commission's authority to take additional evidence regarding the issue of plaintiff's disability is limited by the strictures of Rule 60. Defendant also contends that plaintiff's disability was "at issue" in the first hearing, requiring plaintiff to present his evidence of disability at that time. In fact, the issue of disability was not litigated at the first hearing because disability evidence is not required under N.C. Gen. Stat. § 97-61.5. N.C. Gen. Stat. § 97-61.5 (2005). Moreover, in *Austin II*, the North Carolina Supreme Court held for the first time that this statute was not available to claimants who were retired at the time the claim was filed, and that plaintiff would have to file for benefits under a different statute, N.C. Gen. Stat. § 97-64. *Austin II* at 345, 553 S.E.2d 680 (adopting the reasoning stated in *Austin I* at 416, 553 S.E.2d at 836 (Greene, J., dissenting)).

Defendant cites no authority supporting its position that plaintiff's failure to present disability evidence at the first hearing bars him from doing so now. Indeed, *Hall v. Chevrolet Co.* cited by defendant, holds to the contrary:

> We find convincing the following reasoning of the Connecticut court: '. . . A party to a [workers'] compensation case is not entitled to try his case piecemeal. . . . On the other hand, mere inadvertence on his part, mere negligence, without intentional withholding of evidence, particularly where there is no more than technical prejudice to the adverse party, should not necessarily debar him of his rights, and despite these circumstances a commissioner in the exercise of his discretion might be justified in opening an award.

Hall v. Chevrolet Co., 263 N.C. at 576-77, 139 S.E.2d at 862-63 (1965) (quoting *Kearns v. City of Torrington*, 119 Conn. 522, 529-30, 177 Atl. 725, 728 (1935)).

Nor does defendant cite any pertinent authority holding that the Commission's authority to take new evidence is limited to those issues on which plaintiff presented evidence. In *Trivette v. Mid-South Mgmt., Inc.*, 141 N.C. App. 151, 541 S.E.2d 523 (2000), the plaintiff appealed from an Opinion and Award, and this Court remanded to the Commission for findings on permanent partial impairment. *Trivette v. Mid-South Mgmt., Inc.*, 154 N.C. App. 140, 141-42, 571 S.E.2d 692, 694 (2002) (citing 141 N.C. App. 151, 541 S.E.2d 523). On remand, the Commission addressed this issue, and also awarded compensation for temporary total disability. *Id.* at 142, 571 S.E.2d at 694. This Court held that in so doing the Commission did not exceed its authority. *Id.* at 143, 571 S.E.2d at 695. In *Joyner v. Rocky Mount Mills*, the Commission dismissed a plaintiff's claim for future medical expenses because it determined that the claim "had not been preserved according to the Commission's rules." 92 N.C. App. 478, 481, 374 S.E.2d 610, 612 (1988). The sole question before this Court was whether the Commission had erred by dismissing that claim. *Id.* at 480, 374 S.E.2d at 612. We reversed because

> Plaintiff's claim . . . embodied a claim for future medical expenses. When the matter was 'appealed' to the full Commission by defendants it was the duty and responsibility of the full Commission to decide all of the matters in controversy between the parties. . . . The Commission may not use its own rules to deprive a plaintiff of the right to have his case fully determined. Thus, the Commission's statement . . . that 'the issue of payment of future medical expenses is not properly preserved' will not support the order [dismissing plaintiff's motion].

Id. at 482, 571 S.E.2d at 613. Thus, even assuming, *arguendo*, that disability was raised by plaintiff's initial claim, the fact that it wasn't litigated at the first hearing did not preclude plaintiff's presenting evidence on the issue on remand. This assignment of error is overruled.

[4] Defendant argues next that the Full Commission erred by finding that the findings of fact from the first hearing were *res judicata* in the second one. Assuming, *arguendo*, that the Full Commission erred in this regard, we conclude that defendant has failed to show prejudice.

In its Opinion and Award the Full Commission stated that:

> The Findings of Fact of the Full Commission Opinion and Award filed December 18, 1998, as approved by the North Carolina Court of Appeals and Supreme Court, are *res judicata* and if not specifically addressed herein, are incorporated by reference.

Defendant has failed to identify any specific findings from the first hearing that it contends: (1) were unsupported by the evidence; or (2) were contradicted by evidence taken at the second hearing. Nor has defendant asserted any way in which the Full Commission's incorporation of its findings from the first hearing hindered defendant's ability to defend this action. This assignment of error is overruled.

[5] Defendant argues next that the Full Commission erred by awarding plaintiff benefits, on the grounds that plaintiff "retired voluntarily" and not due to pulmonary problems. We disagree.

Defendant cites no authority for the proposition that a claimant cannot recover for an occupational disease if he has voluntarily retired prior to filing a claim, and long-established precedent to the contrary clearly establishes that a claimant is not barred from receiving workers' compensation benefits for an occupational disease solely because he or she was retired. *See, e.g.*, *Heffner v. Cone Mills Corp.*, 83 N.C. App. 84, 88, 349 S.E.2d 70, 74 (1986) ("[T]he Commission may not deny disability benefits because the claimant retired where there is evidence of diminished earning capacity caused by an occupational disease."). In *Heffner*, the Commission denied the plaintiff's claim for disability compensation, and in doing so "apparently placed great reliance on its conclusion . . . that the plaintiff's lack of earnings was due to his desire to retire and the closing of the plant where he was working. In doing so, we believe the Commission acted under a misapprehension of the law." *Id.*

> The *Heffner* rule is consistent with G.S. § 97-29, the statute through which claimants are awarded benefits for total disability, in that the section provides that compensation is to be paid 'during the lifetime of the injured employee,' and payments are not terminated when a claimant reaches an age at which he or she would have retired if able to work.

Stroud v. Caswell Center, 124 N.C. App. 653, 656, 478 S.E.2d 234, 236 (1996). This assignment of error is overruled.

We have considered defendant's remaining arguments, and conclude that they are without merit.

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. ANTHONY BURROUGHS

No. COA06-1263

(Filed 21 August 2007)

Search and Seizure— traffic checkpoint—required trial court findings

The trial court is not required to make extensive inquiries into the purpose behind every traffic checkpoint, no evidence was brought forward in this case to suggest that the stated purpose behind this checkpoint (sobriety) was a mask for another, unconstitutional purpose, and an order excluding evidence from the sobriety checkpoint was reversed. However, the case was remanded for further findings as to the manner in which this individual stop was conducted.

Appeal by the State from an order entered 3 August 2006 by Judge Karl Adkins in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 June 2007.

Attorney General Roy A. Cooper, III, by Special Counsel Isaac T. Avery, III and Assistant Attorneys General William B. Crumpler and Michael R. Epperly, for the State-appellant.

Nixon, Park, Gronquist & Foster, PLLC, by James Gronquist, for defendant-appellee.

Morrow, Alexander & Porter PLLC, by John C. Vermitsky, for the North Carolina Academy of Trial Lawyers, amicus curiae.

HUNTER, Judge.

The State appeals from an order granting a pretrial motion to suppress certain evidence in the case against Anthony Burroughs ("defendant"), who was charged with driving while impaired ("DWI"). After careful review, we reverse and remand for additional findings of fact.

On 26 March 2005, officers from the Charlotte-Mecklenburg Police Department ("CMPD") set up a DWI checkpoint (also referred to as a "sobriety checkpoint") on a certain section of Park Road in Charlotte. Defendant was stopped at the DWI checkpoint by Officer Matthew Pressley. The officer asked defendant how he was doing, explained that the officers were conducting a DWI checkpoint, and asked defendant for his driver's license, which defendant gave him.

Officer Pressley testified at the hearing on the motion to suppress that he noticed defendant's eyes were glossy and bloodshot and that his breath had a strong odor of alcohol. He also testified that defendant admitted upon questioning that he had consumed two glasses of wine half an hour earlier. Officer Pressley asked defendant to exit his car and submitted him to several alcohol screening tests. As a result of these tests, Officer Pressley believed defendant was impaired and placed him under arrest.

Defendant entered a plea of guilty in district court to the charge of DWI on 8 December 2005. On 3 February 2006 and 3 April 2006, defendant filed motions in superior court to suppress the evidence derived from the DWI checkpoint stop, arguing that the checkpoint was unconstitutional. On 3 August 2006, the court issued an order suppressing the evidence obtained from the stop pursuant to the Fourth and Fourteenth Amendments to the United States Constitution and N.C. Gen. Stat. § 20-16.3 (2005). The State appeals from this order.

The trial court based its holding on the motion to suppress almost entirely on this Court's decision in *State v. Rose*, 170 N.C. App. 284, 612 S.E.2d 336 (2005). Of its fifteen conclusions of law, the first thirteen concern whether or not the checkpoint itself was constitutional, and twelve of those thirteen directly rely on *Rose*:

2. That the decision of the North Carolina Court of Appeals in State v. Rose, 170 N.C. App. 284, 612 S.E.2d 336 (2005)[,] is applicable to the facts in this case;

3. In Rose, the court stated that trial courts are required to make findings of fact regarding the "primary programmatic purpose" of a checkpoint based on the decision in Indianapolis v. Edmond, 531 U.S. 32[,] 148 L.Ed.2d 333, 121 S. Ct. 447 (2000);

4. That the trial court cannot simply accept the State's invocation of a proper purpose but must examine the available evidence to determine the purpose at the programmatic level and cannot probe the minds of individual officers;

5. That the State has the burden of establishing that the primary programmatic objective, and not the subjective intent of the officer for initiating a suspicionless vehicle stop, was not merely to further general crime control;

6. That even an apparent[ly] lawful purpose is insufficient without additional information that the lawful purpose was the primary programmatic purpose and that the checkpoint did not have a multi-purpose objective;

7. That in this case the "checkpoint plan" contained information about the location of the checkpoint and assertions, but no documentation, as to why the decision was made at the programmatic level to place the checkpoint at the place and at the time it was established;

8. That the [t]estimony presented relied solely on Officer Pressley's explanation for why the checkpoint was an appropriate DWI Checkpoint for that time and location. Officer Pressley was not a supervisor at the programmatic level as contemplated by State v. Rose, and the State offered no testimony from an officer acting at the programmatic level. As a result, this Court was deprived of the opportunity to conduct a close review of the checkpoint scheme[,] a review which is mandated by the United States Supreme Court; see Ferguson

v. City of Charleston, 532 U.S. 67 (2001). It is the State's burden to prove the primary programmatic purpose of a checkpoint and to provide the trial judge with sufficient evidence to make a determination as to whether a particular checkpoint passes constitutional muster. The State failed to carry its burden in this matter;

9. That the Court of Appeals in Rose specifically prohibits reliance on the individual arresting officer's primary purpose or intent when inquiring into the programmatic purpose of the checkpoint;

10. That Park Road in Charlotte[,] North Carolina, is a lengthy stretch of road from downtown Charlotte to Pineville, North Carolina, and runs through diverse areas of town involving industrial, residential, and commercial areas which present a diverse number of challenges for law enforcement activity which could involve use of roadblocks or checkpoints;

11. That without more information contained in the plan or communicated from the programmatic level, the court cannot ascertain the primary programmatic purpose of the checkpoint in issue, and whether the checkpoint was sufficiently tailored by a supervisory official to permit a suspicionless stop of a vehicle;

12. That the checkpoint plan as presented fails to meet the necessary constitutional and statutory standards as set out in State v. Rose, 170 N.C. App. 284, 612 S.E.2d 336 (2005).

13. That the testimony presented fails to prove the primary purpose in implementing the roadblock was a "Sobriety Checking Station" and the Court cannot presume from an unsubstantiated record that the constitutional requirements have been satisfied. See Rose at 341 citing Baker v. State, 252 Ga. App. 695, 698-99, 556 S.E.2d 892, 897 (2001)[.]

Because of this heavy reliance on our holding in *Rose*, we believe a close examination of that opinion is appropriate here. First, however, a brief summary of the case on which *Rose* in turn heavily relies—*City of Indianapolis v. Edmond*, 531 U.S. 32, 148 L. Ed. 2d 333 (2000)—is in order.

In *Edmond*, the defendant challenged a checkpoint with the stated and actual purpose of detecting narcotics. *Id.* at 34, 148

L. Ed. 2d at 339. In its opinion, the Court summarized a series of its earlier cases which had considered the constitutionality of certain programmatic purposes, including sobriety and border patrol checks, and noted that this case presented for the first time the programmatic purpose of narcotics possession. *Id.* at 37-40, 148 L. Ed. 2d at 340-42. The Court then proceeded to carefully consider whether such a purpose was constitutional, noting that "our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion." *Id.* at 41, 148 L. Ed. 2d at 343. Finally, the Court concluded that the purpose of checking for narcotics possession was unconstitutional because it is a checkpoint intended to "uncover evidence of ordinary criminal wrongdoing," and as such "the program contravenes the Fourth Amendment." *Id.* at 42, 148 L. Ed. 2d at 343.

This Court applied the principles of *Edmond* in *Rose*. The language in *Rose* requiring an examination of a checkpoint's purpose—specifically, that the trial court must " 'examine the available evidence to determine the primary purpose of the checkpoint program' "—comes directly from *Edmond*. *Rose*, 170 N.C. App. at 289, 612 S.E.2d at 339 (quoting *Edmond*, 531 U.S. at 46, 148 L. Ed. 2d at 347). In *Rose*, five police officers were together one evening and decided to " 'spontaneously throw [a checkpoint] up' " for the purpose, they stated, of checking licenses and registrations on a certain road in Onslow County. *Rose*, 170 N.C. App. at 291, 612 S.E.2d at 341. While operating the checkpoint, the officers noticed the passengers in one stopped car " 'seemed nervous' " and, after questioning, discovered that they were in possession of marijuana and a gun. *Id.* at 286-87, 612 S.E.2d at 338. The defendant was convicted for various counts of possession of controlled substances and carrying a concealed weapon. *Id.* at 287, 612 S.E.2d at 338. He appealed his conviction to this Court, arguing that the trial court erred in denying his motion to suppress the evidence obtained at the checkpoint. *Id.*

This Court reversed, remanding the case for the trial court to make findings of fact as to the checkpoint's purpose. *Id.* at 285-86, 612 S.E.2d at 337. Although the officers had *stated* that the checkpoint's purpose was to check licenses and registration, the Court pointed to several facts that belied that statement. First, the officers who had testified at trial had readily admitted that no plan for the checkpoint had been created or approved beforehand, and the State had offered no evidence whatsoever as to "why there was a particular need for a checkpoint in this particular area of the county." *Id.* at 291, 612 S.E.2d

at 341. Also, no evidence had been offered that this one portion of the county "was having a larger problem with unlicensed or unregistered drivers than another part," and thus that any checkpoint there was in fact meant to apprehend persons with faulty licenses or registrations. *Id.* at 291-92, 612 S.E.2d at 341.

Further, four of the five officers involved in the checkpoint were narcotics detectives, and the arrest at issue was not for a faulty license or registration, but for possession of drugs and a weapon. *Id.* at 290, 612 S.E.2d at 340. In conducting the checkpoint, one officer would examine drivers' licenses and registrations while another officer would "scan the inside of the vehicle and walk around it," behavior that the Court noted was never linked by testimony to the stated purpose of checking licenses and registrations; indeed, the Court noted, "it appears that the function of the second officer may have been to scan for possible criminal activity." *Id.* at 292, 612 S.E.2d at 341.

The Court concluded in *Rose* that the evidence presented at trial clearly tended to show that the actual purpose of the checkpoint was simply to check the vehicles for "possible criminal activity"—specifically, narcotics possession—a purpose which had been held unconstitutionally broad by the United States Supreme Court. *Rose*, 170 N.C. App. at 292-93, 612 S.E.2d at 341-42; *see also Edmond*, 531 U.S. at 32, 148 L. Ed. 2d at 333-34. The trial court, however, had taken the officers' testimony as to the checkpoint's purpose at face value and ignored the weight of the evidence that contradicted those statements. As such, the Court held, the trial court's "fail[ure] to make findings of fact regarding the 'primary programmatic purpose' of the checkpoint" meant that it had not properly determined the checkpoint's actual purpose, nor considered whether that actual purpose was constitutional. *Id.* at 285-86, 612 S.E.2d at 337.

Thus, our holding in *Rose* was that where contradictory evidence exists as to the actual primary purpose of a checkpoint program, the trial court must examine the available evidence to determine the actual purpose, because bare assertions of a constitutional purpose cannot be allowed to mask actual purposes that are unconstitutional. In *Rose* this Court cited *Edmond* on this point:

> Petitioners argue that the Indianapolis checkpoint program is justified by its lawful secondary purposes of keeping impaired motorists off the road and verifying licenses and registrations. If this were the case, however, law enforcement authorities would

> be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check. *For this reason, we examine the available evidence to determine the primary purpose of the checkpoint program.*

Edmond, 531 U.S. at 46, 148 L. Ed. 2d at 346-47 (citation omitted) (emphasis added).

In *Edmond*, the Supreme Court noted that there was no question as to whether the actual purpose of the checkpoint was the same as its stated purpose; thus, it focused its inquiry on the constitutionality of that purpose. In *Rose*, however, this Court was forced to closely examine the facts surrounding the checkpoint's purpose because its alleged purpose—to check licenses and registrations, which the Supreme Court has held to be constitutional—was belied by substantial evidence to the contrary showing the checkpoint's actual purpose was almost certainly to check for narcotics, which the Supreme Court has expressly held to be unconstitutional. This, then, is why this Court held in *Rose* that the trial court was required to make findings of fact as to the checkpoint's purpose: Not because every trial court in every case must make such findings of fact, but because in this specific case, bare statements that the checkpoint had a constitutional purpose were unreliable.

The trial court, as mentioned above, relied heavily on *Rose*. It stated in Conclusion of Law 3 that our opinion in *Rose* "stated that trial courts are required to make findings of fact regarding the 'primary programmatic purpose' of a checkpoint based on the decision in Indianapolis v. Edmond[.]" The court then stated in Conclusions of Law 7 and 8 that no proper documentation as to the programmatic purpose was presented. This dearth of evidence as to the checkpoint's programmatic purpose, the court stated in Conclusions of Law 9 and 11, meant it could not evaluate whether the checkpoint was "sufficiently tailored" to permit a suspicionless stop. Therefore, the court held, the evidence must be suppressed.

This holding misconstrues the principles of *Rose* and *Edmond*. Both cases hold that only certain purposes for checkpoints are constitutionally allowed, and where the stated purpose is at odds with the evidence brought forth, the trial court must inquire as to the actual purpose. The trial court's order in this case, however, misapplies these principles. Neither *Rose* nor *Edmond* mandates that every trial court make extensive inquiries into the purpose behind every checkpoint. No evidence was brought forward in the case at hand

to suggest that the stated purpose of the checkpoint (sobriety), which has been affirmatively declared constitutional by both this Court and the Supreme Court, was a mask for another, unconstitutional purpose. As such, the trial court was in error in holding that the lack of such evidence required it to exclude the evidence obtained by the stop.

From the available evidence, it is clear to this Court that the actual purpose of the checkpoint was the same as its stated purpose: To check for sobriety. Because such a purpose has been expressly held constitutional, and because the trial court misconstrued our holding in *Rose*, we reverse the trial court's order.

However, the constitutional inquiry into the checkpoint does not end here. As the trial court's final three conclusions of law correctly note, after a checkpoint has been found constitutional, the next inquiry must be whether the checkpoint was conducted in a constitutional manner—that is, whether the individual stop at issue was itself constitutional. *See Rose*, 170 N.C. App. at 293, 612 S.E.2d at 342 ("even if a checkpoint is for one of the permissible purposes, '[t]hat does not mean the stop is automatically, or even presumptively, constitutional. It simply means that we must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances' "). As our Supreme Court noted in *State v. Mitchell*, 358 N.C. 63, 592 S.E.2d 543 (2004), "checkpoint stops conform to the Fourth Amendment if they are reasonable. '[W]e must judge [the] reasonableness [of a checkpoint stop], hence, its constitutionality, on the basis of individual circumstances.' " *Id.* at 66, 592 S.E.2d at 545 (quoting *Illinois v. Lidster*, 540 U.S. 419, 426, 157 L. Ed. 2d 843, 852 (2004)). The trial court's order considers this question, but only briefly, in its final three conclusions of law. As such, we remand this case to the trial court for further findings of fact as to the manner in which this individual stop was conducted.

Because the trial court's order misapplies *Rose*, we reverse its order excluding the evidence of the stop but remand the case for further findings of fact as to the constitutionality of the individual stop of defendant.

Reversed and remanded.

Judges WYNN and BRYANT concur.

[185 N.C. App. 504 (2007)]

ROBIN Y. JONES, ADMINISTRATOR OF THE ESTATE OF CALVERINE OBIE, PLAINTIFF v. DURHAM ANESTHESIA ASSOCIATES, P.A., DEFENDANT

No. COA06-1510

(Filed 21 August 2007)

1. Appeal and Error— appealability—judgment notwithstanding verdict—substantial right

Defendant's appeal from an interlocutory order entered 21 July 2006 granting judgment notwithstanding the verdict and ordering a new trial on the remaining issues of causation and damages is immediately appealable because it affects a substantial right when: (1) defendant has already gone through one trial on the issue of liability and damages and is now being forced to undertake a second trial on the same issues; and (2) the possibility of being forced to undergo two full trials on the merits and to incur the expense of litigating twice works an injury to defendant if not corrected before appeal from a final judgment.

2. Evidence— standard of care—testimony not judicial admission—judgment notwithstanding verdict improper

Testimony by an anesthesiologist, an employee of the defendant in a wrongful death case, indicating that she did not comply with the applicable standard of care when she was not present at the beginning of decedent's surgery, was not a judicial admission but was an evidential admission that did not support the trial court's allowance of plaintiff's motion for judgment notwithstanding the verdict for defendant and a new trial because the admission did not conclusively establish that the applicable standard of care had been breached where the testimony of the anesthesiologist, when viewed as a whole, did not unequivocally show that she breached the standard of care when she stated that she had not breached the standard, then admitted that she breached the standard., and later again denied she had breached the standard; her testimony was by its very nature a matter of opinion and did not concern concrete facts; and there was sufficient evidence in the record to support a finding that the anesthesiologist did not breach the applicable standard of care.

Appeal by defendant from an order entered 21 July 2006 by Judge Abraham Penn Jones in Durham County Superior Court. Heard in the Court of Appeals 24 May 2007.

Law Offices of Grover C. McCain, Jr., by Grover C. McCain, Jr., for plaintiff-appellee.

Young Moore and Henderson P.A., by William P. Daniell and Elizabeth P. McCullough, for defendant-appellant.

BRYANT, Judge.

Durham Anesthesia Associates, P.A. (defendant) appeals from an order entered 21 July 2006 granting judgment notwithstanding the verdict and ordering a new trial. For the reasons stated herein we reverse the order of the trial court.

Facts and Procedural History

On 16 January 2003, Calverine Obie underwent surgery on her right eye at North Carolina Specialty Hospital in Durham, North Carolina. The surgery was conducted by her ophthalmic surgeon, Dr. J. Richard Marlon. Anesthesia services for the surgery were provided by defendant, through Dr. Cathy W. Thomas, an anesthesiologist, and Beverly Teal, a certified registered nurse anesthetist, both of whom were employees of defendant. At the outset of the surgery, Ms. Teal was present in the operating room with Ms. Obie, and Dr. Thomas was tending to another patient in a nearby room. Shortly after the surgery began, Ms. Obie began to suffer complications ultimately resulting in permanent brain damage leaving Ms. Obie in a comatose state. Ms. Obie's family decided to withdraw life support on 23 January 2003, and she died the same day.

On 20 January 2005, Robin Y. Jones, acting as the administrator of Ms. Obie's estate, (plaintiff) filed a wrongful death action against defendant, Dr. Thomas, and the North Carolina Specialty Hospital, LLC. Plaintiff alleged Ms. Obie died as the result of medical negligence in connection with the providing of anesthesia services during the 16 January 2003 surgery to eviscerate her right eye. Plaintiff voluntarily dismissed her claims against North Carolina Specialty Hospital and Dr. Thomas on 27 March 2006 and 7 April 2006.

This case was tried before a jury at the 24 April 2006 session of Civil Superior Court in Durham County, the Honorable Abraham Penn Jones, Judge presiding. On 4 May 2006, the jury returned a verdict in favor of defendant, finding the death of Ms. Obie was not proximately caused by the negligence of any employee of defendant. On 15 May 2006, plaintiff filed a motion for judgment notwithstanding the verdict and for a new trial.

The trial court entered its judgment, consistent with the jury verdict, in favor of defendant on 23 May 2006. On 21 July 2006, the trial court entered its order granting plaintiff's motion for judgment notwithstanding the verdict and granting a new trial. Defendant appeals from the entry of this order.

Interlocutory Appeal

[1] We first address plaintiff's motion before this Court to dismiss this appeal because it is from an interlocutory order. Interlocutory orders and judgments are those "made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court in order to settle and determine the entire controversy." *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999) (citation omitted). "Generally, there is no right to immediate appeal from an interlocutory order." *Milton v. Thompson*, 170 N.C. App. 176, 178, 611 S.E.2d 474, 476 (2005) (citing N.C. Gen. Stat. § 1A-1, Rule 54(b) (2005); *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). This Court has held that an interlocutory order is immediately appealable if:

> (1) the order is final as to some claims or parties, and the trial court certifies pursuant to N.C.G.S. § 1A-1, Rule 54(b) that there is no just reason to delay the appeal, or (2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed.

Currin & Currin Constr., Inc. v. Lingerfelt, 158 N.C. App. 711, 713, 582 S.E.2d 321, 323 (2003) (citations and quotations omitted). As there is no Rule 54(b) certification in the record before this Court, defendants are entitled to pursue this appeal only if the trial court's order deprived them of a substantial right that would be lost if we dismissed their appeal.

Our Courts have recognized that "the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context . . . ." *Davis v. Davis*, 360 N.C. 518, 525, 631 S.E.2d 114, 119 (2006) (citation and quotations omitted). Further, "[t]he reason for these rules is to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division." *Id.*

We find the instant appeal to raise issues similar to those addressed by our Supreme Court in *Bowden v. Latta*, 337 N.C. 794, 448 S.E.2d 503 (1994). In *Bowden*, "the trial court (1) set aside the jury verdict and judgment entered thereon as to the decedent's contributory negligence, (2) entered judgment for the plaintiff upon the issue of contributory negligence, and (3) ordered a new trial on the issue of damages." *Id.* at 795, 448 S.E.2d at 504. This Court, relying on *Unigard Carolina Ins. Co. v. Dickens*, 41 N.C. App. 184, 254 S.E.2d 197 (1979), had held that the order appealed from in *Bowden* was interlocutory and no substantial right was affected thereby. *Bowden*, 337 N.C. at 795, 448 S.E.2d at 405. However, our Supreme Court reversed, holding:

> the only way judicial economy can be served is by a determination of the underlying substantive appeal at this time. Such a determination will not fragment the case. To the contrary, it will significantly shorten the process and clear the path toward finality for all concerned. . . . Regardless of whether an appellate court undertakes a substantive appeal now or after the parties have gone through a trial on damages, the issue of whether the trial judge was correct in overturning the jury verdict on contributory negligence remains central and will, in any event, need to be addressed. Deciding the matter now would streamline the process by delineating, as well as limiting, the remaining issues that could be litigated and appealed.

Id. at 797, 448 S.E.2d at 505.

While "an appeal from a trial court's order accepting the jury's verdict fixing liability but ordering a new trial solely on the issue of damages [is] interlocutory and not immediately appealable[,]" *Loy v. Martin*, 144 N.C. App. 414, 416, 547 S.E.2d 843, 845 (2001) (citation and quotations omitted), here the trial court did not accept the jury's verdict fixing liability. Instead, the trial court granted plaintiff's motion for judgment notwithstanding the verdict and granted plaintiff a new trial on the remaining issues of causation and damages. Here, defendant has already gone through one trial on the issue of liability and damages and is now being forced to undertake a second trial on the same issues. We hold that a substantial right of defendant's is affected by the trial court's order and the order is thus immediately appealable. *See also Roberts v. Heffner*, 51 N.C. App. 646, 650, 277 S.E.2d 446, 449 (1981) (holding "the possibility of being forced to undergo two full trials on the merits and to incur the expense of litigating twice makes it clear that the judgment in question works

an injury to defendants if not corrected before an appeal from a final judgment"). Accordingly we deny plaintiff's motion to dismiss this appeal.

Standard of Review

"[T]he questions concerning the sufficiency of the evidence to withstand a Rule 50 motion for directed verdict or judgment notwithstanding the verdict present an issue of law, while a motion for a new trial for insufficiency of the evidence pursuant to Rule 59(a)(7) is addressed to the discretion of the trial court." *In re Will of Buck*, 350 N.C. 621, 624, 516 S.E.2d 858, 860 (1999). On appeal, this Court thus reviews an order granting a motion for judgment notwithstanding the verdict *de novo*. *See Denson v. Richmond County*, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003).

> The standard of review of a ruling entered upon a motion for judgment notwithstanding the verdict is "whether upon examination of all the evidence in the light most favorable to the non-moving party, and that party being given the benefit of every reasonable inference drawn therefrom, the evidence is sufficient to be submitted to the jury."

Branch v. High Rock Realty, Inc., 151 N.C. App. 244, 249-50, 565 S.E.2d 248, 252 (2002) (quoting *Fulk v. Piedmont Music Ctr.*, 138 N.C. App. 425, 429, 531 S.E.2d 476, 479 (2000)), *disc. review denied*, 356 N.C. 667, 576 S.E.2d 330 (2003). "A motion for . . . judgment notwithstanding the verdict 'should be denied if there is more than a scintilla of evidence supporting each element of the non-movant's claim.' " *Denson*, 159 N.C. App. at 412, 583 S.E.2d at 320 (quoting *High Rock Realty*, 151 N.C. App. at 250, 565 S.E.2d at 252).

Judicial Admissions

[2] Defendant argues the trial court erred in granting plaintiff's motion for a judgment notwithstanding the verdict and a new trial on the grounds that an employee of defendant made a judicial admission concerning the applicable standards of care. We agree.

In its order granting plaintiff's motion for judgment notwithstanding the verdict and a new trial, the trial court held:

> [Dr.] Thomas made a binding judicial admission pursuant to *Body v. Varner*, 107 N.C. App. 219 (1992), based on the following testimony given by her at the trial and that Plaintiff's motions should be granted[:]

> Q. So then do I hear you agreeing that you did not comply with the standard of care for anesthesiologists in 2003 by not being present at the beginning of the case? . . .
>
> A. In that regard, sir, I was not compliant to what you just said.

Based on this finding, the trial court granted plaintiff's motion for judgment notwithstanding the verdict pursuant to Rule 50 and granted a new trial on the issues of:

> 1. "Was the death of Catherine Obie caused, in whole or in part, by the negligence of Dr. Thomas in not being present at the beginning of the case of Calverine Obie?"
>
> 2. "What amount of damages, if any, should the Estate of Calverine Obie recover for the wrongful death of Calverine Obie?"

It is well established that a judicial admission is

> a formal concession made by a party (usually through counsel) in the course of litigation for the purpose of withdrawing a particular fact from the realm of dispute . . . . Such an admission is not evidence, but rather removes the admitted fact from the field of evidence by formally conceding its existence. It is binding in every sense.

Woods v. Smith, 297 N.C. 363, 374, 255 S.E.2d 174, 181 (1979) (citations and quotations omitted). In contrast, an evidential or extrajudicial admission "consists of words or other conduct of a party, or of someone for whose conduct the party is in some manner deemed responsible, which is admissible in evidence against such party, but which may be rebutted, denied, or explained away and is in no sense conclusive." *Id.* at 374, 255 S.E.2d at 181 (citations and quotations omitted). Generally, "a party's statements, given in a deposition or at trial of the case, are to be treated as evidential admissions rather than as judicial admissions." *Id.* at 373-74, 255 S.E.2d at 181. However, there are two exceptions wherein a party's statements made at trial or in a deposition are treated as judicial admissions:

> First, when a party gives unequivocal, adverse testimony under factual circumstances such as were present in *Cogdill*,[1] his state-

1. In *Cogdill v. Scates*, 290 N.C. 31, 224 S.E.2d 604 (1976), the plaintiff

> testified to concrete facts, not matters of opinion, estimate, appearance, inference, or uncertain memory; her testimony was deliberate, unequivocal and repeated; her statements were diametrically opposed to the essential allegations

ments should be treated as binding judicial admissions rather than as evidential admissions. Second, when a party gives adverse testimony, and there is insufficient evidence to the contrary presented to support the allegations of his complaint, summary judgment or a directed verdict would in most instances be properly granted against him.

Id. at 374, 255 S.E.2d at 181. Further, when reviewing whether or not a statement made by a party at trial or in a deposition is a judicial admission, we must look to their testimony as a whole. *Id.* at 372, 255 S.E.2d at 180.

Here, a review of the record before this Court shows that neither of the two exceptions apply and Dr. Thomas' statement must be treated as an evidential admission. The testimony of Dr. Thomas, when viewed as a whole does not show that she gave unequivocal, adverse testimony under factual circumstances as to whether or not she had breached the applicable standard of care. Dr. Thomas initially stated that she had not breached the standard of care, then admitted she breached the standard of care, and then later again denied that she had breached the standard of care. Further, Dr. Thomas' testimony regarding whether or not she breached the applicable standard of care is by its very nature a matter of opinion and does not concern "concrete facts." Finally, there is sufficient evidence in the record to support that Dr. Thomas did not breach the applicable standard of care. Thus, neither of the two *Woods* exceptions apply and the trial court erred in concluding that Dr. Thomas' statement constituted a judicial admission.

All contradictions, conflicts, and inconsistencies in the evidence are resolved in the non-movant's favor when the trial court decides whether to grant or deny a party's motion for judgment notwithstanding the verdict. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369, 329 S.E.2d 333, 337-38 (1985). As Dr. Thomas' statement is an evidential admission, the trial court erred in holding that a new trial on the issues of causation and damages was necessary because the issue of whether defendant breached the applicable standard of care was not conclusively established at trial.

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of her complaint and destroyed the theory on which she brought her action; her attorney did not seek to elicit any remedial testimony from her; and she manifested an intent to be bound by repeating her testimony even after being warned of the consequences of perjury.

Woods, 297 N.C. at 370, 255 S.E.2d at 179.

Reversed.

Judges McCULLOUGH and CALABRIA concur.

EINAT METZKOR COTTER, PLAINTIFF-APPELLEE v. GAD COTTER, DEFENDANT-APPELLANT

No. COA06-994

(Filed 21 August 2007)

1. **Appeal and Error— violations of appellate rules—no dismissal**

Defendant's appeal was not dismissed for violations of the Rules of Appellate Procedure; assuming that defendant violated the Rules, those violations were not sufficiently egregious to warrant dismissal.

2. **Divorce— foreign order—enforcement**

The trial court did not err by granting summary judgment for plaintiff in an action to domesticate an Israeli divorce and child support order. Plaintiff's complaint made sufficiently clear that she was seeking recognition of payments provided in that order, specifically citing the North Carolina Foreign Money Judgments Recognition Act (NCMJRA); the order qualifies as a foreign judgment under that act; and defendant did not assert any ground for nonrecognition. Plaintiff must follow the statutory steps contained in the Uniform Enforcement of Foreign Judgments Act (UEFJA) at the appropriate time to enforce the judgment. N.C.G.S. § 1C-1701 et seq.; N.C.G.S. § 1C-1800 et seq.

Appeal by Defendant from order entered 10 March 2006 by Judge Craig B. Brown in District Court, Durham County. Heard in the Court of Appeals 27 March 2007.

Tharrington Smith, L.L.P., by Jill Schnabel Jackson, for Plaintiff-Appellee.

The Williams Law Group, PC, by T. Miles Williams, for Defendant-Appellant.

McGEE, Judge.

Einat Metzkor Cotter (Plaintiff) and Gad Cotter (Defendant) were married in Israel on 12 June 1997. One child, Y.C., was born of the marriage on 30 November 1997. Plaintiff and Defendant were civilly divorced on 8 April 1999 in the Family Court of Tel Aviv and Central District. Plaintiff and Defendant entered into an agreement, which was made part of the divorce judgment (the Israeli order). The Israeli order provided, *inter alia*, custody, support, and visitation of Y.C., and for a division of personal property. The Israeli order also included a section entitled, "Additional Obligations of the Husband towards the Wife." This section provided:

> The husband is obligated to pay to the wife the sum in NIS equivalent to 40,000 (forty thousand) US Dollars (USD) according to the representative rate on the date of the payment, and shall pay not later than 31 December 2001. Furthermore, the husband is obligated to pay to the wife an additional sum in NIS equivalent to 40,000 (forty thousand) US Dollars according to the representative rate on the date of the payment, and shall pay not later than 31 December 2003.

Plaintiff filed a complaint and affidavit in Durham County on 23 September 2005. Plaintiff alleged that she was a citizen of Israel, and that Defendant was a citizen and resident of North Carolina. Plaintiff further alleged that Defendant had failed to make the child support payments required under the Israeli order, and had also failed to remit the two $40,000.00 payments to Plaintiff. Plaintiff requested that the trial court:

> A. Register the attached Israeli order for child support and property/support payments;
>
> B. Award . . . [P]laintiff reasonable attorney's fees in connection with enforcement of same;
>
> C. Order . . . Defendant to pay all costs, including reasonable attorney's fees, for the prosecution of this action;
>
> D. Determine that the Israeli order is entitled to comity and enforce that order, awarding past due child support arrears to . . . Plaintiff and the sum of $80,000 to Plaintiff;
>
> E. Find . . . Defendant in willful criminal and/or civil contempt of this Court for his failure to comply with his obligation to pay child support as set forth above; and

F. Order that . . . Defendant's prospective child support obligation be paid by and through the North Carolina Centralized Child Support Enforcement Office by wage withholding; and

G. Issue orders for such other and further relief as the Court may deem just and proper.

Defendant filed a motion in the cause and answer on 2 December 2005, in which Defendant asserted that the Family Court of Tel Aviv and Central District retained jurisdiction over Plaintiff, Defendant, and the subject matter of Plaintiff's complaint. Defendant further asserted that (1) he had filed a motion in the Family Court of Tel Aviv and Central District requesting a modification of his child support obligation under the Israeli order; (2) the Israeli order could not be registered in North Carolina pursuant to N.C. Gen. Stat. § 52C-1-101 *et seq.*; and (3) assuming *arguendo* that the Israeli order could be registered in North Carolina, Plaintiff had failed to properly register it under N.C. Gen. Stat. § 52C-6-602 and N.C. Gen. Stat. § 52C-6-605. Defendant requested that the trial court enter an order dismissing Plaintiff's complaint and denying subject matter jurisdiction based upon the motion pending in the Family Court of Tel Aviv and Central District.

Defendant also filed an objection to registration and petition for hearing on 21 December 2005, seeking "a hearing in order to contest the validity of registration and enforcement of the [Israeli order.]" Plaintiff filed a motion for summary judgment on 5 January 2006, stating that Plaintiff was entitled to judgment "under the Uniform Foreign Money-Judgments Recognition Act . . . at North Carolina General Statutes Sections 1C-1801, *et seq.* and Chapters 50 and 52 of the North Carolina General Statutes governing enforcement of foreign child support orders under the laws of comity."

The trial court held a hearing on Plaintiff's motion on 22 February 2006. In an order entered 10 March 2006, the trial court granted summary judgment in Plaintiff's favor. The trial court ordered (1) that the child support provision of the Israeli order be domesticated and subject to enforcement in North Carolina; (2) that Plaintiff recover of Defendant $80,000.00 under the North Carolina Foreign Money-Judgments Recognition Act (the NCFMJRA) and that a judgment be entered against Defendant in that amount; and (3) that execution and enforcement of the $80,000.00 judgment against Defendant be stayed until 31 May 2006 or until Defendant's motion pending be-

fore the Family Court of Tel Aviv and Central District was heard. Defendant appeals.

Initially, we note that Defendant fails to argue his first assignment of error which pertained to the trial court's ruling that the child support provision be domesticated and subject to enforcement in North Carolina. We therefore deem that assignment of error abandoned pursuant to N.C.R. App. P. 28(b)(6).

[1] Next, we must address Plaintiff's argument that Defendant's appeal should be dismissed for various violations of the North Carolina Rules of Appellate Procedure. Since the filing of the briefs in the present case, our Supreme Court decided *State v. Hart*, 361 N.C. 309, 644 S.E.2d 201 (2007), and addressed whether our Court "may review an appeal if there are any violations of the Rules of Appellate Procedure." *Id.* at 310-11, 644 S.E.2d at 202. The Supreme Court stated that "every violation of the rules does not require dismissal of the appeal or the issue, although some other sanction may be appropriate, pursuant to Rule 25(b) or Rule 34 of the Rules of Appellate Procedure." *Id.* at 311, 644 S.E.2d at 202. The Supreme Court also noted Rule 2 gives an appellate court the power to suspend the rules " '[t]o prevent manifest injustice to a party, or to expedite decision in the public interest.' " *Id.* at 315, 644 S.E.2d at 205 (quoting N.C.R. App. P. 2). However, the Court also stated that Rule 2 "must be applied cautiously." *Id.* The Supreme Court clarified, stating: "Thus, the exercise of Rule 2 was intended to be limited to occasions in which a 'fundamental purpose' of the appellate rules is at stake, which will necessarily be 'rare occasions.' " *Id.* at 316, 644 S.E.2d at 205.

Our Court has decided several cases applying *Hart*. In *McKinley Bldg. Corp. v. Alvis*, 183 N.C. App. 500, 645 S.E.2d 219 (2007), and *Peverall v. County of Alamance*, 184 N.C. App. 88, 645 S.E.2d 416 (2007), we declined to dismiss the cases based upon appellate rules violations. Instead, our Court ordered the offending party to pay the printing costs of the appeal pursuant to Rule 34(b). We determined the violations were not sufficiently egregious to warrant dismissal. *McKinley*, 183 N.C. App. at 502, 645 S.E.2d at 221; *Peverall*, 184 N.C. App. at 91, 645 S.E.2d at 419. We came to a different result in *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 183 N.C. App. 389, 645 S.E.2d 212 (2007). In *Dogwood*, the plaintiff filed a motion to dismiss based upon the defendant's rules violations. *Id.* at 390, 645 S.E.2d at 214. The defendant violated (1) Rule 10(c)(1) by failing to include proper record or transcript references; (2) Rule 28(b)(6) by

failing to refer to the assignments of error in the argument section; (3) Rule 28(b)(4) by failing to state the grounds for appellate review; and (4) Rule 28(b)(6) by failing to state the applicable standard of review for each question presented. *Id.* at 391-94, 645 S.E.2d at 214-16. In our discussion, we noted that the defendant failed to respond to the plaintiff's motion to dismiss and failed to correct the violations identified by the plaintiff. *Id.* at 394, 645 S.E.2d at 216. We also noted in *Dogwood*, that

> unlike in *Hart*: (1) we are not dismissing [the] defendant's appeal *ex mero mot[u]*; (2) [the] plaintiff has moved to dismiss the appeal for numerous appellate rule violations; (3) [the] defendant failed to respond to [the] plaintiff's motion; and (4) there are multiple and egregious rule violations instead of one violation as in *Hart*.

Id. at 395, 645 S.E.2d at 217. We determined that the appropriate sanction for the rules violations was dismissal of the defendant's appeal. *Id.* at 395, 645 S.E.2d at 217.

We find the present case to be similar to *McKinley* and *Peverall*. We do not agree with Plaintiff's assertion that Defendant violated Rule 28(b)(5) by failing to support the facts with references to the transcript or the record, or that Defendant violated Rule 28(b)(6) by failing to cite authority supporting his argument. In his reply brief, Defendant concedes that he failed to include a statement of the applicable standard of review in violation of Rule 28(b)(6). Plaintiff also argues that Defendant's second assignment of error violated Rule 10(c)(1). Even assuming *arguendo* that Defendant's second assignment of error did not comply, we believe these violations are "not sufficiently egregious to warrant dismissal." *McKinley*, 183 N.C. App. at 502, 645 S.E.2d at 221. *See also Peverall*, 184 N.C. App. at 91, 645 S.E.2d at 419. Therefore, we decline to dismiss Defendant's appeal and proceed to our review of his remaining assignment of error.

[2] In his second assignment of error, Defendant argues that the trial court erred by granting summary judgment in favor of Plaintiff. Specifically, Defendant argues that Plaintiff failed to follow the proper statutory procedures under the NCFMJRA. Defendant contends that, by failing to file a motion seeking recognition, Plaintiff did not abide by the provisions of the NCFMJRA. Defendant further argues that even had Plaintiff followed the proper procedures, the trial court had no authority to enforce the judgment under the

NCFMJRA because enforcement of a foreign judgment is governed by the Uniform Enforcement of Foreign Judgments Act (the UEFJA).

In response, Plaintiff argues that the Israeli order is a foreign judgment entitled to recognition under the NCFMJRA. Further, Plaintiff argues that Defendant did not assert any of the grounds for nonrecognition under the NCFMJRA and therefore, the Israeli order is conclusive between the parties pursuant to N.C. Gen. Stat. § 1C-1803. Plaintiff also argues that she was not required to follow the procedures of the UEFJA before seeking recognition of the Israeli order under the NCFMJRA.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). "[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). We review the evidence in the light most favorable to the nonmoving party. *Id.*

Resolution of this issue involves a discussion of both the UEFJA and the NCFMJRA. According to the UEFJA:

> "Foreign judgment" means any judgment, decree, or order of a court of the United States or a court of any other state which is entitled to full faith and credit in this State, except a "child support order," . . . a "custody decree," . . . or a domestic violence protective order[.]

N.C. Gen. Stat. § 1C-1702(1) (2005). Under this definition, the Israeli order is a not a "foreign judgment." On the other hand, the NCFMJRA defines foreign judgment, in part, as "any judgment of a foreign state granting or denying recovery of a sum of money[.]" N.C. Gen. Stat. § 1C-1801(1) (2005). Further, the NCFMJRA includes in its definition of foreign state "any governmental unit other than the United States[.]" N.C. Gen. Stat. § 1C-1801(2) (2005). Thus, because this is an order issued from an Israeli court, we conclude that Plaintiff was correct to proceed under the NCFMJRA.

We must next determine whether Plaintiff followed the proper procedures under the NCFMJRA. N.C. Gen. Stat. § 1C-1802 (2005) states that the NCFMJRA "applies to any foreign judgment that is

final and conclusive and enforceable where rendered even though an appeal of the judgment is pending or the judgment is subject to appeal." N.C. Gen. Stat. § 1C-1803 (2005) provides:

> Except as provided in G.S. 1C-1804, a foreign judgment meeting the requirements of G.S. 1C-1802 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment is enforceable in the manner set forth in Article 17 of this Chapter. The defenses available to a judgment debtor under G.S. 1C-1804 may be asserted by the judgment debtor in the manner set forth in G.S. 1C-1705.

N.C. Gen. Stat. § 1C-1804 (2005) sets out various grounds for nonrecognition of a foreign judgment that would render a foreign judgment "not conclusive[.]" Our review of the NCFMJRA reveals that no provision of the NCFMJRA describes the enforcement procedures to be followed. Rather, the NCFMJRA provides that it is enforceable pursuant to the UEFJA. N.C.G.S. § 1C-1803. We note that in *VF Jeanswear Ltd. Partnership v. Molina*, 320 F. Supp. 2d 412, 418 (2004), the United States District Court for the Middle District of North Carolina noted that the NCFMJRA "does not govern the enforcement of foreign judgments. Rather, it pertains only to whether a court should recognize the judgment."

The UEFJA sets out the appropriate steps for enforcing a judgment recognized under the NCFMJRA. N.C. Gen. Stat. § 1C-1703(a) (2005) permits an authenticated foreign judgment to be filed with the clerk of court in a county where the judgment debtor resides, or owns real or personal property. The judgment creditor is required (1) "to make and file" an affidavit stating that the judgment is final and unsatisfied; and (2) state the amount remaining unpaid. N.C.G.S. § 1C-1703(a). The judgment is then to be docketed and indexed as any other judgment under N.C. Gen. Stat. § 1C-1703(b) (2005). Upon filing of the judgment and affidavit, the judgment creditor is required to serve a notice of the filing on the judgment debtor. N.C. Gen. Stat. § 1C-1704(a) (2005). The judgment debtor can then file a motion for relief from, or notice of defense to, the judgment pursuant to N.C. Gen. Stat. § 1C-1705 (2005).

In the present case, Plaintiff's complaint made sufficiently clear that she was seeking, *inter alia*, recognition of the $40,000.00 payments provided for in the Israeli order. Further, in her motion for summary judgment, Plaintiff specifically cited the NCFMJRA as the basis for her motion. Moreover, the Israeli order qualifies as a foreign

judgment under the NCFMJRA. At the summary judgment hearing, Defendant did not assert any ground for nonrecognition, nor has he done so before this Court. We therefore conclude that the trial court did not err by entering an order which recognized the payments due Plaintiff by Defendant under the Israeli order. As noted above, to enforce the judgment, Plaintiff must follow the statutory steps contained in the UEFJA at the appropriate time. We find no error in the trial court's order.

Affirmed.

Judges ELMORE and STEPHENS concur.

NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, PLAINTIFF v. THE BOARD OF TRUSTEES OF GUILFORD TECHNICAL COMMUNITY COLLEGE, DEFENDANT

No. COA06-401

(Filed 21 August 2007)

1. Appeal and Error— appealability—sovereign immunity—substantial right

Although defendant community college's appeal from the denial of its motion to dismiss is an appeal from an interlocutory order, it is immediately appealable because the defense of sovereign immunity affects a substantial right.

2. Immunity— sovereign—community college—reimbursement of payments for workers' compensation benefits

The trial court erred by denying defendant community college's motion to dismiss a declaratory judgment action by the Insurance Guaranty Association for reimbursement of payments for workers' compensation benefits under the net worth provisions of the Guaranty Act in N.C.G.S. § 58-48-50(a1), because: (1) the cases cited by plaintiff from other jurisdictions are not instructive when they fail to analyze whether the sovereign immunity defense is a bar to a guaranty association's right to reimbursement from a State agency, and no legal authority exists to support a guaranty association's right to seek reimbursement from a State agency which has asserted sovereign immunity; (2)

our General Assembly has explicitly waived defendant's sovereign immunity only as to its institutional employees raising valid workers' compensation claims; (3) the General Assembly is silent as to any claims for reimbursement plaintiff has against the State; and (4) there are no provisions in the North Carolina General Statutes that present a clear waiver of defendant's sovereign immunity or a plain unmistakable mandate for waiver of sovereign immunity.

Defendant appeals from an order entered 26 January 2006 by Judge A. Leon Stanback, Jr. in Wake County Superior Court. Heard in the Court of Appeals 5 June 2007.

Nelson, Mullins, Riley, & Scarborough, LLP, by Christopher J. Blake, for plaintiff-appellee.

Smith Moore, LLP, by Sidney S. Eagles, Jr. and James R. Holland, for defendant-appellant.

BRYANT, Judge.

The Board of Trustees of Guilford Technical Community College (defendant-GTCC) appeals from an order entered 26 January 2006 denying its motion to dismiss a declaratory judgment action filed by North Carolina Insurance Guaranty Association (plaintiff-NCIGA). Because we hold NCIGA's claim for reimbursement for payments made on behalf of GTCC is barred by the doctrine of sovereign immunity, we reverse the judgment of the trial court.

This case arises from claims for workers' compensation benefits made against GTCC by its employees that were paid by NCIGA as "covered claims" within NCIGA's obligations under the North Carolina Insurance Guaranty Association Act (Guaranty Act). N.C. Gen. Stat. § 58-48-1, *et seq.* GTCC is a two-year accredited community college operating under the provisions of N.C. Gen. Stat. § 115D-1, *et seq.* NCIGA is a non-profit, unincorporated, statutory association arising and existing pursuant to the Guaranty Act. GTCC purchased workers' compensation liability insurance from Reliance Insurance Company (Reliance). Reliance was declared insolvent and placed into liquidation in Pennsylvania on 3 October 2001.

Following Reliance's insolvency, NCIGA fulfilled its statutory obligations under the Guaranty Act, and began making indemnity and defense payments in connection with GTCC workers' compensation claims which were "covered claims" under the Guaranty Act. NCIGA

thereafter demanded that GTCC reimburse $324,013 paid by NCIGA through 19 August 2005 on GTCC workers' compensation claims. NCIGA's demand for reimbursement was made pursuant to N.C. Gen. Stat. § 58-48-50(a1), a provision of the Guaranty Act which grants NCIGA the right to recover all sums paid for "covered claims" on behalf of an insured if the insured's net worth as of December 31 of the year preceding the insolvency of the insured's carrier exceeds $50 million. N.C. Gen. Stat. § 58-48-50(a1) (2005). GTCC does not dispute that it had a net worth in excess of $50 million as of 31 December 2000.

NCIGA commenced a declaratory judgment action on 20 September 2005 against GTCC. NCIGA's complaint seeks reimbursement from GTCC pursuant to the net worth provisions of the Guaranty Act. In response to NCIGA's complaint, GTCC moved to dismiss pursuant to Rules 12 (b)(1), (b)(2) and (b)(6) of the North Carolina Rules of Civil Procedure, all on the grounds NCIGA's claims against GTCC were barred by sovereign immunity. The trial court denied GTCC's motion to dismiss. Defendant-GTCC appeals.

Defendant argues that based on the doctrine of sovereign immunity the trial court erred by denying GTCC's motion to dismiss because: (I) the trial court lacked subject matter jurisdiction (II) the trial court lacked personal jurisdiction and (III) plaintiff failed to state a claim upon which relief may be granted.

The standard of review on appeal from a motion to dismiss is *de novo*. *Hatcher v. Harrah's N.C. Casino Co., LLC*, 169 N.C. App. 151, 155, 610 S.E.2d 210, 212 (2005). "Under a *de novo* review, the [C]ourt considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citing *Mann Media, Inc. v. Randolph County Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)).

[1] Defendant argues the trial court erred by denying their motion to dismiss on the basis of sovereign immunity because the trial court lacked subject matter and personal jurisdiction. Initially, we note the immediate appeal, although interlocutory, is appropriate because the trial court's denial of a motion to dismiss based on GTCC's sovereign immunity defense affects a substantial right. *McClennahan v. N.C. Sch. of the Arts*, 177 N.C. App. 806, 808, 630 S.E.2d 197, 199 (2006) (Appeals raising issues of sovereign immunity affect a substantial

right and are immediately appealable.) (internal quotation marks and citations omitted). However,

> "an appeal of a motion to dismiss based on sovereign immunity presents a question of personal jurisdiction rather than subject matter jurisdiction[.]" [*Data Gen. Corp. v. County of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245-46 (2001).] Therefore, our Court held that the denial of a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is not immediately appealable, even where the defense of sovereign immunity is raised. *Id.* at 100, 545 S.E.2d at 246.

Davis v. Dibartolo, 176 N.C. App. 142, 144, 625 S.E.2d 877, 880 (2006). Therefore, we review defendant's appeal from their motion to dismiss on the basis of defendant's claim that the trial court lacked personal jurisdiction to determine whether the General Assembly has waived GTCC's sovereign immunity for claims by NCIGA under the reimbursement provision of the Guaranty Act.

[2] The reimbursement provision of the Guaranty Act states in pertinent part:

> The [NCIGA] shall have the right to recover from the following *persons* the amount of any "covered claim" paid on behalf of such person pursuant to this Article: (1) *Any insured* whose net worth on December 31 of the year next preceding the date the insurer becomes insolvent exceeds fifty million dollars ($50,000,000) and whose liability obligations to other persons are satisfied in whole or in part by payments under this Article. . . .

N.C. Gen. Stat. § 58-48-50 (al) (2002)[1] (emphasis added). While the General Assembly did not define the term "insured" in the Guaranty Act, a "person" is defined as "any individual, corporation, partnership, association or voluntary organization." N.C. Gen. Stat. § 58-48-20 (8) (2002). NCIGA argues that the broad language of "any insured" in the reimbursement provision waives GTCC's sovereign immunity.

However, a waiver of sovereign immunity can be made only by the General Assembly. *Wood v. N.C. State Univ.*, 147 N.C. App. 336, 338, 556 S.E.2d 38, 40 (2001). North Carolina courts have applied a rule of strict construction to statutes authorizing waiver of sovereign immunity. *Id.* (citation omitted); *Jones v. Pitt Co. Mem. Hosp.*, 104

1. This provision was amended in 2003. However, the 2002 version of the statute remains applicable to insurer insolvencies, such as Reliance, which occurred prior to the effective date of the 2003 amendments.

N.C. App. 613, 615-16, 410 S.E.2d 513, 514 (1991). Our Supreme Court has stated "[i]t is for the General Assembly to determine when and under what circumstances the State may be sued." *Jones* at 615-16, 410 S.E.2d at 514 (citing *Great Am. Ins. Co. v. Gold, Comm'r of Ins.*, 254 N.C. 168, 172-73, 118 S.E.2d 792, 795 (1961)). Further,

> [t]he State and its governmental units cannot be deprived of the sovereign attributes of immunity except by a clear waiver by the lawmaking body. The concept of sovereign immunity is so firmly established that it should not and cannot be waived by indirection or by procedural rule. Any such change should be by *plain, unmistakable mandate of the lawmaking body.*

Wood at 338, 556 S.E.2d at 40 (quotation omitted); *See Orange County v. Heath*, 282 N.C. 292, 296, 192 S.E.2d 308, 310-11 (1972) ("the Courts will never say that [sovereign immunity] has been abrogated, abridged, or surrendered, except in deference to *plain, positive legislative declarations* to that effect") (emphasis added); *Davidson County v. High Point*, 85 N.C. App. 26, 37, 354 S.E.2d 280, 286, *aff'd as modified*, 321 N.C. 252, 362 S.E.2d 553 (1987) (citation omitted) ("general statutes do not apply to the State unless the State is specifically mentioned therein").

The absolute and unqualified protection of sovereign immunity extends to suits against State "departments, *institutions* and agencies." *RPR & Assocs. v. State*, 139 N.C. App. 525, 528, 534 S.E.2d 247, 250 (2000) (emphasis added), *aff'd*, 353 N.C. 362, 543 S.E.2d 480 (2001) (citation omitted). As a sovereign, the State of North Carolina is immune from suit absent its consent to be sued or waiver of immunity. *Welch Contr., Inc. v. N.C. DOT*, 175 N.C. App. 45, 51, 622 S.E.2d 691, 695 (2005) (citing *Battle Ridge Cos. v. N.C. DOT*, 161 N.C. App. 156, 157, 587 S.E.2d 426, 427 (2003)). GTCC, as a community college and an institution of the State,[2] is authorized to waive its governmental immunity from liability through the purchase of liability insurance for negligent or tortious conduct that results in bodily injury or property damage. N.C. Gen. Stat. § 115D-24 (2005). GTCC is also authorized to waive its immunity by purchasing insurance to cover liability for workers' compensation claims.

NCIGA argues the net worth provision compels its right to reimbursement from GTCC and that GTCC has waived its sovereign immu-

2. *See Miller v. Guilford Tech. Comm. College*, 1998 US. Dist. LEXIS 15153, *6 (M.D.N.C. June 15, 1998) (concluding "GTCC is an alter ego of the [S]tate" of North Carolina).

nity by purchasing workers' compensation liability insurance from Reliance. We are ultimately unpersuaded by these arguments. First, the cases cited by NCIGA from other jurisdictions are not instructive where they fail to analyze whether the sovereign immunity defense is a bar to a guaranty association's right to reimbursement from a State agency. *See*, *e.g.*, *Borman's*, *Inc. v. Mich. Prop. & Cas. Guar. Assoc.*, 925 F.2d 160 (6th Cir. 1991) (upholding as constitutional Michigan's net worth provision); *Minn. Ins. Guar. Ass'n v. Integra Telecom*, *Inc.*, 697 N.W.2d 223, 231 (Minn. 2005) (permitting the guaranty association to recover from an insured with a net worth over $25 million); *Rhode Island Insurer's Insolvency Fund v. Leviton Mfg. Co.*, 716 A.2d 730, 735 (R.I. 1998) (upholding as constitutional Rhode Island's net worth provision allowing for reimbursement). In fact, no legal authority exists to support a guaranty association's right to seek reimbursement from a State agency which has asserted sovereign immunity.

NCIGA's second argument, that GTCC has waived sovereign immunity, also fails. With respect to workers' compensation claims against GTCC, the Community Colleges Act provides that "all institutional employees" are protected under Chapter 97 of the General Statutes of North Carolina (Workers' Compensation Act). N.C. Gen. Stat. § 115D-23 (2005). Further, community colleges are authorized to "purchase insurance to cover workers' compensation liability." *Id.* Accordingly, our General Assembly has explicitly waived GTCC's sovereign immunity only as to its institutional employees raising valid workers' compensation claims. However, and most notably, the General Assembly is silent as to any claims for *reimbursement* NCIGA has against the State.

Accordingly, we have found no provision in the North Carolina General Statutes that presents a "clear waiver" of GTCC's sovereign immunity or a "plain, unmistakable mandate" for waiver of sovereign immunity. Absent clear proof that the State has waived sovereign immunity pursuant to the reimbursement provision of the Guaranty Act, we are compelled to reverse the trial court's denial of defendant's motion to dismiss. *See Sellers v. Rodriguez*, 149 N.C. App. 619, 623, 561 S.E.2d 336, 339 (2002) (holding in order to state a cognizable claim against a government entity plaintiff "must allege and prove" waiver of sovereign immunity).

Moreover, dismissal is appropriate "where the face of the complaint discloses some insurmountable bar to recovery." *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d

201, 203 (2005). As discussed above, accepting the factual allegations in NCIGA's complaint as true, dismissal is proper because NCIGA cannot defeat GTCC's sovereign immunity defense. NCIGA's allegations fail to state a claim upon which relief can be granted. We therefore reverse the trial court's denial of defendant's motion to dismiss.

Reversed.

Judges WYNN and HUNTER concur.

PHILLIP SMITH, PLAINTIFF-APPELLANT v. ROBERT JOHN SERRO, M.D., CAROLINA REHABILITATION & SURGICAL ASSOCIATES, P.A., DEFENDANT-APPELLEE

No. COA06-1427

(Filed 21 August 2007)

1. Medical Malpractice— Rule 9(j) certification—reasonable expectation expert would qualify

A de novo review revealed that the trial court did not err in a medical malpractice case by holding that plaintiff failed to comply with N.C.G.S. § 1A-1, Rule 9(j), because: (1) plaintiff could not have reasonably expected the pertinent doctor to qualify as an expert under N.C.G.S. § 8C-1, Rule 702 when his specialty was not the same as defendant doctor nor is it a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint; and (2) familiarity is not the same as the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the pertinent procedure.

2. Medical Malpractice— common law negligence—specialized knowledge or skill

Plaintiff's complaint did not state a claim for common law negligence against defendant doctor which did not require a Rule 9(j) certification because plaintiff's contention that preventing plaintiff from participating in the bowling outing did not require specialized knowledge or skill is without merit since determining whether a patient who is known to be at risk of falling should participate in such an activity is precisely the kind of professional judgment to which N.C.G.S. § 90-21.11 applies.

Appeal by plaintiff from judgment entered 29 March 2006 by Judge Clifton W. Everett, Jr. in Nash County Superior Court. Heard in the Court of Appeals 9 May 2007.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Adrienne E. Allison, for plaintiff-appellant.

Harris, Creech, Ward and Blackerby, P.A., by Charles E. Simpson, Jr. and Jay C. Salsman, for defendant-appellee Robert John Serro.

Crawford & Crawford, LLP, by Renee B. Crawford and Robert O. Crawford III for defendant-appellee Carolina Rehabilitation & Surgical Associates, P.A.

North Carolina Association of Defense Attorneys, by Norman F. Klick, Jr. and Robert N. Young; Carruthers & Roth, P.A., Of Counsel, Amicus Curiae.

ELMORE, Judge.

On 22 April 2002, Phillip Smith (plaintiff) suffered brain damage as a result of bleeding in his brain. On 16 May 2002, he was admitted to the Bryant T. Aldridge Rehabilitation Center (the Center), where he received inpatient services under Dr. Robert John Serro's care. On 27 June 2002, Dr. Serro discharged plaintiff from the Center's inpatient services to a retirement home. Plaintiff took part in the Center's Bridge Program, an outpatient rehabilitation program. During this time, he continued to receive treatment from Dr. Serro as part of his participation in the Bridge Program.

On 11 July 2002, plaintiff took part in a bowling outing organized by the Bridge Program. During the outing, plaintiff fell and fractured his hip.

On 11 July 2005, plaintiff filed suit against Dr. Serro, Carolina Rehabilitation, and Nash Health Care Systems. He alleged negligence, and stated that he reasonably expected Dr. Eduardo Marsigli to qualify as an expert witness in the case.[1]

On 28 November 2005, Carolina Rehabilitation, joined by Dr. Serro, moved to dismiss and for summary judgment, alleging that plaintiff failed to file within the applicable statute of limitations, and, in the alternative, that plaintiff failed to identify a qualifying expert to

1. Dr. Marsigli, an orthopedic surgeon, treated plaintiff's fractured hip. Dr. Marsigli's son, Jeffrey Marsigli, served as plaintiff's trial counsel.

testify as to the standard of care. On 29 March 2006, the trial court entered an order and involuntary dismissal with prejudice, holding that "Dr. Marsigli is and was not reasonably expected to qualify as an expert witness . . . ." Plaintiff now appeals.

[1] Plaintiff contends that the trial court erred in holding that he failed to comply with Rule 9(j) of our Rules of Civil Procedure. Rule 9(j) reads, in pertinent part:

> *Medical malpractice.*—Any complaint alleging medical malpractice by a health care provider . . . in failing to comply with the applicable standard of care . . . shall be dismissed unless:
>
> > (1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care . . . .

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2005).

The pertinent section of Rule 702 of our Rules of Evidence reads:

> (b) In a medical malpractice action as defined in G.S. 90-21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:
>
> > (1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:
> >
> > > a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or
> > >
> > > b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.
> >
> > (2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:
> >
> > > a. The active clinical practice of the same health profession in which the party against whom or on whose behalf

> the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or
>
> b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

N.C. Gen. Stat. § 8C-1, Rule 702(b) (2005).

At the outset, we must determine the proper standard of review. We agree with plaintiff that our review of Rule 9(j) compliance is *de novo*, because such compliance "clearly presents a question of law . . . ." *Phillips v. Triangle Women's Health Clinic, Inc.*, 155 N.C. App. 372, 376, 573 S.E.2d 600, 603 (2002) (citation omitted). Moreover, we note that the question properly before this Court is whether Dr. Marsigli was "*reasonably expected* to qualify as an expert witness under Rule 702 of the Rules of Evidence," not whether he did, in fact, qualify. N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (2005) (emphasis added). *See Trapp v. Maccioli*, 129 N.C. App. 237, 241, 497 S.E.2d 708, 711 (1998) ("The disqualification of a Rule 9(j) witness under Rule 702 does not necessarily require the dismissal of the pleadings. The question under Rule 9(j) instead is whether it was 'reasonably expected' that the witness would qualify under Rule 702.").

In this case, however, it is clear that plaintiff could not reasonably have expected Dr. Marsigli to qualify as an expert under Rule 702. It is uncontroverted that Dr. Marsigli's specialty, orthopedic surgery, is not "the same specialty as [Dr. Serro's specialty, physical medicine and rehabilitation]," nor is it "a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint . . . ." N.C. Gen. Stat. § 8C-1, Rule 702(b)(1)b (2005).

Nevertheless, plaintiff suggests that we are bound by our decision in *Trapp*. As we have noted, the inquiry is the same in this case as in *Trapp*: We must determine whether it was "reasonably expected" that Dr. Marsigli would qualify.

Contrary to plaintiff's assertion, however, the fact that the inquiry is the same does not mandate a similar result. This case is distinguishable on its facts. In *Trapp*, our analysis hinged on the procedure at issue. The plaintiff in that case underwent "a central venous access for the specific purpose of plasmapheresis." *Trapp*, 129 N.C. App. at 240, 497 S.E.2d at 710. The plaintiff's expert in *Trapp*, an emergency medicine physician, worked in a specialty similar to that at issue in the case, anesthesiology. Further, the expert had performed central venous accesses, but not for the purpose of plasmapheresis. Although the plaintiff argued that the expert did not satisfy Rule 702(b)(1)(6), we held that on those facts, there was "ample evidence in this record that a reasonable person armed with the knowledge of the plaintiff at the time the pleading was filed would have believed that [the expert] would have qualified as an expert under Rule 702." *Id.* at 241, 497 S.E.2d at 711.

In this case, plaintiff contends that there is a question as to what procedure is the subject of the complaint. Plaintiff suggests that the trial court based its decision on Carolina Rehabilitation's framing of the procedure as "rehabilitation of the plaintiff after a cerebral vascular accident," and "rehabilitation of patients following brain injuries." Instead, plaintiff suggests, the trial court ought to have focused on plaintiff's complaint, which plaintiff alleges identified the following procedures: (1) rehabilitation from brain surgery and ataxia;[2] (2) diagnosis of plaintiff's condition; and (3) treatment and care of plaintiff's condition. Plaintiff insists that "[i]dentification of the procedure is . . . significant because Dr. Marsigli's affidavit shows his experience as an orthopedic surgeon with spinal cord and brain injuries and with symptoms Plaintiff suffered, 'namely ataxia or a loss of coordination, which resulted from his brain injury.' "

However, we find the key phrase in plaintiff's assertion to be his reference to Dr. Marsigli's "experience *as an orthopedic surgeon*." Even accepting that plaintiff's characterization of the procedure is correct, and that Dr. Marsigli has experience with the types of injuries and symptoms that afflicted plaintiff, his experience is in the specialty of orthopedic surgery. As Dr. Christopher Godbout stated in his affidavit on Carolina Rehabilitation's behalf, Dr. Serro's specialty, physical medicine and rehabilitation, is completely distinct from Dr. Marsigli's specialty in orthopedic surgery.

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2. Ataxia is a side effect of plaintiff's brain surgery, "which is defined as an inability to coordinate muscular movements."

Even if Dr. Marsigli is "familiar with the standard of care," as he claims to be, familiarity is not the same as "the active clinical practice of the same specialty or a similar specialty which includes within its specialty the *performance* of the procedure that is the subject of the complaint . . . ." N.C. Gen. Stat. § 8C-1, Rule 702(b)(2)a (2005) (emphasis added). It is clear that Dr. Marsigli does not administer the kind of treatment that Dr. Serro provides; Dr. Marsigli referred plaintiff to Dr. Serro for rehabilitation after Dr. Marsigli treated plaintiff for his injuries.

Plaintiff could have had no reasonable expectation that Dr. Marsigli would qualify as an expert in this case. Accordingly, the trial court did not err.

[2] Plaintiff's sole remaining contention is that the trial court erred in dismissing his complaint in its entirety, including what plaintiff characterizes as allegations of common law negligence.[3] Because we can discern no legitimate allegations of common law negligence, we find plaintiff's argument unpersuasive.

Whether an action is treated as a medical malpractice action or as a common law negligence action is determined by our statutes, which define a " 'medical malpractice action' [as] a civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider." N.C. Gen. Stat. § 90-21.11 (2005).

Plaintiff's contention that preventing plaintiff from participating in the bowling outing did not require "specialized knowledge or skill" is clearly without merit. Rehabilitative outings constitute part of the treatment prescribed by specialists such as Dr. Serro. Determining whether a patient who is known to be at risk of falling should participate in such an activity is precisely the kind of professional judgment to which N.C. Gen. Stat. § 90-21.11 applies. Accordingly, this contention is without merit.

Having conducted a thorough review of the record, we find no error. Accordingly, we affirm the trial court's order.

Affirmed.

Judges HUNTER and GEER concur.

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3. Plaintiff abandoned his other argument, that Dr. Serro did not properly join in Carolina Rehabilitation's motion to dismiss and for summary judgment, in his reply brief.

STATE OF NORTH CAROLINA v. BRYAN KEITH HESS

No. COA06-1413

(Filed 21 August 2007)

Search and Seizure— investigatory stop—vehicle owned by driver with suspended license—reasonable suspicion

An officer had reasonable suspicion to make an investigatory stop of a vehicle when he knew that defendant was the owner of the vehicle and that defendant's license had been suspended. In the absence of evidence to the contrary, it was reasonable to infer that defendant was driving the vehicle, and the judge did not err by denying defendant's motion to suppress in the resulting prosecution for driving while impaired.

Appeal by Defendant from order entered 14 July 2006 by Judge Michael E. Beale in Rowan County Superior Court. Heard in the Court of Appeals 21 May 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Hal F. Askins, for the State.

Haakon Thorsen for Defendant.

STEPHENS, Judge.

On 15 May 2004, Officer Jarrett Doty of the Granite Quarry Police Department was on patrol in an unmarked vehicle. At approximately 9:32 p.m., Officer Doty pulled his automobile "in behind a Pontiac vehicle[.]" It was dark and Officer Doty could not determine the sex, race, or ethnicity of the driver of the Pontiac, or how many individuals were riding inside. Officer Doty traveled behind the Pontiac for approximately "[a] mile[,] . . . [m]aybe two miles" and did not observe the driver of the vehicle commit any traffic violations or weave in the lane of travel. Nevertheless, Officer Doty "ran the registration plate that was attached to the rear of the vehicle" through a computer in his patrol car. Officer Doty discovered that the vehicle was registered to Defendant. He then "ran [Defendant's] license number from the registration information" and determined that Defendant's license had been suspended. Once he had this information, but still not knowing whether Defendant was driving the vehicle, Officer Doty activated the blue lights on his patrol car and stopped the Pontiac. When he approached the Pontiac, Officer Doty found that Defendant was oper-

ating the vehicle. As a result of the stop, Defendant was cited for driving while impaired and driving with a revoked license.

On 10 March 2005, Defendant moved to suppress "any and all statements and/or evidence which was obtained or received as a result of Defendant being stopped . . . without reasonable and articulable suspicion to believe that . . . Defendant was either committing a crime or about to commit a crime." A hearing on Defendant's motion was held before the Honorable Michael E. Beale in Rowan County Superior Court on 12 July 2006. After the hearing, in an order dated 14 July 2006, Judge Beale denied Defendant's motion to suppress. Upon preserving his right to appeal Judge Beale's decision, Defendant pled guilty to both charges. From the denial of his motion to suppress, Defendant appeals. For the reasons stated herein, we affirm the order of the trial court.

By his only assignment of error, Defendant asserts the trial court erred in determining that Officer Doty had reasonable suspicion to stop Defendant's vehicle. Contending to the contrary, he argues further that Officer Doty's investigatory stop violated Defendant's Fourth Amendment right to be free from unreasonable searches and seizures. Under the totality of the circumstances presented herein, we disagree.

We first observe that Defendant has not assigned error to any of the trial court's findings of fact. Therefore, our review of the order denying his motion to suppress "is limited to the question of whether the trial court's findings of fact, which are presumed to be supported by competent evidence, support its conclusions of law and judgment." *State v. Pickard*, 178 N.C. App. 330, 334, 631 S.E.2d 203, 206 (citation omitted), *appeal dismissed and disc. review denied*, 361 N.C. 177, 640 S.E.2d 59 (2006). "This Court must not disturb the trial court's conclusions if they are supported by the court's factual findings." *State v. McArn*, 159 N.C. App. 209, 211-12, 582 S.E.2d 371, 373-74 (2003) (citing *State v. Cooke*, 306 N.C. 132, 291 S.E.2d 618 (1982)). "However, the trial court's conclusions of law are reviewed *de novo* and must be legally correct." *State v. Hernandez*, 170 N.C. App. 299, 304, 612 S.E.2d 420, 423 (2005) (citing *State v. Fernandez*, 346 N.C. 1, 484 S.E.2d 350 (1997)).

In his order denying Defendant's motion to suppress, Judge Beale made the following uncontested findings of fact:

> 2. That one witness testified, . . . C.J. Doty, and the court is the sole judge of the credibility and weight of his testimony.
>
> . . . .
>
> 4. That at 9:32 p.m. on the 15th day of May, 2004, Mr. Doty was on routine patrol in the town of Granite Quarry in an unmarked patrol car and was dressed in a regular police issued uniform.
>
> . . . .
>
> 7. That it was dark and he had his headlights on when he got behind a Pontiac vehicle operated on Legion Club Road.
>
> 8. That Mr. Doty could not determine anything about the driver from behind that vehicle. That he was unable to determine either the sex or the race of the operator of that vehicle or how many people were in the vehicle.
>
> 9. That he observed no traffic violations or weaving or er[r]atic driving.
>
> 10. That he was able to observe the registration plate and ran the registration plate and determined that the vehicle was registered to one Bryan Keith Hess, the Defendant in this case. That he ran a license check on the license number that came up for Mr. Hess and he determined from that check that Mr. Hess'[s] license had been suspended.
>
> . . . .
>
> 12. That upon making the observations found herein the patrolman initiated the stop by activating his blue light and the vehicle pulled over and stopped.

From these findings, Judge Beale concluded "[t]hat Officer Doty had a reasonable suspicion to stop the vehicle in question and make an investigatory stop" and "[t]hat none of the Defendant's constitutional rights, either State or Federal were violated in the making of this stop."

The Fourth Amendment protects private individuals from unreasonable governmental intrusions on the individual's liberty or property. *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968). However, "[i]t is well-established that a law enforcement officer may temporarily detain a person for investigative purposes without violating the Fourth Amendment." *State v. Shearin*, 170 N.C. App. 222, 226, 612

S.E.2d 371, 375 (citing *Terry*, *supra*), *appeal dismissed and disc. review denied*, 360 N.C. 75, 624 S.E.2d 369 (2005). "An investigatory stop must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.' " *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)). "When determining whether an officer had 'a reasonable suspicion to make an investigatory stop' . . . trial courts must consider the totality of the circumstances." *Shearin*, 170 N.C. App. at 226, 612 S.E.2d at 376 (quoting *State v. Willis*, 125 N.C. App. 537, 541, 481 S.E.2d 407, 410 (1997)).

The appellate courts of this State have yet to address the constitutionality of an investigatory stop based solely on an officer's knowledge that an automobile currently being operated is registered to an individual with a suspended or revoked driver's license. We thus find it instructive to examine decisions from other jurisdictions for guidance.

In *Village of Lake in the Hills v. Lloyd*, 591 N.E.2d 524, 526 (Ill. App. Ct. 1992), *appeal denied*, 602 N.E.2d 455 (Ill. 1992), the Illinois Court of Appeals held that

> [p]olice knowledge that an owner of a vehicle has a revoked driver's license provides a reasonable suspicion to stop the owner's vehicle for the purpose of ascertaining the status of the license of the driver. Common sense dictates that such information, even alone, is enough to provide a constitutional basis for stopping a vehicle or its occupants.

Similarly, in *State v. Pike*, 551 N.W.2d 919, 922 (Minn. 1996), the Minnesota Supreme Court held "that the knowledge that the owner of a vehicle has a revoked license is enough to form the basis of a 'reasonable suspicion of criminal activity' when an officer observes the vehicle being driven." However, Minnesota's high court limited the application of its holding to circumstances where, based on the information that the police officer was able to gather about the physical characteristics of the driver, it was reasonable to infer that the owner of the automobile was also the driver. *Id.*

Relying on *Village of Lake in the Hills*, *supra*, the New Hampshire Supreme Court held that when "an officer observed a vehicle, which he properly determined to be registered to an owner who had a suspended driver's license, being driven on a public roadway" and the "officer observed nothing that would indicate that the

driver was not the owner[,]" it "was reasonable for the officer to infer" that the owner of the vehicle was driving. *State v. Richter*, 765 A.2d 687, 689 (N.H. 2000). Additionally, in *People v. Jones*, 678 N.W.2d 627, 630 (Mich. Ct. App. 2004), the Michigan Court of Appeals held that

> [i]n the absence of evidence to the contrary, a police officer may reasonably suspect that a vehicle is being driven by its registered owner . . . [and that] [w]here information gleaned from a computer check provides a basis for the arrest or further investigation of the registered owner of the vehicle, a police officer may initiate an investigatory stop to determine if the driver is the registered owner of the vehicle.

In sum, our research reveals that when an officer knows that a vehicle being operated is registered to an owner with a suspended or revoked driver's license, the majority of jurisdictions have held that an officer has reasonable suspicion to make an investigatory stop, absent evidence that the driver is not the owner. *See, e.g., State v. Tozier*, 905 A.2d 836, 839 (Me. 2006) (holding that "[a]lthough it is possible that a driver under suspension could register a vehicle and that others . . . could drive it, it is reasonable for an officer to suspect that the owner is driving the vehicle, absent other circumstances that demonstrate the owner is not driving"); *accord State v. Mills*, 458 N.W.2d 395, 397 (Iowa Ct. App. 1990) (holding that "[i]t was reasonable to infer the vehicle was being driven by its owner given the absence of evidence to the contrary"); *accord State v. Panko*, 788 P.2d 1026, 1027 (Or. Ct. App. 1990) (holding that if an officer knows that the owner's driver's license is suspended, "he may make a stop . . . unless other circumstances put him 'on notice that the driver is not the vehicle's owner' ").[1] We are persuaded by the rationale of the majority of jurisdictions and thus adopt the holding of the majority of jurisdictions that when a police officer becomes aware that a vehicle being operated is registered to an owner with a suspended or revoked driver's license, and there is no evidence appearing to the officer that the owner is not the individual driving the automobile, reasonable suspicion exists to warrant an investigatory stop.

After careful review of these cases and the facts of the case before us, we hold that because Officer Doty knew Defendant was the

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1. However, in *State v. Cerino*, 117 P.3d 876, 878 (Idaho Ct. App. 2005), the Idaho Court of Appeals held "that the mere observation of a vehicle being driven by someone of the same gender as the unlicensed owner is insufficient to give rise to a reasonable suspicion of unlawful activity."

owner of the Pontiac and that Defendant's license had been suspended, it was reasonable for Officer Doty, in the absence of evidence to the contrary, to infer that Defendant was driving the automobile. Based on this inference, reasonable suspicion existed for Officer Doty to make an investigatory stop to determine if Defendant was operating the vehicle. Furthermore, because the unchallenged findings of fact made by the trial court support this conclusion, the trial court did not err in denying Defendant's motion to suppress. Accordingly, the order of the trial court is affirmed.

AFFIRMED.

Chief Judge MARTIN and Judge STEELMAN concur.

STATE OF NORTH CAROLINA v. JAMES CURTIS DANIELS, JR., DEFENDANT

No. COA06-478

(Filed 21 August 2007)

Probation and Parole— probation revocation—reasonable effort to conduct hearing prior to expiration of probation

The trial court had jurisdiction to revoke defendant's probation and activate the suspended sentence for assault with a deadly weapon inflicting serious injury, and the case is remanded to make sufficient material findings, because although the trial court's statutorily required findings of fact were incomplete since merely issuing a warrant for arrest is not a reasonable effort to conduct a hearing prior to the expiration of defendant's probation, there was sufficient additional evidence in the record to support a reasonable effort finding including: (1) calling defendant's employer only to be informed that defendant no longer worked there; (2) leaving a note at defendant's residence only to receive a phone call from defendant's mother saying he no longer lived there; (3) attempting to personally serve the warrant at defendant's residence but being unable to locate defendant; and (4) soliciting the help of a surveillance officer to locate defendant after the warrant was returned unserved.

Judge WYNN dissenting.

Appeal by defendant from judgment entered 12 September 2005 by Judge Alma L. Hinton in Pitt County Superior Court. Heard in the Court of Appeals 5 June 2007.

Attorney General Roy Cooper, by Assistant Attorney General Scott K. Beaver, for the State.

Gilda C. Rodriguez for defendant-appellant.

BRYANT, Judge.

On 3 April 2001, defendant James Curtis Daniels, Jr. was convicted of assault with a deadly weapon inflicting serious injury. The trial court sentenced him to a suspended term of twenty-nine to forty-four months imprisonment and placed him on supervised probation for thirty-six months.[1]

On 19 March 2003, three probation violation reports were filed alleging that defendant failed to comply with the terms of his probation. On 31 August 2005, the arrest warrant was served on defendant. Following a hearing on 12 September 2005, the trial court revoked defendant's probation and activated the suspended sentence. Defendant appeals contending that the trial court lacked jurisdiction to revoke his probation and the trial court's findings were insufficient and incomplete.

North Carolina General Statute Section 15A-1344(f) states:

> (f) Revocation after Period of Probation.—The court may revoke probation after the expiration of the period of probation if:
>
> (1) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and
>
> (2) The court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier.

N.C. Gen. Stat. § 15A-1344(f) (2005). In *State v. Bryant*, the Supreme Court held that N.C.G.S. § 15A-1344(f) ". . . unambiguously requires the trial court to make a judicial finding that the State has made a reasonable effort to conduct the probation revocation hearing during the

1. The trial court attached several other intermediate punishments to defendant's sentence. Defendant was ordered to serve an active term of 217 days in the custody of Department of Correction and defendant was placed on intensive probation for six months.

period of probation set out in the judgment and commitment." 361 N.C. 100, 102-03, 637 S.E.2d 532, 534 (2006). Moreover, "[i]n the absence of statutorily mandated factual findings, the trial court's jurisdiction to revoke probation after expiration of the probationary period is not preserved." *Id.* at 103, 637 S.E.2d at 534.

Here the trial court made the following ruling regarding the State's burden of making a reasonable effort to conduct a hearing prior to the expiration of the probationary period: "I think that issuing an order for arrest on March 19th of 2003 was sufficient. That was [the State's] effort . . . and the efforts were reasonable as of March 19th, 2003. And that's my ruling." Technically, it appears the trial court made the statutorily required findings. However, this Court has previously held that merely issuing a warrant for arrest is not a "reasonable effort," in which case the trial court's findings of fact are incomplete. *See State v. Burns*, 171 N.C. App. 759, 762-63, 615 S.E.2d 347, 349-50 (2005) (The trial court's findings are to include "actions a reasonable person would pursue in seeking to notify defendant of his probation violation and conduct a hearing on the matter."). According to *Bryant*, " 'when [there is a failure] to make a material finding of fact . . ., the case must be remanded . . . for a proper finding . . . .' [However], when the record lacks sufficient evidence to support such a finding, the case should not be remanded in order to conserve judicial resources." *Bryant*, 361 N.C. at 104, 637 S.E.2d at 535 (citing *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 674-75, 599 S.E.2d 888, 904 (2004)).

In the instant case there is sufficient additional evidence in the record to support a reasonable effort finding. Specifically, the State presented evidence through sworn testimony that it made an effort to contact defendant prior to the expiration of his probation in the following ways: (1) calling defendant's employer, only to be informed that defendant no longer worked there; (2) leaving a note at defendant's residence, only to receive a phone call from defendant's mother saying that defendant no longer lived there;[2] (3) attempting to personally serve the warrant at defendant's residence, but being unable to locate defendant; and (4) soliciting the help of a surveillance officer to locate defendant after the warrant was returned unserved. Therefore, because there is sufficient evidence in the record to support a finding that the State made reasonable efforts to conduct a hearing prior to the expiration of defendant's probation, this case is

2. Defendant testified at trial that he had lived with his mother since the age of three, and denied having told his mother to tell authorities he no longer lived there.

remanded to the trial court to enter sufficient material findings. *See Bryant* at 104, 637 S.E.2d at 535.

Remanded.

Judge HUNTER concurs.

Judge WYNN dissents in a separate opinion.

WYNN, Judge dissenting.

"In the absence of statutorily mandated factual findings, the trial court's jurisdiction to revoke probation after expiration of the probationary period is not preserved." *State v. Bryant*, 361 N.C. 100, 103, 637 S.E.2d 532, 534 (2006). Here, the majority holds, and I agree, that the trial court failed to make the required statutory findings to preserve its jurisdiction to revoke Defendant's probation after the expiration of the period of probation. I, however, disagree with the majority's decision to remand this matter "to enter sufficient findings" because under *Bryant*, in the absence of the required statutory findings, this Court should vacate the order revoking Defendant's probation. In *Bryant*, the Supreme Court held that Section 15A-1334(f) of the North Carolina General Statute "unambiguously requires the trial court to make a judicial finding that the State has made a reasonable effort to conduct the probation revocation hearing during the period of probation set out in the judgment and commitment." Id. at 102-03, 637 S.E.2d at 534. Moreover, "[i]n the absence of statutorily mandated factual findings, the trial court's jurisdiction to revoke probation after expiration of the probationary period is not preserved." *Id.* at 103, 637 S.E.2d at 534. Furthermore,"[t]he statute makes no exception to this finding of fact requirement based upon the strength of the evidence in the record." *Id.*

Here, as in *Bryant*, the trial court failed to make the required statutory findings of fact. Accordingly, *Bryant* compels us to set aside the trial court's order revoking Defendant's probation. Additionally, as in *Bryant*, the State asks this Court to remand this matter to the trial court to make additional findings. However, in this case, "further proceedings are neither necessary nor advisable." *Id.* at 104, 637 S.E.2d at 535 (citation omitted).

Moreover, the majority states that it has found the necessary facts to support upholding the invocation of jurisdiction after the expiration of Defendant's probation:

Therefore, because there is sufficient evidence in the record to support a finding that the State made reasonable efforts to conduct a hearing prior to the expiration of defendant's probation, this case is remanded to the trial court to enter sufficient material findings.

Having so found and enumerated the findings of fact that would support the order in this case, the majority usurps the authority of the trial court to do the same by directing it to "enter sufficient findings of fact."

Because the trial court failed to make the statutorily mandated findings, this matter should be vacated.

STATE OF NORTH CAROLINA v. CHARLES EUGENE WATTS

No. COA04-874-2

(Filed 21 August 2007)

Sentencing— *Blakely* error—harmless beyond reasonable doubt

The trial court's *Blakely* error during a sentencing hearing finding as an aggravating factor that defendant committed the rape offense while on pretrial release on another charge was harmless beyond a reasonable doubt, because: (1) defendant has never disputed at trial or on appeal that he was on pretrial release when he committed the present crimes, and the validity of the charges for which he was on pretrial release is irrelevant; and (2) the evidence was so overwhelming or uncontroverted that any rational factfinder would have found this aggravating factor beyond a reasonable doubt.

Appeal by defendant from judgment entered 13 June 2003 by Judge B. Craig Ellis in Superior Court, Scotland County. Heard in the Court of Appeals 1 March 2005, and opinion filed 2 August 2005, finding sentencing error and remanding for resentencing. Remanded to this Court by order of the North Carolina Supreme Court for reconsideration in light of *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006).

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Bruce T. Cunningham, Jr. for defendant-appellant.

WYNN, Judge.

This case is before us on remand from the North Carolina Supreme Court to reexamine Defendant Charles Eugene Watts's sentencing in light of *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, 127 S. Ct. 2281, 167 L. Ed. 2d 1114 (2007). During Defendant's sentencing hearing, the trial court found as an aggravating factor that Defendant committed the offense while on pretrial release on another charge. Because we find that the evidence was so overwhelming or uncontroverted that any rational factfinder would have found this aggravating factor beyond a reasonable doubt, we find no prejudicial error.

At the conclusion of Defendant's trial, the jury found him guilty of raping a thirteen-year-old female, and the trial court sentenced him in the aggravated range to three hundred sixty to four hundred forty-one months' imprisonment, without possibility of parole. The trial court found the statutory aggravating factor that Defendant had committed the rape while on pretrial release for another offense. Defendant appealed, arguing several assignments of error overruled by this Court in our earlier opinion affirming his conviction. However, Defendant also filed a motion for appropriate relief, contending that the trial court committed a *Blakely* error by sentencing him in the aggravated range, in violation of his Sixth Amendment right to a jury trial.

In *Blakely v. Washington*, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt[]" in order to safeguard a defendant's Sixth Amendment right to trial by jury. 542 U.S. 296, 301, 159 L. Ed. 2d 403, 412 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000)), *reh'g denied*, 542 U.S. 961, 159 L. Ed. 2d 851 (2004). More recently, in *Washington v. Recuenco*, the Supreme Court further held that failure to submit a sentencing factor to the jury was not structural error but was subject to harmless error review. 548 U.S. ——, ——, 165 L. Ed. 2d 466, 477 (2006).

Our Supreme Court applied *Blakely* and *Recuenco* in *State v. Blackwell*, conducting a two-part test to determine first if the trial court had committed a *Blakely* error by finding an aggravated factor rather than submitting it to the jury, and if so, whether such error was harmless beyond a reasonable doubt. 361 N.C. at 45, 638 S.E.2d at 458. Harmless error review in this context requires "determin[ing] from the record whether the evidence against the defendant was so 'overwhelming' and 'uncontroverted' that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *Id.* (quoting *Neder v. United States*, 527 U.S. 1, 9, 144 L. Ed. 2d 35, 47 (1999)).

North Carolina law further states that a violation of a defendant's constitutional rights is "prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt[,]" with the burden on the State to demonstrate such harmlessness. N.C. Gen. Stat. § 15A-1443(b) (2005). Nevertheless,

> [A] defendant may not avoid a conclusion that evidence of an aggravating factor is "uncontroverted" by merely raising an objection at trial. *See*, *e.g.*, *Neder*, 527 U.S. at 19, 144 L. Ed. 2d at 47. Instead, the defendant must "bring forth facts contesting the omitted element," and must have "raised evidence sufficient to support a contrary finding." *Id.*

Blackwell, 361 N.C. at 50, 638 S.E.2d at 458.

In the instant case, it is undisputed that the facts for the aggravated factor that Defendant committed the rape while on pretrial release for another offense were neither presented to the jury nor proved beyond a reasonable doubt. Thus, the trial court committed a *Blakely* error which leads us to now determine whether such error was harmless beyond a reasonable doubt.

As in *Blackwell*, where the trial court likewise found the statutory aggravating factor that the defendant had committed the crime while on pretrial release, Defendant here "has never disputed, at trial or on appeal, that he was on pretrial release when he committed the present crimes." 361 N.C. at 50, 638 S.E.2d at 458. Although Defendant attempts to argue that the underlying charges were without merit, we note that the validity of the charges for which he was on pretrial release is irrelevant; the sole question is whether he was, in fact, on pretrial release at the time the alleged crimes took place, which Defendant does not contest.

Accordingly, we find that the evidence of the aggravating factor found by the trial court to be so "overwhelming" and "uncontroverted" that any rational factfinder would have found it beyond a reasonable doubt. As such, we conclude that the trial court's *Blakely* error was harmless beyond a reasonable doubt.

No prejudicial error.

Judges STEELMAN and STROUD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

Filed 21 August 2007

BADROCK v. PICKARD No. 06-1581	Alamance (02CVD898)	Affirmed in part and remanded in part
CAPPS v. NW SIGN INDUS. OF N.C., INC. No. 06-1297	Mecklenburg (03CVS10822)	Affirmed
DENTAL CERAMIC ART, INC. v. KWON No. 06-1334	Wake (05CVS16485)	Affirmed
DRIGGERS v. DRIGGERS No. 06-1038	Cabarrus (5CVD2401)	Affirmed
ESTATE OF KAY v. EXCEL BODY WORKS No. 06-992	Indus. Comm. (I.C. #353936)	Affirmed
GRAYWATER TRADERS, INC. v. B & B ON THE BEACH, INC. No. 06-1612	Dare (06CVS405)	Reversed in part, affirmed in part
IN RE A.J.M. No. 06-197-2	Alamance (99J89)	Affirmed
IN RE C.B. & B.B. No. 06-1136	Cumberland (06JA157-58)	Affirmed
IN RE J.M.B., A.M.B., J.A.B. & D.M.B. No. 07-275	Iredell (06JA101-04)	Reversed and remanded
IN RE L.H., L.H. No. 07-496	Wake (06JA137-38)	Affirmed
IN RE T.J.M. No. 07-357	Burke (03J168)	Affirmed
IN RE Y.G. No. 07-308	Mecklenburg (05JA379)	Affirmed in part; reversed in part and remanded
SKISLAK v. IMPERIAL GOURMET BUFFET, L.L.C. No. 06-1017	Guilford (04CVS7100)	Affirmed
STATE v. BELL No. 06-1621	Mecklenburg (05CRS229937) (05CRS229940)	No error
STATE v. BLACKMON No. 06-1656	Buncombe (05CRS63585)	No error

STATE v. BROWN No. 04-737-2	New Hanover (02CRS25841) (02CRS25843)	No prejudicial error
STATE v. COHEN No. 07-340	Cumberland (02CRS58309) (02CRS19674)	Affirmed
STATE v. HARRISON No. 06-1492	Lincoln (01CRS52476) (02CRS1162)	No error
STATE v. HEATH No. 06-1643	Pitt (05CRS59639)	No error
STATE v. HORNE No. 07-65	Rowan (05CRS55264)	No error
STATE v. JONES No. 07-81	Lenoir (04CRS51802)	Remanded for resentencing
STATE v. JONES No. 07-94	Davidson (04CRS61972)	Affirmed
STATE v. LITTLE No. 07-47	Guilford (03CRS92993) (03CRS92989)	No error
STATE v. McSWAIN No. 06-1235	Lincoln (04CRS53646) (06CRS748)	No error
STATE v. PRATT No. 07-155	Guilford (05CRS85660-63) (05CRS86016)	Dismissed
STATE v. STUART No. 06-908	Alamance (03CRS53654)	No error
STATE v. THAI No. 05-347-2	Mecklenburg (02CRS207578)	Harmless error
STATE v. WEBB No. 04-103-2	Pitt (02CRS5685) (02CRS5687-88) (02CRS54018)	No error. Remanded for correction of clerical error
WALKER v. BRSS, LLC & MCC OUTDOOR, LLC No. 06-1340	Guilford (05CVS12213) (04CRS26161)	Affirmed
WILSON v. GREEN No. 06-186	New Hanover (02CVS2318)	Affirmed

PITT COUNTY, PLAINTIFF v. DEJAVUE, INC., DEJAVUE II, CHARLES LEE CUMMINGS, JR., MISTY'S, MARIE BRADSHAW HUDSON, REX HUDSON, SILVER BULLET DOLLS, INC., MATTHEW EARL FAULKNER, LINDA FAULKNER, DORA CRAWFORD FAULKNER, DEFENDANTS

No. COA06-838

(Filed 4 September 2007)

1. Pleadings— motion to dismiss—verification of complaint

The trial court did not err in a declaratory and injunctive relief case concerning the interpretation and enforcement of a county ordinance regulating sexually oriented businesses by denying defendant's motion to dismiss plaintiff's complaint based on it not being verified by an officer, or managing or local agent of the county as required by N.C.G.S. § 1A-1, Rule 11(d), because: (1) this case is not the type of action for which a verified complaint is required; and (2) there are no statutes requiring verification of plaintiff's complaint requesting declaratory and injunctive relief under N.C.G.S. § 153A-123.

2. Counties— pleading section and caption of ordinance

Plaintiff county's complaint sufficiently pleaded both the section number and caption of the pertinent amended ordinance in accordance with N.C.G.S. § 160A-179 in an action seeking declaratory and injunctive relief concerning the interpretation and enforcement of an ordinance regulating sexually oriented businesses.

3. Appeal and Error— preservation of issues—invited error

Defendants waived the issue as to whether the trial court applied the wrong standard when it denied their motion to dismiss plaintiff's complaint at the close of evidence where defendants expressly consented to the standard applied by the court and thus invited the alleged error of which they complain.

4. Constitutional Law— county ordinance—regulation of sexually oriented businesses—not ex post facto law

An amended county ordinance regulating sexually oriented businesses was not an unconstitutional ex post facto law even though it provided that all enforcement action would be based upon the effective date of the original ordinance because a retroactive civil regulatory law does not violate the ex post facto clause, and the amended ordinance was a civil regulatory law

since it placed a time, place and manner restriction on the location of sexually oriented businesses and was enacted pursuant to the county's police powers.

5. Constitutional Law— county ordinance—regulation of sexually oriented businesses—finding of fact

In determining that a county ordinance regulating sexually oriented businesses was not content-based and thus not subject to strict constitutional scrutiny, competent evidence supported the trial court's finding that the county relied upon a variety of evidence regarding the secondary effects of sexually oriented businesses even though plaintiff did not show that members of the board of commissioners (BOC) actually viewed the documentary evidence tendered by plaintiff, because: (1) the sheriff testified that he and county legal staff began researching the 2002 ordinance approximately one year before it was adopted by the BOC, and the BOC was undoubtedly aware of the efforts of county staff on their behalf; (2) the sheriff was present at the agenda meeting at which the 2002 ordinance was reviewed by the BOC, and the sheriff was available to answer questions about the ordinance; and (3) the legislative reality is that county staff, not county commissioners, are most often the actual individuals drafting county legislation on the commissioners' behalf.

6. Constitutional Law— county ordinance—regulation of sexually oriented businesses—content-neutral—intermediate scrutiny

A county ordinance and amended ordinance regulating sexually oriented businesses were content-neutral, and thus subject to intermediate constitutional scrutiny, even though defendants contend individual commissioners did not personally review the research materials considered by county legal staff during drafting of the ordinance, because: (1) a zoning ordinance regulating sexually oriented businesses is content-neutral when it is unrelated to the suppression of free expression and its purpose is to eliminate undesirable secondary effects of the sexually oriented business; (2) a content-neutral ordinance is subject to intermediate scrutiny, meaning the reviewing court must consider whether the ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication; and (3) county legal staff did complete meaningful review of the secondary effects generated by sexually oriented businesses.

7. Constitutional Law— county ordinance—regulation of sexually oriented businesses—free speech—reasonable alternative avenues of communication

An amended county ordinance regulating sexually oriented businesses left open reasonable alternative avenues of communication for defendant businesses even though defendants emphasize that a county map identifying locations in which sexually oriented businesses were prohibited or permitted was not prepared until after the amended ordinance was enacted, and the cost of relocating is prohibitive, because: (1) the question of whether an ordinance allows for reasonable alternative avenues of communication concerns the effect of the ordinance on speech and not the process by which the ordinance was adopted; and (2) the county planning director testified that the county had approximately 124 square miles available for the development of sexually oriented businesses which was approximately 19% of the entire land area of the county.

8. Constitutional Law— county ordinance—regulation of sexually oriented businesses—Equal Protection

A county ordinance regulating sexually oriented businesses did not violate the Equal Protection clauses of the United States and North Carolina Constitutions even though defendant Hudson argues the amended ordinance prevents him from living within 1,320 feet of a sexually oriented business that he operates, because: (1) defendant Hudson is not treated differently than similarly situated individuals; (2) every business in noncompliance with the amended ordinance is required to come into compliance before being granted a license; and (3) every citizen who, like defendant Hudson, resides within 1,320 feet of such business will be deprived of the opportunity to continue living in such close proximity in their current residence.

Appeal by defendants from order entered on or about 21 December 2005 by Judge W. Russell Duke, Jr. in Superior Court, Pitt County. Heard in the Court of Appeals 19 February 2007.

Pitt County Legal Department, by Janis Gallagher for plaintiff-appellee.

The Robinson Law Firm, P.A., by Leslie S. Robinson, for defendant-appellants Deja Vue, Inc., Deja Vue, II, Charles Lee Cummings, Jr., Silver Bullet Dolls, Inc., Matthew Earl Faulkner, Linda Faulkner and Dora Crawford Faulkner.

David W. Silver for defendants Misty's, Rex Hudson and Marie Hudson.

STROUD, Judge.

This is an action for declaratory and injunctive relief filed in Superior Court, Pitt County, concerning the interpretation and enforcement of a Pitt County ordinance regulating sexually oriented businesses. Plaintiff Pitt County sought a declaratory ruling that defendants unlawfully operated unlicensed sexually oriented businesses in locations prohibited by the county ordinance, as well as temporary and permanent injunctions enjoining defendants from conducting sexually oriented business at those locations.

The parties stipulated that defendants Deja Vue, Inc., Deja Vue II[1], Misty's, and Silver Bullet Dolls, Inc. are sexually oriented businesses located in Pitt County North Carolina.[2] Defendant Mark Saied operates Deja Vue, Inc. and defendant Charles Lee Cummings, Jr. operates Deja Vue, II. Defendant Marie Bradshaw Hudson owns Misty's and defendant Rex Hudson operates Misty's. Defendants Matthew Earl Faulkner and Linda Faulkner operate Silver Bullet Dolls, Inc. in a building owned by defendant Dora Crawford Faulkner. For purposes of this opinion, we refer to defendants Deja Vue, Inc., Deja Vue II, Mark Saied, and Charles Lee Cummings, Jr. collectively as "Deja Vue." We refer to defendants Misty's, Marie Bradshaw Hudson, and Rex Hudson collectively as "Misty's" and defendants Silver Bullet Dolls, Inc., Earl Faulkner, Linda Faulkner, and Dora Crawford Faulkner collectively as "Silver Bullet."

Defendant Silver Bullet has been operating in Pitt County for more than twenty years. Defendant Misty's and defendant Deja Vue, Inc. began operating in Pitt County before 7 October 2002;[3] how-

1. Deja Vue II changed its name to "Club Vegas" after plaintiff filed its complaint.

2. The Pitt County Code defines a sexually oriented business as "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, massage parlor, adult motion picture theater, adult theater, escort agency, sexual encounter center, or any combination of the foregoing." Pitt Co., N.C., Code Chapter VIII, section 2.2 (2003); Pitt Co., N.C., Code Chapter VIII, section 2.2 (2005).

3. Before 7 October 2002, Pitt County did not regulate sexually oriented businesses.

ever, defendant Deja Vue II began operating after that date. Defendants have not been charged with prostitution, crimes against nature, or any violation of North Carolina obscenity law. Pitt County alleges only that defendants may not operate sexually oriented businesses in their current locations or without licenses as required by Pitt County Code.

I. Background

On 2 October 2002, the Pitt County Board of Commissioners adopted an ordinance regulating sexually oriented businesses. The ordinance was prefaced, in part, by the following preamble:

> WHEREAS, the Board of Commissioners recognizes that important and substantial governmental interests provide a constitutional basis for reasonable regulation of the time, place and manner under which adult and sexually oriented businesses operate; and
>
> WHEREAS, for the purpose of preventing harmful secondary impacts such as neighborhood blight, increases in crime and decreases in property value, this article is adopted by the Board of Commissioners to regulate adult and sexually oriented businesses, as hereby defined, located in the County . . .; and
>
> WHEREAS, the board of Commissioners has determined that persons seeking to operate sexually oriented businesses shall be required to observe specific location requirements before they commence business.

Pitt Co., N.C., Code Preamble (2003) (emphasis added).

In section 1.1 of the ordinance, the Board of Commissioners stated its purpose, in part, as follows:

> Pitt County is committed to protecting the general welfare of the County through the enforcement of laws prohibiting obscenity, indecency, and sexual offenses. It seeks to reduce and eliminate the deleterious effects of sexually oriented businesses while preserving constitutionally protected forms of expression. Pitt County finds that sexually oriented businesses in certain locations contribute to neighborhood deterioration and blight through an increase in crime and diminution of property values, among other adverse consequences, and finds that such effects are contrary to the general welfare of the County.

Pitt Co., N.C., Code 1.1 (2003) (emphasis added).

To those ends, the ordinance provided that "[i]t is unlawful for any person to operate a sexually oriented business without a valid sexually oriented business privilege[4] license approved by the Code Enforcement Officer pursuant to this article." Pitt Co., N.C., Code Chapter VIII, section 4.1 (2003). "Every sexually oriented business that is granted a license (new or renewal) shall pay to Pitt County an annual nonrefundable privilege license fee of $1,000.00[5] upon license issuance or renewal." Pitt Co., N.C., Code Chapter VIII, section 7.1 (2003).

The ordinance also contained two provisions, entitled "Overconcentration" and "Residential Proximity," regulating the places in which sexually oriented businesses could locate.

> 8.1. Overconcentration [sic]. No more than one (1) sexually oriented business shall be located in any one thousand three hundred and twenty (1320) foot radius (determined by a straight line measured from building to building and not by street distance). This regulation is necessary to prevent an overconcentration [sic] of sexually oriented businesses and the creation of a de facto downgrading or blighting of surrounding neighborhoods.
>
> 8.2. Residential Proximity.
>
> 8.2.(a) No sexually oriented business shall be located within a one thousand three hundred twenty (1320) foot radius (determined by a straight line measured building to building and not by street distance) of any place of worship, a school (public or private), specialty school, day-care facility, or any residential zoning districts[6] or residential properties or a lot or parcel of land on which a public playground, public swimming pool, or public park is located. Special regulation of these establishments is necessary to insure [sic] that deleterious secondary effects which can reasonably be expected to result from the inappropriate location or concentration of sexually oriented businesses and these adverse effects will not contribute to a downgrading or blighting of surrounding residential districts or certain other districts which permit residential uses.

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4. The word "privilege" was deleted from this section by amendment in 2004.

5. The cost of license substitution or renewal was changed to $200.00 by amendment in 2004.

6. The phrase "residential zoning districts" was deleted and replaced with the phrase "a residential dwelling" by amendment in 2004.

Pitt Co., N.C., Code Chapter VIII, sections 8.1 & 8.2 (2003) (emphasis added). Defendants do not dispute that the restrictions contained in sections 8.1 and 8.2(a) may properly be classified as "time, place, and manner" restrictions for the purpose of First Amendment review. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46, 89 L. Ed. 2d 29, 37 (1986) (stating an ordinance regulating sexually oriented businesses that circumscribes their choice as to location without banning the speech expressed therein altogether is a time, place, manner restriction).

With respect to pre-existing sexually oriented businesses, the ordinance provided that: "Any sexually oriented business lawfully operating on the date that this ordinance becomes effective, that is in violation of this article shall be deemed a nonconforming use." Pitt Co., N.C., Code Chapter VIII, section 9.1 (2003). However, the ordinance also granted a one year grace period, commonly known as the "amortization period," which provided that "[a]ny use which is determined to be nonconforming by application of the provisions of this section shall be permitted to continue for a period not to exceed one year from the date this ordinance becomes effective." Pitt Co., N.C., Code Chapter VIII, section 9.2 (2003). "Such nonconforming uses shall not be increased, enlarged, extended or altered, except that the use may be changed to a conforming use." Pitt Co., N.C., Code Chapter VIII, section 9.3 (2003). This ordinance became effective on 7 October 2002 [hereinafter 2002 Ordinance]. Pitt Co., N.C., Code Chapter VIII, section 14 (2003).

On 2 February 2004, the Pitt County Board of Commissioners adopted an ordinance entitled "Amended Ordinance Regulating Adult Establishments Sexually Oriented Businesses" [Amended Ordinance].[7] (emphasis added). The Amended Ordinance contained technical changes to the 2002 Ordinance most of which are not relevant to the case *sub judice*. These changes were made to promote consistency with a separate county-wide zoning ordinance. Except as noted by footnotes ante, provisions of the 2002 Ordinance quoted herein are identical to the Amended Ordinance.

For purposes of this appeal, we consider section 8-187 of the Amended Ordinance, which provides:

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7. The Amended Ordinance was adopted without comment at its second reading. Meeting notes reflect that one commissioner voted not to adopt the ordinance after its first reading in December 2003 because a fellow commissioner who wished to participate in the decision was not present.

> This amended Ordinance shall be in full force and effect on and after February 2, 2004 and shall replace the Ordinance which first became effective on October 7, 2002. <u>All enforcement action shall be based upon the effective date of October 7, 2002.</u>

Pitt Co., N.C., Code Chapter VII, section 8-187 (2004) (emphasis added).

Plaintiff and defendants stipulated that Pitt County adopted the Amended Ordinance pursuant to its police powers. *See* N.C. Gen. Stat. § 153A-121 (2005) (defining a county's "[g]eneral ordinance making power). Defendants Misty's applied for a sexually oriented business license as required by the Amended Ordinance, but the application was denied because the Misty's sexually oriented business is located within 1,320 feet of a residential dwelling, as are the businesses of all defendants in this matter. The remaining defendants have not applied for sexually oriented business licenses under either ordinance.

Plaintiff Pitt County sought a declaratory ruling that defendants unlawfully operated unlicensed sexually oriented businesses in locations prohibited by the Amended Ordinance, as well as temporary and permanent injunctions enjoining defendants from conducting sexually oriented business at those locations. Defendants Deja Vue and defendants Silver Bullet filed motions to dismiss plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 11, arguing that plaintiff failed to properly verify its complaint, and pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), arguing that plaintiff failed to state a claim upon which relief may be granted. Defendants Misty's also filed a motion to dismiss plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Pitt County Superior Court Judge W. Russell Duke, Jr. orally denied defendants' motions on 14 November 2005.

At the declaratory judgment hearing, plaintiff called two witnesses: Pitt County Sheriff Mac Manning and Pitt County Planning Director James Rhodes. Sheriff Manning testified that he has responded to numerous calls at sexually oriented businesses in Pitt County, including calls concerning assault, drunk driving, trespassing, suspicious activity, hit and run, intoxicated and disruptive behavior, loud music, and even murder. Sheriff Manning further testified that he has received general complaints from a number of homeowners who reside near sexually oriented businesses. The homeowners complained of squealing tires, beer bottles in their front yards, and trespassers. Many of these incidents occurred after 2:00 a.m., the time

at which ABC regulated bars close. All of these incidents occurred before enactment of the 2002 Ordinance. Additionally, Sheriff Manning received a complaint concerning plans to locate an adult bookstore near a local high school.

Sheriff Manning further testified that sexually oriented businesses that do not sell alcoholic beverages are not subject to ABC regulation. According to Sheriff Manning, these businesses "tend to run all night long" and present "more forms of nudity and sexually oriented type exhibitions." At least one established sexually oriented business in Pitt County gave up its alcoholic beverage license so that it would be better suited to compete with newer unregulated sexually oriented businesses locating in Pitt County.

Based on these complaints and Sheriff Manning's previous experience policing Pitt County, Sheriff Manning asked Pitt County legal staff whether the County could regulate sexually oriented businesses. Sheriff Manning and members of the legal staff "looked at studies done in other jurisdictions" and "adopt[ed]" and "incorporate[d]" the conclusions of these studies into the "ordinance building process." The publications reviewed by county staff included: (1) a University of North Carolina at Chapel Hill Institute of Government publication entitled "Regulating Sexually Oriented Businesses" and a supplement to that publication; (2) a summary of calls to law enforcement in Pitt County; (3) a summary of studies concerning sexually oriented businesses conducted in other jurisdictions; (4) Internet photos of an x-rated Super Bowl party held at Deja Vue; and (5) a letter from the ABC Board Law Enforcement Division informing Pitt County that sexually oriented businesses that turn in their alcoholic beverage licenses are no longer subject to ABC regulation. These materials were admitted into evidence at the declaratory judgment hearing.

During drafting of the 2002 Ordinance, the county staff also relied on N.C. Gen. Stat. § 160A-181.1 (2005), which provides:

> (a) <u>The General Assembly finds and determines that sexually oriented businesses can and do cause adverse secondary impacts on neighboring properties</u>. Numerous studies that are relevant to North Carolina have found increases in crime rates and decreases in neighboring property values as a result of the location of sexually oriented businesses in inappropriate locations or from the operation of such businesses in an inappropriate manner. Reasonable local government regulation of sexually oriented businesses in order to prevent or ameliorate adverse secondary

> impacts is consistent with the federal constitutional protection afforded to nonobscene but sexually explicit speech.
>
> (b) In addition to State laws on obscenity, indecent exposure, and adult establishments, local government regulation of the location and operation of sexually oriented businesses is necessary to prevent undue adverse secondary impacts that would otherwise result from these businesses.

(emphasis added). The trial court took judicial notice of N.C. Gen. Stat. § 160A-181.1 during the hearing.

At an "agenda review meeting" preceding the Board of Commissioner's vote on the 2002 Ordinance, Sheriff Manning discussed the "basis for the ordinance" with the Commissioners and "identified the need for the ordinance."

Pitt County Planning Director James Rhodes testified that he is the Code Enforcement Officer for the Amended Ordinance. Rhodes further testified that Pitt County is a total area of 656 square miles and that, after accounting for the Amended Ordinance and the 100-year flood plain, approximately 124 square miles are available for the development of sexually oriented businesses.

At the close of plaintiff's evidence, defendants moved to dismiss arguing, in part, that the twelve-month amortization period contained in the Amended Ordinance had not expired at the time plaintiff filed its complaint. After hearing argument from both parties, Judge Duke denied defendants' motion.

Defendants presented no evidence at the declaratory judgment hearing. On 21 December 2005, Judge Duke ordered defendants to "immediately cease all operation of the[ir] sexually oriented businesses" and "permanently enjoined [defendants] from continuing to operate their sexually oriented businesses in violation of the [2004] Ordinance." In so doing, Judge Duke found that the county had relied on the documentary evidence tendered by plaintiff when it drafted the 2002 Ordinance and the Amended Ordinance. Defendants appeal.

II. N.C. Gen. Stat. § 1A-1, Rule 11 (2005).

[1] Defendants Deja Vue and defendants Silver Bullet argue that the trial court erred by denying their motion to dismiss plaintiff's complaint because the complaint was not verified by an "officer, or managing or local agent" of Pitt County "upon who[m] summons might be served" as required by N.C. Gen. Stat. § 1A-1, Rule 11(d). N.C. Gen.

Stat. § 1A-1, Rule 4(j)(5)(b) provides that a county is served only by delivering the summons to the county manager, county clerk, or any member of the board of commissioners, including that chairman. Because the county planning director verified the complaint *sub judice*, defendants Deja Vue and defendants Silver Bullet conclude that the complaint did not comply with Rule 11 and should have been dismissed. We do not consider the question of whether a county planning director may properly verify a complaint filed by a county; rather, we conclude that the action *sub judice* is not a type of action for which a verified complaint is required.

Complaints need not be verified "unless some statute requires verification as a condition to the maintenance of the action." *Levy v. Meir*, 248 N.C. 328, 329, 103 S.E.2d 288, 289 (1958) (per curiam); *see also* N.C. Gen. Stat. § 1A-1, Rule 11(a) and cmt. (2005) (stating "[e]xcept when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit" and "the only time any pleading must be verified is when some statute specifically requires it"). When the "plaintiff can maintain his action without verifying the complaint, an attempted verification . . . cannot defeat that right." *Id.*

Plaintiff filed its action pursuant to N.C. Gen. Stat. § 153A-123, entitled "[e]nforcement of ordinances" and sought equitable relief as permitted by Chapter VIII, section 15.2 of the Amended Ordinance. Defendants cite no statute, and we find no statute, requiring verification of plaintiff's complaint requesting declaratory and injunctive relief under N.C. Gen. Stat. § 153A-123. *See e.g.*, *Animal Legal Defense Fund v. Woodley*, ––– N.C. App. –––, 640 S.E.2d 777 (2007) (explaining that North Carolina Rule of Civil Procedure 65, entitled "Injunctions," is "devoid of any mention of a verified complaint requirement").

For the reasons stated above, defendants Deja Vue and defendants Silver Bullet's assignment of error is overruled.

III. N.C. Gen. Stat. § 1A-1, Rule 12(b)(6)

[2] Defendants Deja Vue and defendants Silver Bullet argue that the trial court erred by denying their motion to dismiss plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). In support of their argument, Defendants Deja Vue and defendants Silver Bullet contend that plaintiff failed to state a claim upon which relief may be granted because it did not plead in its complaint the

section number and caption of the county ordinance it sought to enforce. We disagree.

N.C. Gen. Stat. § 160A-179 (2005), which governs the pleading and proving of county ordinances[8] provides: "In all civil and criminal cases a [county] ordinance that has been codified in a code of ordinances adopted and issued in compliance with G.S. [153A-49] must be pleaded by both section number and caption." Here, plaintiff pled the caption of the Amended Ordinance in paragraph 12 of its complaint as follows: "Defendants are sexually oriented businesses as defined in <u>Pitt County Code Article VIII, entitled Sexually Oriented Business</u>." (emphasis added). Plaintiff also pled the section number in paragraphs 14 and 16 of its complaint, alleging

> 14. Pursuant to <u>Pitt County Code Article VIII section 8-174</u>, it is unlawful for any person to operate a sexually oriented business without a sexually oriented business license.
>
> 16. Pursuant to <u>Pitt County Code Article VII section 8-178</u>, no sexually oriented business shall be located within a 1,320 foot radius of any place of worship, a residential dwelling, a school, specialty school, day care facility, or lot or parcel of land on which a public playground, swimming pool or park is located.

(emphasis added). Therefore, plaintiff has pled the ordinance "by both section number and caption" as required by section 160A-179. Although defendant Deja Vue voices confusion, asking "Did the plaintiff intend to enforce the first or second ordinance?," we find the answer to be clear. The Amended Ordinance is the only ordinance codified at Article VIII, section 8-178 and 8-174 of the Pitt County Code at the time plaintiff filed its complaint. Moreover, the 2002 Ordinance was codified differently at sections 4.1 and 8.2.

For the reasons stated above, defendants Deja Vue and defendants Silver Bullet's assignment of error is overruled.

IV. N.C. Gen. Stat. § 1A-1, Rule 41 (2005).

[3] Defendants Deja Vue and defendants Silver Bullet argue that the trial court erred in denying their motion to dismiss plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 41 at the close of evi-

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8. N.C. Gen. Stat. § 153A-50 (2005). (making N.C. Gen. Stat. § 160A-179 applicable to county ordinances, providing that "[c]ounty ordinances shall be pleaded and proved under the rules and procedures of G.S. 160A-79. References to G.S. 160A-77 and G.S. 160A-78 appearing in G.S. 160A-79 are deemed, for purposes of this section, to refer to G.S. 153A-49 and G.S. 153A-48, respectively").

dence. In support of this assignment, defendants Deja Vue and defendants Silver Bullet argue that the trial court applied the wrong standard when resolving their motion to dismiss by viewing the evidence in the light most favorable to plaintiff. Defendants Deja Vue and defendants Silver Bullet also argue that plaintiff filed its complaint before expiration of the twelve-month amortization period contained in the Amended Ordinance. We disagree.

First, N.C. Gen. Stat. § 1A-1, Rule 41 permits a defendant to move for involuntary dismissal at the close of the plaintiff's evidence during a bench trial. The trial court must grant the motion when "upon the facts and the law the plaintiff has shown no right to relief." N.C. Gen. Stat. § 1A-1, Rule 41. When considering a motion to dismiss made under Rule 41(b), the trial judge must " 'evaluate the evidence without any limitations as to the inferences which the court must indulge in favor of the plaintiff's evidence on a similar motion for a directed verdict in a jury case.' " *Dealers Specialties, Inc. v. Neighborhood Housing Services, Inc.*, 305 N.C. 633, 638, 291 S.E.2d 137, 140 (1982) (quoting and adopting the rule of *Bryant v. Kelly*, 10 N.C. App. 208, 213, 178 S.E.2d 113, 116 (1970), *rev'd on other grounds*, 279 N.C. 123, 181 S.E.2d 438 (1971)). Thus, the trial judge is not required to consider the evidence in the light most favorable to the plaintiff. *Id.*

Even so, we conclude that defendants invited the alleged error of which they complain. Here, defendants Deja Vue and Silver Bullet expressly consented to the erroneous standard as follows:

> The Court: All right, well I believe the Court at this point has to take all the evidence in the light most favorable to the plaintiff.
>
> [Counsel for defendants Misty's]: I believe that's correct.
>
> [Counsel for defendants Deja Vue and Silver Bullet]: I would do that.

(emphasis added).

Because "[a] party may not complain of an action which he induced," *Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994), this assignment of error is overruled.

[4] Second, defendants Deja Vue and Silver Bullet argue that the trial court erred by denying their motion to dismiss because plaintiff filed its complaint before the expiration of the amortization period contained in the Amended Ordinance. Defendants Deja Vue and Silver

Bullet contend that the Amended Ordinance replaced the 2002 Ordinance in total and a new twelve-month amortization period began on 16 December 2003, the date on which Amended Ordinance became effective. They conclude that calculating the amortization period based upon the effective date of the 2002 Ordinance, which was 7 October 2002, would render the Amended Ordinance ex post facto. We disagree.

The express language of the Amended Ordinance provides that "[a]ll enforcement action shall be based upon the effective date of October 7, 2002." Therefore, 7 October 2002 is the effective date to be employed when determining whether a particular sexually oriented business is in compliance with the Amended Ordinance and for purposes of "enforcement action" the amortization period expired on 7 October 2003. Plaintiff did not file its declaratory judgment action until on or about 25 January 2005, more than one year after the expiration of the amortization period.

Article I, section 10 of the United States Constitution prohibits the states from enacting any ex post facto law. The following four types of laws are ex post facto:

> "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender."

State v. Wiley, 355 N.C. 592, 625, 565 S.E.2d 22, 45 (2002) (quoting *Collins v. Youngblood*, 497 U.S. 37, 42, 111 L. Ed. 2d 30, 38-39 (1990)) (emphasis omitted), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). However, "[a] retroactive civil or regulatory law . . . does not violate the ex post facto clause." *State v. Johnson*, 169 N.C. App. 301, 307, 610 S.E.2d 739, 743, *disc. rev. denied and appeal dismissed*, 359 N.C. 855, 619 S.E.2d 855 (2005); *see also State v. White*, 162 N.C. App. 183, 590 S.E.2d 448 (2004).

Here, defendants do not dispute that the Amended Ordinance is a time, place, manner restriction on the location of sexually oriented businesses. Defendants do not dispute that Pitt County enacted the Amended Ordinance pursuant to its police powers, meaning that the

ordinance was enacted to promote the health, safety, and welfare of Pitt County citizens. *See* N.C. Gen. Stat. § 153A-121 (2005) (granting counties the authority to regulate acts "detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county"); *Maynor v. Onslow County*, 127 N.C. App. 102, 488 S.E.2d 289 (1997), *appeal dismissed*, 347 N.C. 268, 493 S.E.2d 458 (1997), *cert. denied*, 347 N.C. 400, 496 S.E.2d 385 (1997) (county ordinance which regulated the location of sexually oriented businesses for the stated purpose of promoting the health, safety and morals and general welfare of the citizenry of the county was a valid exercise of the county's police powers.). Accordingly, we conclude that the Amended Ordinance is a civil regulatory law that does not violate the ex post facto clause of the United States Constitution.

This assignment of error is overruled.

V. Defendants' Constitutional Right to Freedom of Speech

[5] Defendants Deja Vue and defendants Silver Bullet argue that the trial court erred by finding the following:

> 10. The County relied upon a variety of evidence regarding the secondary effects of sexually oriented businesses in the months leading up to the enactment of the statute, including:
>
> > a. Studies from other jurisdictions on the adverse impacts of sexually oriented businesses on crime rates, property values, and other adverse effects such as noise, litter, and increased phone calls;
> >
> > b. Similar ordinances in other jurisdictions as well as cases addressing such ordinances;
> >
> > c. Publications from the University of North Carolina at Chapel Hill's Institute of Government relating to the adverse effects of sexually oriented businesses and proper methods of regulation to combat such effects;
> >
> > d. N.C. Gen. Stat. § 160-181.1
> >
> > . . . .
> >
> > e. Research regarding the sexually oriented businesses in operation in Pitt County at the time the Ordinance was drafted, including the number of police calls made to the businesses and complaints from local citizens about the businesses.

In support of their argument, defendants Deja Vue and defendants Silver Bullet emphasize that members of the Board of Commissioners did not actually view the above listed materials themselves; rather county staff reviewed the materials when drafting the 2002 Ordinance. Thus, defendants Deja Vue and defendants Silver Bullet conclude that the Amended Ordinance was not enacted to prevent undesirable secondary effects created by sexually oriented businesses and that the Amended Ordinance was content-based. Because content-based ordinances are subject to strict scrutiny, all defendants argue that the trial court erred by applying intermediate scrutiny when resolving their constitutional challenge. We disagree. In so doing, we consider "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." *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); *Cartin v. Harrison*, 151 N.C. App. 697, 567 S.E.2d 174, *disc. rev. denied*, 572 S.E.2d 428 (2002).

A. Findings of Fact

Defendants Deja Vue and Silver Bullet argue that the trial court erred in finding that "[t]he County relied upon a variety of evidence regarding the secondary effects of sexually oriented business" because plaintiff did not show that members of the Board of Commissioners actually viewed the documentary evidence tendered by plaintiff. We conclude that the trial court's finding was supported by competent evidence.

Sheriff Manning testified that he and county legal staff began researching the 2002 Ordinance approximately one year before it was adopted by the Board of Commissioners. During that time, Sheriff Manning and county staff considered "studies done in other jurisdictions" and "adopt[ed]" and "incorporate[d]" the conclusions of those studies into the "ordinance building process." Sheriff Manning compiled a list of service calls related to Pitt County sexually oriented businesses. He also spoke with sexually oriented business proprietors and members of the ABC Board concerning the effect of new sexually oriented businesses choosing not to obtain alcoholic beverage licenses. Finally, Sheriff Manning accumulated a list of general complaints from residents living near sexually oriented businesses in Pitt County.

From this evidence, and our review of the record in total, we conclude that the Pitt County Board of Commissioners was un-

doubtedly aware of the efforts of county staff on their behalf. Moreover, Sheriff Manning was present at the Agenda Meeting at which the 2002 Ordinance was reviewed by commissioners. At that time, Sheriff Manning was available to answer questions about the ordinance. In fact, Sheriff Manning testified that he "discussed the basis for the ordinance" with the commissioners and "identified the need for the ordinance."

We hold that plaintiff presented competent evidence from which the trial court could find "[t]he County relied upon a variety of evidence regarding the secondary effects of sexually oriented business," including the documentary evidence tendered by plaintiff at the declaratory judgment hearing. In so doing, we acknowledge the "legislative reality" that county legal staff, not county commissioners, are most often the actual individuals drafting county legislation on the commissioner's behalf. *See e.g. Lakeland Lounge v. Jackson*, 973 F.3d 1255, 1258 (5th Cir. 1992) (noting that the city council "could properly place some reliance upon others to do research" concerning the secondary effects of sexually oriented business in their municipality), *cert. denied*, 507 U.S. 1030, 123 L. Ed. 2d 469 (1993).

This assignment of error is overruled.

B. Conclusions of Law

This Court reviews a trial court's conclusions of law *de novo*. *Luna v. Div. of Soc. Servs.*, 162 N.C. App. 1, 4, 589 S.E.2d 917, 919 (2004).

1. Content-neutral vs. content-based

[6] Defendants argue that the trial court erred by concluding that the Amended Ordinance was content-neutral, and therefore subject to intermediate constitutional scrutiny, because individual commissioners did not personally review the research materials considered by county legal staff during drafting of the ordinance. We disagree.

A zoning ordinance regulating sexually oriented businesses is content-neutral, when it is "unrelated to the suppression of free expression" and its purpose is to eliminate undesirable secondary effects of the sexual oriented business. *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). "Put another way, the ordinance does not attempt to regulate the primary effects of the expression, i.e., the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impacts on public health, safety,

and welfare, which" the United States Supreme Court has "previously recognized are 'caused by the presence of even one such establishment.' " *Erie v. Pap's A.M.*, 529 U.S. 277, 291, 146 L. Ed. 2d 265, 279 (2000).[9] A content-neutral ordinance is subject to intermediate scrutiny, meaning the reviewing court must consider "whether the . . . ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *Renton*, 475 U.S. at 50, 89 L. Ed. 2d at 39.

In *Renton*, the United States Supreme Court "specifically refused to set . . . a high bar for municipalities that want to address merely the secondary effects of protected speech." *L.A. v. Alameda Books Inc.*, 535 U.S. 425, 438, 152 L. Ed. 2d 670, 683 (2002) (citing *Renton*, 475 U.S. at 47-48, 50, 89 L. Ed. 2d 29). The Court held that "a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." *Id.* (quoting *Renton*, 475 U.S. at 51-52, 89 L. Ed. 2d at 40.) Relevant evidence may include the secondary effects of sexually oriented businesses in other communities. *Renton*, 475 U.S. at 51-52, 89 L. Ed. 2d at 40.

In *Lakeland Lounge v. Jackson*, the United States Court of Appeals for the Fifth Circuit considered a similar constitutional challenge to a sexually oriented business ordinance. *Lakeland Lounge*, 973 F.3d 1255. In *Lakeland*, a business regulated by the ordinance challenged its constitutionality, arguing, in part, that there was "no testimony that the members of the city council ever looked at the studies about secondary effects or that they received any summary of those studies from their staff." *Id.* at 1258. Considering the question, the Fifth Circuit "perceive[d] no constitutional requirement that the council members personally physically review the studies of secondary effects," and concluded that "such a holding would fly in the face of legislative reality." *Id.*

We are persuaded by the reasoning of the Fifth Circuit. As explained above, the Board of Commissioners relied upon the research and conclusions of Pitt County legal staff who drafted the ordinance on their behalf. The research and drafting process was carried out by multiple county employees over the course of a year. Sheriff Manning was present at the Board of Commissioner's Agenda Meeting preced-

9. The North Carolina General Assembly has also made a legislative finding "that sexually oriented businesses can and do cause adverse secondary impacts on neighboring properties," including "increases in crime rates and decreases in neighboring property values." N.C. Gen. Stat. § 160A-181.1(a).

ing adoption of the 2002 Ordinance to answer questions about the ordinance, "discuss[] the basis for the ordinance," and "identif[y] the need for the ordinance."

While the best practice would be for each commissioner personally to fully review evidence of secondary effects and for the county to document that the review occurred, we do not believe that the omission in this case transformed the 2002 Ordinance and the Amended Ordinance into content-based regulations. In so doing, we emphasize that county legal staff did, in fact, complete meaningful review of the secondary effects generated by sexually oriented businesses.

For the reasons stated above, we hold that the trial court did not err by concluding that the Amended Ordinance are content-neutral. Accordingly, the trial court properly subjected the Amended Ordinance to intermediate scrutiny when resolving defendants' constitutional challenge.

This assignment of error is overruled.

2. Reasonable Alternative Avenues of Communication

[7] Defendants Deja Vue and Silver Bullet argue that the trial court erred by concluding that the Amended Ordinance left open "reasonable alternative avenues of communication." In support of their argument, defendants Deja Vue and Silver Bullet emphasize that a county map identifying locations in which sexually oriented businesses were prohibited or permitted was not prepared until after the Amended Ordinance was enacted; thus, the map was not considered by the Board of Commissioners when adopting the ordinance. Defendants further emphasize that the cost of relocating, including the cost of improving an available site and constructing a building thereon, is prohibitive.

As explained above, intermediate scrutiny requires the reviewing court to consider "whether the . . . ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *Renton*, 475 U.S. at 50, 89 L. Ed. 2d at 39. The question of whether an ordinance "allows for reasonable alternative avenues of communication" concerns the effect of the ordinance on speech; not the process by which the ordinance was adopted. Thus, to the extent defendants Deja Vue and Silver Bullet argue that there are not "reasonable alternative avenues for commu-

nication" because the Board of Commissioners did not review the subsequently created zoning map, this argument is without merit.

With respect to defendants Deja Vue and defendants Silver Bullet's argument that locations in which they may operate sexually oriented business under the Amended Ordinance are not commercially viable, the United States Supreme Court rejected a similar argument in *Renton*. In *Renton*, the ordinance permitted development of sexually oriented business on approximately 520 acres or five percent of the entire land area of the municipality. *Renton*, 475 U.S. at 53, 89 L. Ed. 2d at 41. The respondents argued "that some of the land [was] . . . already occupied by existing businesses, that 'practically none' of the undeveloped land [was] currently for sale or lease, and that in general there [were] no 'commercially viable' adult theater sites within the 520 acres left open by the Renton ordinance." *Id.* The United States Supreme Court held

> [t]hat respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. . . . In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

Id. (emphasis added).

Here, Pitt County Planning Director James Rhodes testified that Pitt County is a total area of 656 square miles and that, after accounting for the Amended Ordinance and the 100-year flood plain, approximately 124 square miles are available for the development of sexually oriented businesses. This is approximately nineteen percent of the entire land area of Pitt County. We conclude that the Amended Ordinance affords defendants Deja Vue and defendants Silver Bullet a reasonable opportunity to open and operate sexually oriented businesses within these 124 square miles of Pitt County.

For the reasons stated above, this assignment of error is overruled.

V. Defendant Rex Hudson's Constitutional Right to Equal Protection

[8] Defendant Rex Hudson argues that the trial court erred by concluding that the Amended Ordinance does not violate the Equal Protection clauses of the United States and North Carolina Consti-

tutions. In support of his argument, defendant Hudson argues that the Amended Ordinance prevents him from living within 1,320 feet of Misty's. We disagree.

"[T]o state an equal protection claim, a claimant must allege (1) the government (2) arbitrarily (3) treated them differently (4) than those similarly situated." *Lea v. Grier*, 156 N.C. App. 503, 509, 577 S.E.2d 411, 416 (2003). Here, defendant Hudson is not treated differently than other similarly situated individuals. Every business in noncompliance with the Amended Ordinance is required to come into compliance before being granted a license. Correspondingly, every citizen who, like defendant Hudson, resides within 1,320 feet of such a business will be deprived of the opportunity to continue living in such close proximity in their current residence. Accordingly, we conclude that the Amended Ordinance does not violate defendant Hudson's right to Equal Protection. In so doing, we note that defendant Hudson cites no substantive legal authority in support of his argument.

For the reasons stated above, this assignment of error is overruled.

VI. Conclusion

For the reasons stated above we hold that the trial court did not err by denying defendants' motions to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rules 11 and 12(b)(6). Plaintiff pled the section number and caption of Pitt County Code as required by N.C. Gen. Stat. § 160A-179 and plaintiff's request for declaratory and injunctive relief filed pursuant to N.C. Gen. Stat. § 153A-123 is not a type of action for which a verified complaint is required. We further hold that the trial court did not err in denying defendants' motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 41. The twelve month amortization period expired more than one year before plaintiff filed its complaint and defendants Deja Vue and Silver Bullet "may not complain" of alleged error resulting from the trial court's consideration of the evidence in the light most favorable to plaintiff because defendants invited the trial court's action.

With respect to defendants' constitutional arguments, we hold that competent evidence supported the trial court's finding that the county "relied upon a variety of evidence regarding the secondary effects of sexually oriented businesses" when drafting the 2002 Ordinance. We further hold that the trial court properly concluded that the 2002 Ordinance and 2004 Ordinance are content-neutral and

properly applied intermediate scrutiny to defendants' First Amendment constitutional challenge. Moreover, the trial court properly determined that the 2004 Ordinance left "reasonable alternative avenues of communication" available in nearly nineteen percent of Pitt County. We do not reach defendants' remaining arguments, concerning the ability of either ordinance to withstand strict constitutional scrutiny.

Finally, the trial court properly denied defendant Hudson's Equal Protection claim. This argument is meritless on its face.

Accordingly, we affirm the order entered in Superior Court, Pitt County on or about 21 December 2005 permanently enjoining defendants from continuing to operate their sexually oriented businesses in violation of the Amended Ordinance.

AFFIRMED.

Chief Judge MARTIN and Judge BRYANT concur.

ALICIA MOORE, PETITIONER v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, RESPONDENT

No. COA06-601

(Filed 4 September 2007)

1. Schools and Education— probationary teacher—contract not renewed—no right to evidentiary hearing before Board

There is no implicit right to notice and a hearing before the board of education on the issue of nonrenewal for a probationary teacher in N.C.G.S. § 115C-325, which authorizes direct judicial review in superior court of a nonrenewal decision. Although plaintiff argues that judicial review is merely pro forma without a hearing process before the board, the Court of Appeals is not permitted to read matters into an unambiguous statute.

2. Schools and Education— probationary teacher—not renewed—no right to hearing before board

A probationary teacher whose contract was not renewed was not granted a right to a hearing before the board of education by N.C.G.S. § 115C-45, which deals with appeals to a local board of

education from a final administrative decision. If the Legislature had meant to bestow hearing rights on probationary teachers, it would have done so explicitly.

3. Schools and Education— probationary teacher—contract not renewed—superior court consideration—documents not considered

The superior court properly struck from the record documents that a probationary teacher had offered on appeal from a school board decision to not renew her contract. Although plaintiff argues that judicial review will be futile if probationary teachers are prevented from offering evidence at a board hearing and before the superior court, a prior Court of Appeals decision held that a trial court sits as an appellate court on appeal of a school board decision.

4. Schools and Education— probationary teacher—contract not renewed—record sufficient

The record was sufficient under the whole record test to support the school board's decision not to renew a probationary teacher's contract as non-arbitrary. Nothing in controlling case law suggests that an evidentiary hearing is necessary.

5. Schools and Education— probationary teacher—contract not renewed—superintendent's decision

A letter recommending that a probationary teacher's contract not be renewed that was signed by someone other than the superintendent was sufficient where the language of the letter resolved any doubt that the superintendent made the recommendation.

Appeal by petitioner from order entered 9 January 2006 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 February 2007.

Ferguson, Stein, Chambers, Gresham & Sumter, P.A., by S. Luke Largess, for petitioner-appellant.

Helms Mullis & Wicker, PLLC, by H. Landis Wade, Jr. and Melissa M. Kidd, for respondent-appellee.

Tharrington Smith, L.L.P., by Deborah R. Stagner and Ann L. Majestic; and North Carolina School Boards Association, by Allison B. Schafer, for Amicus Curiae North Carolina School Boards Association.

GEER, Judge.

Petitioner Alicia Moore appeals from a decision of the superior court upholding the non-renewal of her teaching contract by respondent Charlotte-Mecklenburg Board of Education (the "Board"). On appeal, Ms. Moore primarily argues that the Board deprived her of a statutory right to have an evidentiary hearing before the Board on the non-renewal issue. Based upon our review of the plain language of the pertinent statutes as well as controlling precedent from the North Carolina appellate courts, we hold that the trial court properly concluded that Ms. Moore was not entitled to the hearing she sought. Her remaining arguments on appeal have been resolved against her by *Davis v. Macon County Bd. of Educ.*, 178 N.C. App. 646, 651, 632 S.E.2d 590, 594, *disc. review denied*, 360 N.C. 645, 638 S.E.2d 465 (2006), an opinion filed after submission of Ms. Moore's brief in this appeal. We, therefore, affirm the order of the superior court.

Facts

During the academic year 2004-2005, Ms. Moore worked as a middle school teacher in the Charlotte-Mecklenburg school system. Ms. Moore was employed on a year-to-year contract with the school district. In January 2005, the principal of the school sent a letter to Ms. Moore, stating that he had received complaints that she had used a ruler to hit students and also had used profanity in front of them. The letter directed Ms. Moore to leave school grounds because of the allegations.

Several days later, Ms. Moore responded in writing to the allegations. In her letter, she told the principal that she used a yardstick or ruler "to awaken students or get their attention by slapping it down on a desk" and to "prod[] them to get in a straight line (playfully), showing them what a straight line is." As for the use of profanity, Ms. Moore admitted that, in moments of frustration, she "may some times say 'ah damn' or 'shit where did it go?' or the like (under my breath)" but that none of the "irresponsible outbursts" was directed at her students. She added that she relocated the student who sat closest to her desk because of an "awareness" that her "outbursts" might be overheard by that student.

Following an investigation into the allegations of misconduct, the school district "determined that [Ms. Moore] did indeed make inappropriate contact with [her] students by hitting and prodding them with a yardstick" and there was "evidence that supported allegations

that [she] consistently cursed at the students also and not just in their presence." On 24 March 2005, Charles Head, an Employee Relations Specialist with the school system, sent a formal reprimand letter to Ms. Moore in which he stated that her conduct violated school policy and ordered her to refrain from further such conduct. Ms. Moore submitted no written response to that letter.

Less than two months later, at the appropriate time for non-renewal recommendations, Charles Head authored a letter to the Board stating that the superintendent was recommending that Ms. Moore's contract not be renewed. This letter cited the superintendent's belief that "continued employment of Ms. Moore would pose a threat to the physical safety of students or personnel or that the person [sic] has demonstrated that he or she does not have sufficient integrity, ethics or other traits to fulfill his or her duties as a public school employee."

In support of the recommendation, the administration compiled certain materials and submitted them to the Board. Those materials included: the May 2005 letter recommending non-renewal; a 2004-2005 performance evaluation that gave Ms. Moore a "below standard" rating in the area of "management of student behavior" and an "unsatisfactory" rating in the area of "communicating within the educational environment"; the 24 March 2005 letter from Charles Head outlining the findings of the administration's investigation into the allegations of misconduct; the principal's 13 January 2005 letter to Ms. Moore; other documents relating to the investigation, including written statements from five students; and documentation relating to two instances in the 2002-2003 school year when an assistant principal had accused Ms. Moore of insubordination. The materials also included Ms. Moore's January 2005 letter, in which she defended herself against the allegations regarding the use of the ruler and profanity.

On 24 May 2005, the Board considered the superintendent's recommendation and voted not to renew Ms. Moore's teaching contract. Ms. Moore responded to the decision by requesting, through counsel, a hearing before the Board pursuant to the appeal provisions of N.C. Gen. Stat. § 115C-45(c) (2005). After the Board denied her request for a hearing, Ms. Moore appealed the non-renewal decision to Mecklenburg County Superior Court "pursuant to G.S. §115C-325(n) and G.S. §115C-45(c)" on the grounds "that the decision violated G.S. §115C-325(m)(2) and was made under unlawful procedure."

In its response filed with the superior court, the Board denied Ms. Moore's allegations and submitted the record considered by the Board. Ms. Moore filed an affidavit accompanied by 12 attachments, consisting of e-mails, written observations, and personnel documents that had not been included in the Board's record. The Board moved to strike these submissions, contending that "[i]n the case of a non-renewal of a probationary teacher, the record on appeal is limited solely to those documents that were part of the administrative, or Board, record."

The superior court entered a final order on 9 January 2006. In its order, the court allowed the Board's motion to strike, stating "that Petitioner's Affidavit and the twelve exhibits attached thereto are not part of the Board Record, and that they should not be included as part of the Board Record." Based on "the entire Board record as relied upon by the Board of Education," the court then held "that Respondent's decision was not arbitrary, capricious, discriminatory, or for personal or political reasons, and was supported by substantial evidence when considering the record as a whole." Lastly, the court determined "that Petitioner was not entitled to an adversarial, evidentiary hearing to be held prior to any decision by Respondent not to renew her employment contract, and that this matter is not to be remanded to Respondent for that purpose." Ms. Moore timely appealed this order.

Statutory Framework

A probationary teacher is "a certificated person, other than a superintendent, associate superintendent, or assistant superintendent, who has not obtained career-teacher status and whose major responsibility is to teach or to supervise teaching." N.C. Gen. Stat. § 115C-325(a)(5) (2005). After a probationary teacher "has been employed by a North Carolina public school system for four consecutive years," the local school board must vote to determine "whether to grant the teacher career status." N.C. Gen. Stat. § 115C-325(c)(1).

Once a teacher achieves career status, the General Assembly has prescribed a detailed procedure that must be followed before that career teacher may be dismissed or demoted. *See* N.C. Gen. Stat. § 115C-325(h)-(j3). This procedure includes a teacher's right to receive notice of an adverse recommendation by the superintendent, to be heard before a case manager and/or the board of education, to present evidence, and generally to defend against whatever the charges or allegations might be. *See id.*

In contrast, the General Assembly has provided with respect to probationary teachers:

(m) Probationary Teacher.

(1) The board of any local school administrative unit may not discharge a probationary teacher during the school year except for the reasons for and by the procedures by which a career employee may be dismissed as set forth in subsections (e), (f), (f1), and (h) to (j3) above.

(2) The board, upon recommendation of the superintendent, may refuse to renew the contract of any probationary teacher or to reemploy any teacher who is not under contract for any cause it deems sufficient: Provided, however, that the cause may not be arbitrary, capricious, discriminatory or for personal or political reasons.

N.C. Gen. Stat. § 115C-325(m). Thus, the General Assembly established a bifurcated framework with respect to probationary teachers. During the school year, they may not be discharged "except for the reasons for and by the procedures by which a career employee may be dismissed . . . ." N.C. Gen. Stat. § 115C-325(m)(1). But, upon expiration of the probationary teacher's contract, the board "may refuse to renew the contract . . . for any cause it deems sufficient . . . ." N.C. Gen. Stat. § 115C-325(m)(2).

The only stated limitation on the board's authority to not renew the probationary teacher's contract is "that the cause may not be arbitrary, capricious, discriminatory or for personal or political reasons." *Id.* If a probationary teacher believes that a board's non-renewal decision is motivated by or premised upon one of the prohibited reasons, the teacher may appeal the decision directly to superior court under N.C. Gen. Stat. § 115C-325(n): "any probationary teacher whose contract is not renewed under G.S. 115C-325(m)(2) shall have the right to appeal from the decision of the board to the superior court . . . ."

The provision authorizing a probationary teacher to directly appeal a non-renewal decision to superior court, § 115C-325(n), was added to the statute in 1997 and represented a departure from the pre-1997 remedial scheme. *See* 1997 N.C. Sess. Laws 221, § 13. Prior to 1997, when "no statutory right to appeal exist[ed]," a non-renewed probationary teacher could challenge the decision not to renew his or her contract by filing suit and obtaining a trial on the issues arising under N.C. Gen. Stat. § 115C-325(m)(2). *See Spry v. Winston-*

Salem/Forsyth County Bd. of Educ., 105 N.C. App. 269, 273, 412 S.E.2d 687, 689, *aff'd per curiam*, 332 N.C. 661, 422 S.E.2d 575 (1992).

On appeal of a decision of a school board, pursuant to the amended N.C. Gen. Stat. § 115C-325(n), "a trial court sits as an appellate court and reviews the evidence presented to the school board." *Davis v. Macon County Bd. of Educ.*, 178 N.C. App. 646, 651, 632 S.E.2d 590, 594, *disc. review denied*, 360 N.C. 645, 638 S.E.2d 465 (2006). Review of a school board's decision is governed by N.C. Gen. Stat. § 150B-51 (2005) of the North Carolina Administrative Procedure Act ("APA"). *Davis*, 178 N.C. App. at 651, 632 S.E.2d at 594. Under the APA, the court may reverse or modify a school board's decision only if the petitioner's substantial rights may have been prejudiced because the board's findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b)(1)-(6).

"A *de novo* standard of review applies to asserted errors under subsections (1) through (4) of N.C.G.S. § 150B-51(b), while errors under subsections (5) and (6) of this statute are reviewed under the whole record test." *Davis*, 178 N.C. App. at 652, 632 S.E.2d at 594. When conducting de novo review, the court considers the matter anew and may freely substitute its own judgment for the board's. *In re Alexander v. Cumberland County Bd. of Educ.*, 171 N.C. App. 649, 654, 615 S.E.2d 408, 413 (2005). The whole record test, by contrast, requires the reviewing court to examine all competent evidence and determine whether the board's decision is supported by "substantial evidence." *Davis*, 178 N.C. App. at 652, 632 S.E.2d at 594.

Finally, "[w]hen an appellate court reviews 'a superior court order regarding [a board] decision, the appellate court examines the

trial court's order for error of law.' " *Alexander*, 171 N.C. App. at 655, 615 S.E.2d at 413 (quoting *Mann Media, Inc. v. Randolph County Planning Bd.*, 356 N.C. 1, 14, 565 S.E.2d 9, 18 (2002)). Our task is essentially twofold: " '(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.' " *Id.* (quoting *Mann Media*, 356 N.C. at 14, 565 S.E.2d at 18).

Board's Denial of Evidentiary Hearing

[1] Ms. Moore first contends that "a probationary teacher is entitled to some sort of evidentiary hearing prior to judicial review of a school board decision not to renew the teacher's contract." Since this question raises issues of law, de novo review applies.

As Ms. Moore acknowledges, N.C. Gen. Stat. § 115C-325(m)(2)—the provision specifically setting forth the rights of probationary teachers—fails to expressly provide any right to a hearing before the Board. Ms. Moore, however, essentially asks this Court to find that a right to notice and a hearing is implicit in N.C. Gen. Stat. § 115C-325.

In matters of statutory interpretation, it is well established that legislative intent is first ascertained from the plain words of the statute. "When 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." *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978).

The plain language of the statutes at issue do not support the implied remedy sought by Ms. Moore. The detailed procedure set forth for career teachers in § 115C-325(h)-(j3), set out just prior to the probationary teacher provision, is made applicable only to probationary teachers dismissed during the school year. *See* N.C. Gen. Stat. § 115C-325(m)(1) (providing that a probationary teacher may not be subject to mid-year dismissal "except for the reasons for and by the procedures by which a career employee may be dismissed as set forth in [§ 115C-325(e), (f), (f1), and (h) to (j3)]"). Moreover, the General Assembly specifically addressed a Board's non-renewal decision in N.C. Gen. Stat. § 115C-325(o): "A probationary teacher whose contract will not be renewed for the next school year shall be notified of this fact by June 15." A reasonable construction of this provision is that the Board is only required to notify the probationary teacher once its non-renewal decision has been made, but this notification must occur no later than June 15.

By contrast, the General Assembly has expressly required, in the case of school administrators and career teachers, that the superintendent give *prior* notice regarding a recommendation that may adversely affect the employee's future status. *See* N.C. Gen. Stat. § 115C-287.1(d) (2005) ("the superintendent shall give the school administrator written notice of his or her decision and the reasons for his or her decision"); N.C. Gen. Stat. § 115C-325(h)(2) ("the superintendent shall give written notice to the career employee by certified mail or personal delivery . . . and shall set forth as part of his recommendation the grounds upon which he believes . . . dismissal or demotion is justified"). The absence of any *prior* notice requirement in the non-renewal provision applicable to probationary teachers is further evidence that the legislature did not intend to require an evidentiary hearing in the case of probationary teachers.

Ms. Moore argues, however, that such a right must be inferred from the 1997 amendment to § 115C-325(n) authorizing direct judicial review in superior court of the Board's non-renewal decision. She reasons that, unless some hearing process before the Board is read into the amendment, judicial review under § 115C-325(n) will be merely a *pro forma* exercise incapable of policing non-renewal decisions for arbitrary, capricious, discriminatory, personal, or political motivation.

Although prior to the 1997 amendment relied upon by Ms. Moore, a non-renewed probationary teacher was able to file a lawsuit in superior court—and pursue discovery, submit evidence, and obtain a jury trial—the legislature in amending § 115C-325(n) replaced this pre-1997 independent action with "a specific appeal process" for probationary teachers not renewed. *Craig v. Asheville City Bd. of Educ.*, 142 N.C. App. 518, 520, 543 S.E.2d 186, 188 (2001). This change brought judicial review of non-renewal decisions in line with review of other school board decisions. N.C. Gen. Stat. § 115C-325(n), as amended, provides:

> (n) Appeal.—Any career employee who has been dismissed or demoted under G.S. 115C-325(e)(2), or under G.S. 115C-325(j2), or who has been suspended without pay under G.S. 115C-325(a)(4a), or any school administrator whose contract is not renewed in accordance with G.S. 115C-287.1, *or any probationary teacher whose contract is not renewed under G.S. 115C-325(m)(2) shall have the right to appeal from the decision of the board to the superior court* for the superior court dis-

> trict or set of districts as defined in G.S. 7A-41.1 in which the career employee is employed. This appeal shall be filed within a period of 30 days after notification of the decision of the board. The cost of preparing the transcript shall be determined under G.S. 115C-325(j2)(8) or G.S. 115C-325(j3)(10). A career employee who has been demoted or dismissed, or a school administrator whose contract is not renewed, who has not requested a hearing before the board of education pursuant to this section shall not be entitled to judicial review of the board's action.

(Emphasis added.)

Significantly, this statute focuses not on the procedures governing the Board's non-renewal decision, but rather on the procedural mechanism by which a probationary teacher may challenge that decision. Moreover, Ms. Moore's reliance on this statute is undercut by its final sentence: "*A career employee* who has been demoted or dismissed, or *a school administrator* whose contract is not renewed, who has not requested a hearing before the board of education pursuant to this section shall not be entitled to judicial review of the board's action." *Id.* (emphasis added). If the General Assembly had intended to provide for a hearing before the Board for probationary teachers, it would have certainly required that probationary teachers seek such a hearing as a precondition for judicial review.

Nonetheless, Ms. Moore argues that adverse consequences will inevitably flow from any construction of § 115C-325(n) that does not require a right to a hearing before the Board. According to Ms. Moore, such a construction would risk (1) rendering the statute unconstitutional and (2) eliminating the requirement of exhaustion of administrative remedies since any remedy under the statute would be futile.[1] While Ms. Moore thus urges us to "read into" § 115C-325(n) a remedial process that arguably might make the scheme more effective, fair, or meaningful, we are not permitted to read matters into an unambiguous statute. As our Supreme Court has explained: "The duty of a court is to construe a statute as it is written. It is not the duty of a court to determine whether the legislation is wise or unwise, appropriate or inappropriate, or necessary or unnecessary."

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1. Ms. Moore has not preserved for review any question whether the statute—if construed as the superior court did—is unconstitutional. Nor does this appeal present any question regarding exhaustion of administrative remedies. Since those questions are not properly before us, we express no opinion on them. Until properly raised, those questions must be considered by the individual Boards of Education in deciding whether or not to provide a hearing before the Board.

Campbell v. First Baptist Church of the City of Durham, 298 N.C. 476, 482, 259 S.E.2d 558, 563 (1979); *see also Ferguson v. Riddle*, 233 N.C. 54, 57, 62 S.E.2d 525, 528 (1950) (holding that when a statute is clear, "[w]e have no power to add to or subtract from the language of the statute").

Our obligation in this case is, therefore, simply to construe the meaning of N.C. Gen. Stat. § 115C-325(m) and (n) and decide whether those provisions encompass the right to a hearing before the Board. Based on the statute's plain language, therefore, we hold that the statute does not entitle probationary teachers facing non-renewal to an evidentiary hearing before the Board.

[2] Ms. Moore next argues that N.C. Gen. Stat. § 115C-45(c)(2)-(3) grants her a right to a hearing before the Board:

> An appeal shall lie to the local board of education from any final administrative decision in the following matters:
>
> . . . .
>
> (2) An alleged violation of a specified federal law, State law, State Board of Education policy, State rule, or local board policy . . . ;
>
> (3) The terms or conditions of employment or employment status of a school employee . . . .

Our Supreme Court has, however, already resolved this contention against Ms. Moore.

In *Still v. Lance*, 279 N.C. 254, 261, 182 S.E.2d 403, 407 (1971), the Supreme Court held that N.C. Gen. Stat. § 115-34 had "no application" in the case of a teacher terminated without a hearing before the board of education. N.C. Gen. Stat. § 115-34 was subsequently repealed and replaced by N.C. Gen. Stat. § 115C-45. We have held that those two statutes "are not 'materially different.' " *Cooper v. Bd. of Educ. for Nash-Rocky Mount Schs.*, 135 N.C. App. 200, 202, 519 S.E.2d 536, 538 (1999) (quoting *Williams v. New Hanover County Bd. of Educ.*, 104 N.C. App. 425, 429, 409 S.E.2d 753, 756 (1991)).

The Court in *Still* held that, under § 115-34, the non-renewed teacher was not entitled to a board hearing because that statute concerned appeals "from decisions of school personnel to the . . . board of education" whereas "[t]he decision of which the plaintiff complain[ed] [was] the decision of the County Board of Education." 279 N.C. at 261, 182 S.E.2d at 407-08. This Court has since confirmed

that "*Still v. Lance* . . . holds that G.S. 115-34 has no application where the decision complained of is the decision of a county board of education." *Murphy v. McIntyre*, 69 N.C. App. 323, 328, 317 S.E.2d 397, 400 (1984).

N.C. Gen. Stat. § 115C-45, the "replacement" of § 115-34, underwent further amendment in 2001. Prior to amendment, § 115C-45 provided that "[a]n appeal shall lie from the decision of all school personnel to the appropriate local board of education." The amendments narrowed the right to appeal from "the decision of all school personnel" to "any final administrative decision" in certain specified matters, with "final administrative decision" defined as "a decision of a school employee from which no further appeal to a school administrator is available." 2001 N.C. Sess. Laws ch. 260 § 1. Since the appeal is still from the decision of a school employee to the Board, we see no basis for concluding that these amendments altered the applicability of *Still*. We are, therefore, still bound by *Still* and *Murphy* and hold that N.C. Gen. Stat. § 115C-45 does not entitle Ms. Moore to a hearing before the Board on its decision to not renew her contract.

Further support for this conclusion is evident in N.C. Gen. Stat. § 115C-287.1(d), which sets forth procedures relating to the renewal, non-renewal, and extension of school administrators' employment contracts:

> If a superintendent decides not to recommend that the local board of education offer a new, renewed, or extended school administrator's contract to the school administrator, the superintendent shall give the school administrator written notice of his or her decision and the reasons for his or her decision no later than May 1 of the final year of the contract. The superintendent's reasons may not be arbitrary, capricious, discriminatory, personal, or political. No action by the local board or further notice to the school administrator shall be necessary unless the school administrator files with the superintendent a written request, within 10 days of receipt of the superintendent's decision, for a hearing before the local board. . . . *If a school administrator files a timely request for a hearing, the local board shall conduct a hearing pursuant to the provisions of G.S. 115C-45(c)* and make a final decision on whether to offer the school administrator a new, renewed, or extended school administrator's contract.

N.C. Gen. Stat. § 115C-287.1(d) (emphasis added). The existence of language granting administrators the right to a hearing "pursuant to

the provisions of G.S. 115C-45(c)" confirms that when the General Assembly intended to afford notice and hearing rights, it did so in unambiguous terms.

Therefore, had the legislature also intended to bestow hearing rights on probationary teachers pursuant to the provisions of § 115C-45(c), we must presume that it would have done so explicitly. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452, 151 L. Ed. 2d 908, 922, 122 S. Ct. 941, 951 (2002) ("[I]t is a general principle of statutory construction that when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " (quoting *Russello v. United States*, 464 U.S. 16, 23, 78 L. Ed. 2d 17, 24, 104 S. Ct. 296, 300 (1983))). *See also Satterfield v. Edenton-Chowan Bd. of Educ.*, 530 F.2d 567, 570 n.4 (4th Cir. 1975) ("That this omission of a right to a hearing in the case of a probationary teacher was not inadvertent but purposeful appears plain from the other provisions in the Amendments which specifically require hearings on the nonrenewal of the contract of a 'career teacher' (i.e., one with tenure). The absence of any similar provision for probationary teachers in the Amendments compels, it seems to us, the conclusion that no such right to a hearing was intended or contemplated for the probationary teacher denied renewal.").

In sum, the statutes applicable to probationary teachers are devoid of any expression of an intent to attach hearing rights to the decisions to not renew probationary teachers' contracts. The explicit grant of advance notice and hearing rights to other classes of school employees—but not to probationary teachers—makes this conclusion inescapable.[2] To obtain a right to a hearing before the Board, probationary teachers must look to the General Assembly and not the courts. Our hands are tied by the statutes' plain language.

<u>Motion to Strike Exhibits</u>

[3] Ms. Moore next contends that the superior court improperly struck from the record the additional documents she offered for the court's consideration. She argues on appeal that these documents would have shown (1) that she used a ruler without complaint over

2. The parties have debated the applicability of N.C. Gen. Stat. § 115C-325(b) to these proceedings, but that question is not before us since Ms. Moore did not base her appeal below on a violation of § 115C-325(b) and did not include any error based on this provision in her assignments of error.

several years, (2) that "she was lauded for all but one of her interactions with her students over 3.5 years," and (3) she was praised for "her effectiveness with the toughest kids in the system" by other school administrators. Whatever the value of Ms. Moore's extra-record documents, the trial court's decision was proper in light of this Court's recent decision in *Davis*.

Davis also involved a probationary teacher whose contract had not been renewed. She appealed the board decision on the grounds that it violated N.C. Gen. Stat. § 115C-325(m)(2). 178 N.C. App. at 649-50, 632 S.E.2d at 593. This Court held that "[o]n appeal of a decision of a school board, a trial court sits as an appellate court and *reviews the evidence presented to the school board*." *Id.* at 651, 632 S.E.2d at 594 (emphasis added).

Although Ms. Moore argues judicial review will be futile if probationary teachers are prevented from offering evidence at a Board hearing and then are also barred from presenting evidence before the superior court to demonstrate prejudice or discrimination, we are bound by *Davis*. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Consequently, we hold the superior court did not err in striking the additional documents.

The Board's Decision

[4] The last issue raised by Ms. Moore "is whether the Board failed to inquire into the recommendation and undertake 'fair and careful' consideration of the non-renewal decision." Although conceding that "the record reveals a reason for the non-renewal," Ms. Moore argues that "[t]he lack of any inquiry into or awareness of contrary information makes the [Board's] decision arbitrary" and, therefore, unsustainable on appeal to superior court. Again, our recent decision in *Davis* is dispositive.

Davis recognized our prior decisions " 'impos[ing] a duty on boards of education to determine the substantive bases for recommendations of non-renewal and to assure that non-renewal is not for a prohibited reason.' " *Davis*, 178 N.C. App. at 655, 632 S.E.2d at 596 (quoting *Abell v. Nash County Bd. of Educ.*, 71 N.C. App. 48, 52, 321 S.E.2d 502, 506 (1984), *disc. review denied*, 313 N.C. 506, 329 S.E.2d 389 (1985)). Relying further on *Abell*, the *Davis* Court explained:

> "[T]he advisory nature of the superintendent's recommendation to not rehire a non-tenured teacher places the responsibility on the Board to ascertain the rational basis for the recommendation before acting upon it." However, a school board need not "make exhaustive inquiries or formal findings of fact[.]" Rather, "the administrative record, be it the personnel file, board minutes or recommendation memoranda, should disclose the basis for the board's action."

Id. at 655-56, 632 S.E.2d at 596 (second alteration original) (internal citations omitted) (quoting *Abell*, 71 N.C. App. at 53, 321 S.E.2d at 506-07). *Davis* then found that the board's inquiry was sufficient—and the superior court properly applied the whole record test—when the record showed (1) that the superintendent conducted an investigation into the teacher's alleged misconduct and reviewed two "below standard" performance evaluations given to the teacher; (2) the superintendent presented a summary of his investigation to the board along with his non-renewal recommendation; and (3) the board considered the information presented by the superintendent. *Id.* at 657, 632 S.E.2d at 597.

The circumstances of this case are substantially similar. The record here demonstrates that the school administration investigated allegations that Ms. Moore inappropriately used a ruler and profanity while teaching; the administration found these allegations to be supported by evidence; the administration communicated its findings to the Board, in addition to information about Ms. Moore's performance evaluation, containing a "below standard" and "unsatisfactory" with respect to certain elements; and, in conjunction with all of this information, the superintendent recommended non-renewal. The superior court found that "[o]n May 24, 2005, the Board considered the Superintendent's recommendation and voted not to renew [her] contract for employment."

Under *Davis*, the foregoing is sufficient under the whole record test to support the Board's decision as non-arbitrary. Nothing in *Davis* suggests that an evidentiary hearing is necessary in order for the Board to carry out its duty of ascertaining a non-prohibited reason prior to making a non-renewal decision under § 115C-325(m)(2).

[5] Ms. Moore also argues that the Board's record is inadequate because it shows that the superintendent failed to "recommend" her non-renewal, pointing to the fact that the non-renewal recommenda-

tion was signed by Charles Head, the school administration's Employee Relations Specialist, and not the superintendent. Although the letter was signed by Mr. Head, it states that "[t]he *Superintendent* believes the continued employment of Ms. Moore would pose a threat to the physical safety of students or personnel or that the person [sic] has demonstrated that he or she does not have sufficient integrity, ethics or other traits to fulfill his or her duties as a public school employee." (Emphasis added.) In the very next sentence, the letter states: "*We* request that Ms. Alicia Moore not be recommended for career status." (Emphasis added.) This language sufficiently resolves any doubt that the superintendent in fact made the non-renewal recommendation. Ms. Moore points to no authority that would require the superintendent to personally sign the non-renewal recommendation letter, and, accordingly, we decline to impose any such requirement in this case.

Conclusion

In sum, we hold that, although § 115C-325(n) allows non-renewed probationary teachers "the right to appeal from the decision of the board to the superior court," there is no right—express or implied—to have a preliminary hearing before the Board on the issue of non-renewal. While Ms. Moore presents a reasonable argument that some type of hearing would provide for more meaningful review, such arguments must be presented to the General Assembly or individual Boards of Education. We are in no position to disturb the General Assembly's policy judgment.

Moreover, we hold that the superior court committed no error in striking Ms. Moore's extra-record submissions, given that the court's inquiry is limited to the evidence presented to the school board. We also have reviewed the full record considered by the superior court and conclude that this record reveals a non-prohibited reason for Ms. Moore's loss of her teaching contract. The order of the superior court is, therefore, affirmed.

Affirmed.

Judges TYSON and ELMORE concur.

GLENN AND JESSICA COOK; CHARLES AND GERALDINE FRANK; GEORGE AND PHYLLIS HENDRY; NATHAN AND LISA MURPHY; BYRON NESBIT; KELLY AND JENIFER RUBOTTOM; AND UNION COUNTY, A BODY POLITIC AND CORPORATE OF THE STATE OF NORTH CAROLINA, PETITIONERS v. UNION COUNTY ZONING BOARD OF ADJUSTMENT, RESPONDENT, AND WAL-MART STORES EAST, INC.; AND WAL-MART REAL ESTATE BUSINESS TRUST, INTERVENOR RESPONDENTS

No. COA06-1153

(Filed 4 September 2007)

1. Zoning— appeal of special use permit—county as aggrieved person

Union County did not need to show that it is an aggrieved person to have standing to appeal to superior court the decision of the Union County Board of Adjustment granting a special use permit. The statute setting forth the powers and duties of a board of adjustment indicate that such an appeal is permitted, and respondents cited no case or authority prohibiting a county from appealing a decision by its own board of adjustment.

2. Zoning— appeal of special use permit—adjoining landowners—standing

Adjoining landowners had standing to appeal to superior court the issuance of the special use permit for the construction of a Wal-Mart Store on a tract in a planned unit development. The evidence showed that they had suffered special damages which are unique in character and quantity and distinct from those inflicted upon the community at large, including a reduction in the values of their properties.

3. Zoning— special use permit—county and adjoining landowners—status as parties

Petitioners Union County and adjoining landowners were not required to make a motion before the board of adjustment or superior court to intervene as parties in an action involving a special use permit issued to Wal-Mart. No ordinance or statute has been identified indicating an additional procedural step they could have taken to gain status as parties.

4. Zoning— board of adjustment—rules of procedure

The board of adjustment was required to follow its own rules of procedure. No authority was found for the proposition that a formal objection needs to be made when a county board of

adjustment fails to follow its own rules; the Rules of Appellate Procedure do not apply to appeals by certiorari to the superior court from a hearing before a county board of adjustment.

5. Zoning— board of adjustment hearing—due process rights—presentation of evidence—revised site plan

Petitioners were denied their due process rights to present evidence before a board of adjustment before it made its decision to grant Wal-Mart's special use permit. Wal-Mart's revised site plan and its explanation of that plan were crucial to the board of adjustment's decision, but the board of adjustment essentially cut off the rights of petitioners to present evidence or conduct cross-examination while continuing to hold sessions of the hearing and permitting Wal-Mart to present evidence.

Appeals by respondent Union County Zoning Board of Adjustment (BOA) and intervenor respondents Wal-Mart Stores East, Inc. and Wal-Mart Real Estate Business Trust (Wal-Mart) from a final order entered 25 April 2006 by Judge Christopher M. Collier in Union County Superior Court, vacating the issuance of a special use permit, and from an interlocutory order entered 26 April 2005 denying respondent's and intervenor respondents' motions to dismiss the petitioners' petition for writ of certiorari to the superior court. Heard in the Court of Appeals 28 March 2007.

Parker, Poe, Adams & Bernstein, LLP, by Benjamin R. Sullivan and Brenton W. McConkey for Petitioner-Appellees Cook, Frank, Hendry, Murphy, Nesbit & Rubottom.

Shumaker, Loop & Kendrick, LLP, by William H. Sturges for Petitioner-Appellee, Union County.

John T. Burns for Respondent-Appellant, Union County Zoning Board of Adjustment.

Guthrie, Davis, Henderson & Staton, PLLC, by John H. Hasty, Kimberly R. Matthews, and Justin N. Davis for Intervenor-Respondent-Appellant, Wal-Mart.

Troutman Sanders, LLP, by Ashley H. Story for Intervenor-Respondent-Appellant, Wal-Mart.

STROUD, Judge.

The dispositive issues in this case are whether petitioners had standing to appeal to superior court the grant of a special use permit

to respondent-intervenor, and whether petitioners were denied due process in the proceedings by which respondent-intervernors' application for a special use permit was granted. We hold that petitioners had standing to appeal, and that they were denied due process in the proceedings. Accordingly, we affirm the trial court order vacating the issuance of the special use permit to Wal-Mart.

I. Background

Wal-Mart submitted an application for a special use permit (original application) to the BOA on 1 March 2004, seeking to construct a 206,242 square foot retail sales establishment (store) at the corner of Rea Road extension and Tom Short Road on an approximately 31 acre tract of land (tract) in Union County. This tract is located within the Somerset Planned Unit Development (PUD). Individual petitioners Cook, Frank, Hendry, Nesbit, and Rubottom (Somerset citizens)[1] are all landowners whose land adjoins or abuts the store tract. The BOA held a hearing regarding the application, starting on 20 July 2004, with additional sessions on 21 and 22 July, 30 August, 1 September, 4 October, 18 October, and 8 November 2004.[2] Presentation of formal testimony by all parties was completed at the 1 September 2004 hearing. The BOA voted on 1 September 2004 to approve the application, subject to many changes which were discussed during the hearing, and required that Wal-Mart present a revised site plan, at which time the BOA would give its final decision on the issuance of the special use permit.

On 4 October and again with further amendments on 8 November 2004, Wal-Mart submitted a revised site plan (revised application) containing in excess of twenty changes to the project as set forth on the original application. The changes included moving and reorienting the store building to the other side of the tract, reconfiguration of the traffic patterns of the store entrance, addition of a drive-through for the store pharmacy, change of the location of the retention pond, changes to the parking lots, a new lighting plan, new elevations, and a new landscaping plan. On 5 January 2005, the BOA filed its findings of fact, conclusions, and decision regarding the revised application. The Special Use Permit (SUP), issued on 6 January 2005, noted that

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1. Petitioners Nathan and Lisa Murphy dismissed their claims with prejudice on 11 February 2005.

2. One of the issues raised in this appeal is whether the superior court erred in finding that the BOA hearing "concluded" on 1 September 2004, as additional sessions to consider Wal-Mart's application were held by the BOA on 4 October, 18 October, and 8 November, 2004.

the revised application was approved on 8 November 2004. Petitioners filed a verified petition for writ of certiorari on 3 February 2005 with the superior court. On 15 March 2005, the superior court granted Wal-Mart's motion to intervene. On 26 April 2005, the superior court denied Wal-Mart's motions to dismiss the petition for certiorari and granted petitioners' motion to amend the petition. The amended petition, filed 28 June 2005, alleged that the BOA erred by issuing the special use permit based upon the revised application including exhibits which were created after the evidentiary hearing ended on 1 September 2004. Specifically, petitioners asserted that the BOA: (1) committed an error of law in that no evidence was heard on the revised application; (2) failed to follow the statutes, common law, and land use ordinance; (3) violated the due process rights of petitioners to offer evidence, cross-examine witnesses, and inspect documents regarding the revised application; (4) did not have competent, material, and substantial evidence in the record to support approval of the revised application; and (5) arbitrarily and capriciously granted the special use permit.

The superior court held a hearing on the petition on 3 March 2006. On 25 April 2006, the superior court vacated the special use permit because: (1) after reviewing the whole record, it concluded that the decision of the BOA was arbitrary, not being supported by competent, material, and substantial evidence; and (2) on de novo review, it concluded that the BOA violated the due process rights of petitioners. Wal-Mart and the BOA appeal.

II. Issues

Respondents Wal-mart and the BOA argue that the superior court erred in vacating the special use permit. Specifically, they argue that: (1) petitioners lacked standing to appeal the decision of the BOA; (2) petitioners waived all objections to the BOA's "post-decision consideration" (i.e., after 1 September 2004) of permit conditions and therefore did not preserve any right to appellate review; (3) petitioners received due process sufficient to fairly present their petition to the BOA; (4) the BOA's decision was based on sufficient, material, and substantial evidence; and (5) petitioners failed to preserve for appellate review the issues addressed in their cross-assignments of error.

III. Standards of Review

Each of the three levels—the board of adjustment, the superior court, and this Court—has a particular standard of review. First, the

board of adjustment sits as the finder of fact in its consideration of the application for a special use permit. *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 12, 565 S.E.2d 9, 17 (2002). As finder of fact, a board of adjustment is required to

> follow a two-step decision-making process in granting or denying an application for a special use permit. If an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. If a *prima facie* case is established, a denial of the permit then should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.
>
> The board of adjustment planning board sits in a quasi-judicial capacity when determining whether to grant or deny a special use permit and must insure that an applicant is afforded a right to cross-examine witnesses, is given a right to present evidence, is provided a right to inspect documentary evidence presented against him and is afforded all the procedural steps set out in the pertinent ordinance or statute. Any decision of the town board has to be based on competent, material, and substantial evidence that is introduced at a public hearing.

Id., 565 S.E.2d at 16-17 (internal citations and quotations omitted). A board of adjustment's "findings of fact and decisions based thereon are final, subject to the right of the courts to review the record for errors in law and to give relief against its orders which are arbitrary, oppressive or attended with manifest abuse of authority." *Id.*, 565 S.E.2d at 17 (citation and quotations omitted).

At the second level, upon appeal from a board of adjustment decision by petition for certiorari, the superior court acts as a court of appellate review. *Id.* at 12, 565 S.E.2d at 17. The superior court's task is:

> (1) Reviewing the record for errors in law,
>
> (2) Insuring that procedures specified by law in both statute and ordinance are followed,
>
> (3) Insuring that the appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses and inspect documents,

> (4) Insuring that decisions of . . . boards [of adjustment] are supported by competent, material and substantial evidence in the whole record, and
>
> (5) Insuring that decisions are not arbitrary and capricious.

Id. at 13, 565 S.E.2d at 17 (citation omitted).

The type of error assigned determines the standard of review applied by the superior court. If the error assigned is that a board's decision is not supported by the evidence or is arbitrary and capricious, the superior court must apply the whole record test. *Id.* On the other hand, de novo review is appropriate "if a petitioner contends the board's decision was based on an error of law," *id.*, including a contention that the board's proceedings failed to protect the due process rights of a party, *see Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001).

These two standards of review are distinguished from each other as follows:

> Under a *de novo* review, the superior court considers the matter anew and freely substitutes its own judgment for the [board's] judgment. When utilizing the whole record test, however, the reviewing court must examine all competent evidence (the "whole record") in order to determine whether the [board's] decision is supported by "substantial evidence." The "whole record" test does not allow the reviewing court to replace the board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*.

356 N.C. at 13-14, 565 S.E.2d at 17-18 (internal citations and quotations omitted). Finally, the superior court "must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review." 356 N.C. at 13, 565 S.E.2d at 17 (citation omitted).

When this Court reviews a superior court's order which reviewed a zoning board's decision, we examine the order to: "(1) determin[e] whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) decid[e] whether the court did so properly." *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (citation and quotations omitted).

IV. Standing

" 'Standing typically refers to the question of whether a particular litigant is a proper party to assert a legal position.' " *Higgins v. Simmons*, 324 N.C. 100, 103, 376 S.E.2d 449, 452 (1989) (quoting *State v. Labor and Indus. Review Comm'n*, 136 Wis. 2d 281, 287 n.2, 401 N.W.2d 585, 588 n.2 (1987)). "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878, *disc. review denied*, 356 N.C. 610, 574 S.E.2d 474 (2002). Standing is a question of law which this Court reviews de novo. *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 51 (2002), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003).

A. Union County

[1] Respondents contend that Union County did not have standing to appeal to the superior court because the County is not an "aggrieved person" on the facts of this case. Respondents further argue that because the Union County Zoning Board of Adjustment is a creation of and an agent of Union County, Union County has no standing to appeal decisions of the Union County BOA as a matter of law.

The statute which governs standing to appeal decisions pursuant to a county zoning ordinance is N.C. Gen. Stat. § 153A-345 (2003)[3] which provides, in pertinent part, that

> (b) The board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with enforcing [a zoning] ordinance. *Any person aggrieved* or *any officer, department, board, or bureau of the county may take an appeal.*
>
> . . .
>
> (c) The zoning ordinance may provide that the board of adjustment may permit special exceptions to the zoning regulations in classes of cases or situations and *in accordance with the principles, conditions, safeguards, and procedures specified in the ordinance.*
>
> . . .

3. N.C. Gen. Stat. § 153A-345 was subsequently revised, but this case is governed by the provisions of the statute in effect at the time the hearing took place.

> (e) *Each decision of the board is subject to review by the superior court by proceedings in the nature of certiorari.*

(Emphasis added.)

Subsection (b) of the statute, dealing with appeals to a board of adjustment from the ruling of an administrative official, enumerates the parties who may appeal to a board of adjustment, and this includes "any person aggrieved *or* any officer, department, board, or bureau of the county." [Emphasis added.] Thus, a county, in a category distinct from a "person aggrieved," could appeal a ruling by an administrative official of the county to a board of adjustment.

Further, subsection (c) deals with a board's power to issue special use permits, "in accordance with the principles, conditions, safeguards, and procedures specified in the ordinance." Then, subsection (e) provides that "[e]ach decision of the board is subject to review by the superior court" by certiorari. The statute contains no limitation on the parties who may seek certiorari, and it provides that "[e]ach decision" of a board of adjustment is subject to this review. This would necessarily include review of a board of adjustment decisions under subsection (b), which specifically identifies "any officer, department, board, or bureau of the county" as potential parties. Therefore under N.C. Gen. Stat. § 153A-345, Union County may seek review by certiorari of a decision by its BOA, particularly where the County claims, as here, that the BOA has failed to act "in accordance with . . . *procedures* specified in the ordinance" in the issuance of a special use permit. N.C. Gen. Stat. § 153A-345(c) (emphasis added).

This interpretation of the statute is consistent with *Mize v. County of Mecklenburg*, 80 N.C. App. 279, 341 S.E.2d 767 (1986), which held that the zoning board of adjustment was a necessary party respondent to a petition filed pursuant to N.C. Gen. Stat. § 153A-345(e) even though the County was already a party to the certiorari petition. In *Mize*, the appellant argued that the County was "the only necessary party . . . because the Board of Adjustment has only that authority which has been delegated to it by [the] County and is therefore an agent of [the] County." *Id.* at 282, 341 S.E.2d at 769. However, the *Mize* court noted that

> the Board of Adjustment is an independent, quasi-judicial body whose decisions cannot be reviewed or reversed by the Board of Commissioners or the town manager, [and] that instances may

> arise where *the position of the Board of Adjustment and the County . . . may be adverse*. The focus of the review under G.S. § 153A-345(e) is on the decision of the Zoning Board of Adjustment. While the County delegates to the Board the authority to hear appeals of zoning cases, once the delegation has occurred the County has no power to influence the decisions of the Board.

Mize, 80 N.C. App. at 282-83, 341 S.E.2d at 769 (emphasis added) (internal citation omitted).

We conclude that petitioner Union County did not need to show that it is an aggrieved person to have standing to appeal. Further, respondents cite no statute or case on point prohibiting a county from appealing a decision by its own board of adjustment. To the contrary, the statute setting forth the powers and duties of a board of adjustment indicates that such an appeal is permitted. Accordingly, we hold that Union County was a proper party to appeal the BOA's decision to the superior court.

B. Somerset citizens

[2] Respondents further contend that the Somerset citizens lacked standing to appeal to the superior court to vacate the issuance of the special use permit. Specifically, respondents argue that the record does not contain sufficient facts to establish that the Somerset citizens are "persons aggrieved."

"[A]ny person aggrieved" has standing to appeal the decision of a board of adjustment pursuant to N.C. Gen. Stat. § 153A-345(b) (2003). *See Lloyd v. Town of Chapel Hill*, 127 N.C. App. 347, 350, 489 S.E.2d 898, 900 (1997) (applying N.C. Gen. Stat. § 160A-388, the parallel statute governing city zoning boards). A "person aggrieved" must show either "some interest in the property affected," or, if plaintiffs are nearby property owners, they must show special damage which amounts to "a reduction in the value of [their] property." *Heery v. Zoning Board of Adjustment*, 61 N.C. App. 612, 613, 300 S.E.2d 869, 870 (1983) (internal citations and quotations omitted).

The evidence in the record shows that the Somerset citizens have suffered special damages to their properties which are unique in character and quantity and distinct from those inflicted upon the community at large, including a reduction in the values of their properties.

C. As to all petitioners

[3] Respondents further contend that petitioners lack standing because neither the Somerset citizens nor Union County ever made a motion before the BOA or the superior court to intervene as parties to the action. Respondents assert that "[o]ne cannot simply walk into a public hearing, make a statement for the record and then appeal the agency's ruling without moving to be made a party to the proceedings," and cite *Duke Power Co. v. Board of Adjustment*, 20 N.C. App. 730, 202 S.E.2d 607, *cert. denied*, 285 N.C. 235, 204 S.E.2d 22 (1974), in support. However, *Duke Power* is not apposite to the case *sub judice*. In *Duke Power*, the property owners, who made no motion to become parties in the superior court proceedings, sought to appeal the ruling of the superior court to this Court. *Id.* at 732, 202 S.E.2d at 608. The issue in *Duke Power* was thus the right of the property owners to appeal to this Court from a superior court order when they were not parties to the superior court proceedings.

In the instant case, both Union County and the Somerset citizens were petitioners before the superior court. Union County and the Somerset citizens were represented by counsel and participated fully in all eight sessions of the public hearing before the BOA as well as the superior court proceedings. Respondents have not identified, nor can we find, any ordinance or statute which would indicate any additional procedural step that petitioners could have taken to gain status as parties in this case.

We hold that the trial court did not err in denying the motion to dismiss on the basis of standing, as Union County and the Somerset citizens had the right to file a petition for certiorari pursuant to N.C. Gen. Stat. § 153A-345(e). This assignment of error is therefore overruled.[4]

V. Waiver of Objections

[4] Respondents next contend that petitioners waived all objections to the BOA's "post-decision" consideration of the conditions to be attached to the special use permit. Respondents rely solely upon N.C.R. App. P. 10(b), which requires a party to present a "timely request, objection, or motion" in order "to preserve a question for appellate review." N.C.R. App. P. 10(b).

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4. The other grounds asserted by appellants for dismissal of the petition for certiorari were not argued in the brief, and despite the respondents' statement that they do "not waive" such grounds, we deem them abandoned pursuant to N.C.R. App. P. 28(b)(6).

N.C.R. App. P. 1 sets forth the scope of the Rules of Appellate Procedure as follows:

> (a) Scope of Rules. These rules govern procedure in all appeals from the courts of the trial division to the courts of the appellate division; in appeals in civil and criminal cases from the Court of Appeals to the Supreme Court; in direct appeals from administrative agencies, boards, and commissions to the appellate division; and in applications to the courts of the appellate division for writs and other relief which the courts or judges thereof are empowered to give.
>
> . . .
>
> (c) Definition of Trial Tribunal. As used in these rules, the term "trial tribunal" includes the superior courts, the district courts, and any administrative agencies, boards, or commissions from which appeals lie directly to the appellate division.

The Rules of Appellate Procedure do not apply to appeals by certiorari to the superior court from a hearing before a county board of adjustment, as there is no direct right of appeal from a board of adjustment to the appellate division. A board of adjustment is not a "trial tribunal" as defined by N.C.R. App. P. 1(c). Appeals from a board of adjustment are to the superior court, by certiorari. N.C. Gen. Stat. § 153A-345(e).

As discussed more fully below, the BOA was required to follow its own rules of procedure, because "the procedural rules of an administrative agency are binding upon the agency which enacts them as well as upon the public. To be valid the action of the agency must conform to its rules which are in effect at the time the action is taken." *Robins v. Town of Hillsborough*, 361 N.C. 193, 198, 639 S.E.2d 421, 424 (2007) (internal citations and quotations omitted). Respondents do not cite any relevant authority, nor do we find any, for the proposition that a formal objection needs to be made when a county board of adjustment fails to follow its own rules of procedure. We decline to make this rule. This assignment of error is without merit.

VI. Procedure for Approval of Revised Application

[5] Respondents next argue that the superior court erred when it vacated Wal-Mart's special use permit based upon the superior court's finding that the board of adjustment had denied the original application and was thus barred from further consideration of the revised

application. Respondents further contend that the changes to the original application as required by the BOA were just additional requirements under Section 59(a)[5] and not amendments or modifications which substantially changed the original application, so that the BOA proceedings after the 1 September 2004 meeting at which the first "approval" occurred were "post-decision" or administrative proceedings which did not require an additional evidentiary hearing. Because these arguments are concerned with the protection of procedural due process rights, this Court reviews them de novo.

Respondents cite *In re Application of Raynor*, 94 N.C. App. 173, 379 S.E.2d 884, *disc. review denied and appeal dismissed*, 325 N.C. 546, 385 S.E.2d 495 (1989), as establishing that adjoining land owners do not have a right to present evidence during the post-decision administrative process. In fact, *Raynor* does not deal with a "post-decision administrative process" at all. In *Raynor*, there was a public hearing session at which individuals who were opposed to issuance of the conditional use permit were present and permitted to present evidence, but the board made no decision regarding the permit. *Id.* at 174, 379 S.E.2d at 885. At a regularly scheduled meeting of the Board of Aldermen when the petitioners were not present, the permit applicant offered to add two additional minor conditions to his application to address concerns raised during the public hearing. *Id.* At a later meeting, the board voted to approve the permit. The *Raynor* court held that the addition of the two conditions was not an "introduction of evidence" which would give opposing property owners a right to cross-examination and to present their own rebuttal evidence, because the two conditions were very minor changes which

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5. Section 59 of the Union County zoning ordinance reads:

> (a) Subject to subsection (b), in granting a special use or conditional use permit, the permit issuing board may attach to the permit such reasonable requirements in addition to those specified in this ordinance as will ensure that the development in its proposed location:
>
> (1) Will not endanger the public health or safety;
>
> (2) Will not injure the value of adjoining or abutting property;
>
> (3) Will be in harmony with the area in which it is located; and
>
> (4) Will be in conformity with the land development plan, thoroughfare plan, or other plan officially adopted by the Board.
>
> (b) The permit issuing board may not attach additional conditions that modify or alter the specific requirements set forth in this ordinance unless the development in question presents extraordinary circumstances that justify the variation from the specified requirements.

actually favored the opposing property owners. *Id.* at 177-78, 379 S.E.2d at 887.

Although a board of adjustment is a quasi-judicial body which is not bound by formal rules of evidence or civil procedure, when it "conducts a quasi-judicial hearing to determine facts prerequisite to issuance of a permit, [its procedures] can dispense with no essential element of a fair trial." *Raynor*, 94 N.C. App. at 176, 379 S.E.2d at 886 (citation omitted). One essential element of a fair trial is that a "party whose rights are being determined [is entitled to] the opportunity to cross-examine adverse witnesses and to offer evidence in support of his position and in rebuttal of his opponents' contentions." *Id.* at 177, 379 S.E.2d at 887. Furthermore, a board of adjustment is required to follow the procedures set forth in its ordinances. *Robins*, 361 N.C. at 198-99, 639 S.E.2d at 424; *Refining Co. v. Board of Aldermen*, 284 N.C. 458, 471, 202 S.E.2d 129, 138 (1974).

Section 101(b) of the Union County zoning ordinance provides that all persons interested in the application "shall be given an opportunity to present evidence and arguments and ask questions of persons who testify." Under Section 101(c), the BOA "may place reasonable and equitable limitations on the presentation of evidence and arguments and the cross-examination of witnesses so that the matter at issue may be heard and decided without undue delay." On their face, these procedures comport with N.C. Gen. Stat. § 153A-345 and our case law.

At the hearing sessions prior to 4 October 2004, petitioners' witnesses presented many hours of detailed testimony based on the original site plan, addressing concerns such as the proximity of the store's loading dock to homes, traffic patterns, and many other issues based specifically on the original site plan. However, even though the "decision was not final," at the start of the 4 October 2004 session,[6] the Chairman disallowed any further evidence from petitioners by announcing that

> [n]o additional testimony will be taken on any issues that were raised by the parties during the public hearing prior to the Board's decision to grant the special use permit on September 1st, 2004. While the Board may feel it necessary to ask for comment on specific aspects of the amended site plan from Union

6. By the terms of the SUP itself and the findings and conclusions by the BOA, which are supported by evidence in the record, the hearing on the application ended and the "final decision" was made on 8 November 2004.

> County and the public at large, general testimony and comment regarding the compliance of the amended site plan with the Board's September 1st, 2004, ruling will not be allowed.

At the 4 October 2004 session, Wal-Mart presented a revised site plan which was substantially different from the original site plan, as the revised plan completely reoriented the building, parking lot, retention pond, and changed the traffic patterns for the proposed Wal-Mart store. At the 8 November session, Wal-Mart presented another site plan with more revisions. Although Wal-Mart did not present any additional formal testimony, the BOA allowed Wal-Mart's counsel to explain the revised site plan and answer the BOA's questions regarding the revised plans at the 4 October and 8 November 2004 sessions of the hearing.

Wal-Mart contends that no further evidence from petitioners was necessary because the revised site plan which was submitted on 8 November 2004 adequately addressed the concerns raised by the Somerset citizens, Union County, and the BOA in the previous hearing sessions. Petitioners, however, contend that the revised site plan actually raised new concerns based upon the relocation of the building, as the relocated building would not shield the adjacent residences from the parking lot and traffic. Petitioners also note that there were no sound studies for the new configuration of the site and that the back of the building would be very close to Rea Road, which impacts the Hunter Oaks PUD and properties on the other side of Rea Road. There was no analysis of the revised application by the Union County Land Use Administrator as required by Section 56 of the Union County zoning ordinance, and no evidence, expert review, or cross-examination regarding these issues or others raised by the revised application.

However, the revised site plan and explanation of that site plan were in fact crucial to the BOA's decision, as the BOA based its findings and conclusions in large part upon the revised site plan and upon the information adduced at the 4 October and 8 November sessions of the hearing. By not allowing additional testimony or evidence from petitioners, the BOA essentially cut off the rights of the Somerset citizens and the County under Section 101(b) to present evidence or conduct cross-examination as of 1 September 2004, while continuing to hold sessions of the hearing and permitting Wal-mart to present evidence.

Terminating the rights of the petitioners to present evidence and cross-examine on 4 October 2004 was not justified under Section 101(c) as a "reasonable and equitable" limitation on the presentation of evidence. The evidence which petitioners would have sought to present based on the revised site plan would not have been cumulative or redundant, as it would be based on a substantively different revised site plan. Furthermore, after receiving Wal-Mart's revised site plan as an exhibit, the BOA did vote again, on 8 November 2004, to approve the revised application. As a consequence of the above, we hold that petitioners were denied due process rights to present evidence before the BOA before it made its decision to grant Wal-Mart's special use permit.

Because we find that the BOA did not afford due process to the petitioners due to its failure to comply with Section 101 of the Union County zoning ordinance, we do not find it necessary to determine if the revised application was really a "new application" which would be governed by Section 65, or if the revised application as approved by the BOA was properly considered as an application with conditions pursuant to Section 59(a). We also do not find it necessary to address Wal-Mart's argument that the superior court erred by its failure to find facts supporting its decision that the BOA's issuance of the special use permit was not supported by competent, material, and substantial evidence.

VII. Conclusion

The superior court did not err when it found that petitioners had standing to appeal the BOA's decision to superior court. Further, the superior court did not err when it concluded that petitioners were denied due process by the BOA's failure to comply with hearing procedures as set forth in Section 101 of the Union County zoning ordinance. The superior court therefore did not err in vacating the special use permit, and we affirm the order of the superior court.

AFFIRMED.

Judges McCULLOUGH and ELMORE concur.

STATE OF NORTH CAROLINA v. BILLY RAY BYRD

No. COA06-1368

(Filed 4 September 2007)

1. Sentencing— enhancement—domestic violence—violation of valid protective order—motion to dismiss

The trial court did not err in a domestic violence case involving assault with a deadly weapon with intent to kill by denying defendant's motion to dismiss the enhancement of violation of a valid protective order under N.C.G.S. § 50B-4.1, because: (1) N.C.G.S. § 50B-2(a) allows a person to seek the same kind of relief provided by Chapter 50B by filing a civil action under Chapter 50 and a motion in the cause alleging acts of domestic violence; (2) the wife victim filed a civil action under Chapter 50 for divorce from bed and board, and she was thereafter permitted under N.C.G.S. § 50B-2 to file a motion in the cause in her Chapter 50 action alleging acts of domestic violence to avail herself of the protections found in Chapter 50B; (3) the temporary restraining order (TRO) granted in the Chapter 50 action was issued under Chapter 50B; and (4) the ex parte TRO was a protective order within the meaning of Chapter 50B since the hearing requirement found in N.C.G.S. § 50B-1(c) was satisfied when defendant received notice that a TRO had been entered against him.

2. Domestic Violence— instructions—enhancement provisions in Chapter 50B—knowing violation—ignorance of law

The trial court did not err a domestic violence case involving assault with a deadly weapon with intent to kill by its instructions to the jury as they related to the enhancement provisions in Chapter 50B based on a violation of a valid domestic violence protective order, because: (1) defendant conceded that he was aware of the temporary restraining order (TRO), but that he made a mistake of law as to the legal impact of the TRO; and (2) it is well-settled that ignorance of the law or a mistake of law is no defense to criminal prosecution.

3. Criminal Law— prosecutor's argument—defendant's failure to plead guilty—harmless error—overwhelming evidence of guilt

A prosecutor's improper comment referencing defendant's failure to plead guilty was harmless error in a domestic violence

case involving assault with a deadly weapon with intent to kill, and defendant was not entitled to a new trial, because: (1) this kind of error is deemed harmless if a curative instruction is given, or if the State can show that the evidence of defendant's guilt was overwhelming; and (2) the State has established that the evidence of defendant's guilt was overwhelming when defendant had ample time to stop shooting but instead pointed the gun at his wife for a second time and shot her in the head.

Judge WYNN dissenting.

Appeal by defendant from judgments entered 26 August 2005 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 22 May 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Elizabeth F. Parsons, for the State.

Glover & Petersen, P.A., by James R. Glover and Ann B. Petersen, for defendant-appellant.

HUNTER, Judge.

Billy Ray Byrd ("defendant") appeals his conviction and sentence for assault with a deadly weapon with intent to kill. After careful consideration, we find no prejudicial error.

Defendant's wife, Carrie Byrd ("C. Byrd"), filed a *pro se* complaint and motion for a domestic violence protective order against defendant on 11 March 2003. On 13 March 2003, the district court issued an *ex parte* order. Thereafter, the district court issued a protective order for one year. Defendant and C. Byrd, however, eventually reconciled, and the district court granted the victim's motion to set aside the protective order.

One year after filing the original order, C. Byrd, through counsel, commenced a civil action for divorce from bed and board. *Byrd v. Byrd*, No. 04-CVD-114 (Transylvania County District Court). The complaint stated that C. Byrd and defendant were married in 1998 and had two sons together. The complaint also alleged that defendant had "physically assaulted and battered [her] on numerous occasions" and, "in the past, during periods of his intoxication, the Defendant has assaulted and battered [her], resulting in humiliation and serious bodily injury to her." According to the complaint, C. Byrd was "in fear for her own physical and mental wellbeing [sic] and that of

her children." She requested that defendant "not to go about, assault, threaten, molest, harass, interfere with, or bother [C. Byrd] in any way whatsoever."

With the civil complaint, C. Byrd also filed a motion for a preliminary injunction pursuant to N.C.R. Civ. P. 65(a) and for a temporary restraining order ("TRO") pursuant to Rule 65(b). On 11 March 2004, the district court issued an *ex parte* order. The order granted C. Byrd's request for a TRO and set a hearing date of 15 March 2004. The TRO, with accompanying documents, was served on defendant on 12 March 2004. Defendant met with his attorney on 15 March 2004, and the attorney requested a continuance. The hearing and the TRO were both continued until 24 March 2004.

The State's evidence at trial tended to show that defendant entered the office building where his wife worked on 23 March 2004, armed with a .22 caliber, semi-automatic rifle. Gerald Cotton ("Cotton"), a witness and alleged victim of defendant's actions, testified that he heard defendant say, " 'This is what you want[?]' " twice, and C. Byrd responded " 'no' " two times. Cotton also said that defendant pointed the rifle at his chest and pulled the trigger, but the gun did not fire. Cotton ran toward the back door and heard two more shots while he was fleeing.

Beth Vockley ("Vockley"), the branch supervisor of C. Byrd's office, came out of her office when she saw Cotton run down the hall. Vockley saw defendant pointing the gun at C. Byrd. Vockley told him not to shoot C. Byrd. C. Byrd pushed the gun away and ran toward Vockley's office. Vockley heard two gun shots, and C. Byrd fell to the floor after the second. Defendant dropped the rifle on the floor and walked out.

C. Byrd was taken to Mission Memorial Hospital, where she underwent surgery for a bullet wound in the left frontal area of her head. She recovered after the surgery but continued to have difficulty forming words and multi-tasking.

Defendant was indicted for the following offenses: (1) attempted murder of C. Byrd and knowing violation of a valid domestic violence protective order (O4CRS054011); (2) assault with a deadly weapon with intent to kill inflicting serious injury on C. Byrd and knowing violation of a valid domestic violence protective order (04CRS053565); (3) knowingly violating a valid domestic violence protective order by going to C. Byrd's workplace (04CRS053567); (4)

attempted murder of Cotton (04CRS054012); and (5) assault with a deadly weapon with intent to kill Cotton (04CRS053571).

On 23 August 2005, the jurors having reached an impasse as to the charge of attempted murder of C. Byrd, the trial court declared a mistrial as to that charge. The jurors found defendant guilty of the Class C felony of assault with a deadly weapon with intent to kill inflicting serious injury on C. Byrd, the misdemeanor charge of knowingly violating a valid protective order, and misdemeanor assault with a deadly weapon of Cotton. Defendant was found not guilty of attempted murder of Cotton.

After additional deliberation on the charge of felonious assault on C. Byrd, the jurors found defendant knowingly violated a valid domestic violence protective order. The jurors also found an aggravating factor that defendant inflicted permanent and debilitating injury on C. Byrd.

At sentencing, the trial court found Prior Record Level I as to the Class C felonious assault on C. Byrd. Based on the jury finding of violation of a protective order, the offense was elevated to Class B2. The trial court found that mitigating factors were outweighed by the jury's finding of permanent and debilitating injury. The trial court imposed a sentence in the aggravated range of 196 to 245 months. Finding Prior Record Level II as to the misdemeanor assault of Cotton, the trial court imposed a consecutive sentence of seventy-five days. Defendant appeals his convictions.

Defendant presents the following issues for this Court's review: (1) whether the TRO issued in C. Byrd's action for divorce from bed and board is distinguishable from a protective order; (2) if the TRO was a valid protective order, whether defendant violated it knowingly; and (3) whether improper statements by the prosecutor at trial entitle defendant to a new trial.

I.

[1] Defendant's first argument is that the trial court erred in denying his motion to dismiss the enhancement of violation of a valid protective order. This is an issue of first impression and arises under superseded Chapter 50B statutes.[1] Under N.C. Gen. Stat. § 50B-4.1(a)

1. The provisions of Chapter 50B relating to actions for relief from domestic violence have been amended many times since the Chapter was first enacted in 1979. The relevant statutes in this case have been amended subsequent to the March 2004 application for and issuance of the TRO at issue in this case. Accordingly, we review the relevant provisions of Chapter 50B as they existed in March 2004.

(2003), a person will face criminal penalties when he "knowingly violates a valid protective order entered pursuant to . . . Chapter [50B]" of the General Statutes. *Id.* Normally, such a violation would result in a Class A1 misdemeanor. The jury returned a verdict of guilty on this charge; however, the misdemeanor judgment was arrested and is not on appeal before this Court.

When a person commits a felony in the course of knowingly violating a valid protective order, as defendant was alleged to have done in this case, N.C. Gen. Stat. §§ 50B-4.1(d) and (e) enhance the penalty one felony class higher. During the sentencing phase of this case, the jury returned a verdict that defendant knowingly violated a domestic violence protective order in the same course of conduct constituting the assault with a deadly weapon with intent to kill charge. Consequently, the maximum penalty in the aggravated range that could be imposed was increased from a Class C felony to that of a Class B2 felony. N.C. Gen. Stat. §§ 15A-1340.17(c) and (e). As a result, defendant faced a term of imprisonment for 245 months instead of a term of 120 months. *Id.*

At trial, defendant objected to the enhancement on the grounds that the TRO was not a valid protective order entered pursuant to Chapter 50B. Accordingly, we must determine whether the TRO granted between defendant and C. Byrd would permit enhancement under section 50B-4.1(d) upon its violation.

"Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992). Additionally, "it is presumed the General Assembly intended the words it used to have the meaning they have in ordinary speech. When the plain meaning of a statute is unambiguous, a court should go no further in interpreting the statute." *Nelson v. Battle Forest Friends Meeting*, 335 N.C. 133, 136, 436 S.E.2d 122, 124 (1993) (citations omitted). Accordingly, the relevant portions of the statute are quoted below:

> (a) Except as otherwise provided by law, a person who knowingly violates a valid protective order entered pursuant to this Chapter or who knowingly violates a valid protective order entered by the courts of another state or the courts of an Indian tribe shall be guilty of a Class A1 misdemeanor.
>
> . . .

> (d) Unless covered under some other provision of law providing greater punishment, a person who commits a felony at a time when the person knows the behavior is prohibited by a valid protective order as provided in subsection (a) of this section shall be guilty of a felony one class higher than the principal felony described in the charging document. This subsection shall not apply to a person who is charged with or convicted of a Class A or B1 felony or to a person charged under subsection (f) of this section.

N.C. Gen. Stat. § 50B-4.1(a), (d). Defendant argues that a sentence enhancement may occur only if the protective order is issued pursuant to the provisions of Chapter 50B. We disagree.

First, such an interpretation ignores language found within Chapter 50B:

> Any person residing in this State may seek relief under this Chapter by filing a civil action *or by filing a motion in any existing action filed under Chapter 50 of the General Statutes alleging acts of domestic violence against himself or herself* or a minor child who resides with or is in the custody of such person.

N.C. Gen. Stat. § 50B-2(a) (2003) (emphasis added). In other words, this statute allows a person to seek the same kind of relief provided by Chapter 50B by filing a civil action under Chapter 50 and a motion in the cause alleging acts of domestic violence.

In the instant case, C. Byrd filed a civil action under Chapter 50 (divorce from bed and board). *See* N.C. Gen. Stat. § 50-7 (2003). Under N.C. Gen. Stat. § 50B-2 she was then permitted to file a motion in the cause in her Chapter 50 action alleging acts of domestic violence to avail herself of the protections found in Chapter 50B. Here, C. Byrd did in fact file a motion in the cause alleging acts of domestic violence against herself from a person that resides with her. These allegations were consistent with the definition of "domestic violence" found in N.C. Gen. Stat. § 50B-1(a). Specifically, C. Byrd alleged that defendant had attempted to cause bodily injury against her. Thus, we hold that the TRO granted in the Chapter 50 action was issued pursuant to Chapter 50B.

We next turn to the issue of whether the TRO was a "protective order" within the meaning of the statute. A " 'protective order' includes *any order* entered pursuant to this Chapter *upon hearing* by

the court or consent of the parties." N.C. Gen. Stat. § 50B-1(c) (2003) (emphasis added). At the outset, there is no dispute that the TRO was an order, and as we concluded above, it was entered pursuant to Chapter 50B. The TRO, however, was not entered with consent of the parties. Thus, the TRO, entered *ex parte*, will only be a protective order if it was entered pursuant to a hearing.

An *ex parte* proceeding is also known as an *ex parte* "hearing." Black's Law Dictionary 1241 (8th ed. 2004); *see also State v. May*, 354 N.C. 172, 183, 552 S.E.2d 151, 158 (2001) (characterizing an order entered *ex parte* as being issued pursuant to an "*ex parte* hearing"). Indeed, Section 50B itself uses the phrase "*ex parte* hearing" three times. *See* N.C. Gen. Stat. §§ 50B-2 (b), (c) (clerk of superior court required to schedule *ex parte* hearing), and (d) (when emergency relief is granted by a magistrate under subsection (d) an ex parte hearing must be scheduled the next day before a district court judge). Moreover, for there to be an *ex parte* order the trial judge must hold a hearing in which affidavits and supporting documents are reviewed, even though only one party is present, before issuing a protective order. Thus, we conclude that the legislature intended the hearing requirement found in N.C. Gen. Stat. § 50B-1(c) to be satisfied when an *ex parte* order is issued pursuant to Chapter 50B. To hold otherwise would allow one who had notice[2] that an *ex parte* Chapter 50B order had been entered against him a ten-day window[3] in which to continue acts of domestic violence against the party who sought the order, while avoiding the corresponding sentencing enhancement provided in Chapter 50B. We do not believe the legislature intended such a result.

"The best indicia of [legislative] intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish." *Concrete Co. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980). It is without question that the language of the statute, the spirit of Section 50B, and what the act seeks to accomplish is to protect individuals from domestic violence through, *inter alia*, the imposition of an enhanced sentencing to serve as a deterrent against those who perpetrate the violence. Our interpretation of the statute is inline with this intent.

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2. The requirement of notice is discussed in section II of this opinion.

3. Under N.C. Gen. Stat. § 50B-2(c), a hearing on an *ex parte* order is required within ten days of the issuance of that order.

Thus, in the instant case, the "hearing" requirement found in N.C. Gen. Stat. § 50B-1(c) was satisfied when defendant received notice[4] that a TRO had been entered against him. We therefore hold that the TRO was a "protective" order within the meaning of Chapter 50B, and defendant's arguments to the contrary are rejected.

II.

[2] Defendant next argues that the trial court erred in its instructions to the jury as they related to the enhancement provisions in Chapter 50B. We disagree.

Under N.C. Gen. Stat. § 50B-4.1(d) "a person who commits a felony at a time when the person *knows* the behavior is prohibited by a valid protective order *as provided in subsection (a)* of this section shall be guilty of a felony one class higher than the principal felony described in the charging document." *Id.* (emphasis added). Subsection (a) requires that before a defendant's sentence may be enhanced the trier of fact must find that the defendant "knowingly violat[ed] a valid protective order entered pursuant to . . . Chapter [50B]." N.C. Gen. Stat. § 50B-4.1(a). Similarly, under N.C. Gen. Stat. § 50B-4.1(e), "a finding shall be made that [defendant] *knowingly violated the protective order* in the course of conduct constituting the underlying felony." *Id.* (emphasis added).

In this case, the jury found defendant "guilty of violating a valid domestic violence protective order[.]" On the issue of enhancement, the trial court instructed the jury that the State was required to prove: (1) that a valid domestic violence protective order existed; (2) that defendant violated the order; (3) that he did so knowingly; and (4) that he knowingly did so in the course of the conduct constituting the felony. Defendant argues that the omission of "Chapter 50B" language from the instruction means that the jury did not find that defendant knowingly violated a protective order entered pursuant to Chapter 50B. *See* N.C. Gen. Stat. § 50B-2.

In support of this position, defendant argues that his attorney explained to him that the TRO was not a valid protective order entered pursuant to Chapter 50B. This explanation, according to defendant, came before the alleged incidents that led to his arrest. In essence, defendant is conceding that he was aware of the TRO, which we have already concluded to be a valid protective order, but that he

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4. We conclude in Section II of this opinion that defendant had notice of the Chapter 50 order, entered pursuant to Chapter 50B, against him.

made a mistake of law as to the legal impact of the TRO. It is well settled "that ignorance of the law or a mistake of law is no defense to criminal prosecution[.]" *State v. Bryant*, 359 N.C. 554, 566, 614 S.E.2d 479, 486 (2005) (also noting an exception to this rule not relevant to the outcome of this case). Accordingly, we find no error in the trial court's instructions to the jury.

III.

[3] Defendant next argues that an improper comment[5] by the prosecutor warrants a new trial because the trial court sustained the objection but failed to give the jury a corrective instruction sufficient to cure the error. The prosecutor's statement was made during the cross-examination of a defense witness, Dr. Pete Sansbury. The relevant portion of the exchange follows:

> Q You maintained and stated that [defendant] has consistently taken responsibility for his action and actively worked to confront his alcohol and drug abuse, which has attributed [sic] to his aggressive action, isn't that right?
>
> A Yes. In my interviews with him he was always totally focused on that he had done some terrible wrong here and blamed no one but himself.
>
> Q *If the Defendant is taking responsibility for his actions, would he not come in and plead guilty?*
>
> [Defense Counsel]: Well, Your Honor, objection to that.
>
> THE COURT: Sustained.
>
> [Defense Counsel]: Plead guilty to what?
>
> A It's my understanding that he's been—
>
> THE COURT: *Wait just a minute. There's no question for you to answer. The question was sustained. Don't consider the question, members of the jury.*
>
> A Sorry. Sorry.

(Emphasis added.)

"[A] criminal defendant possesses an *absolute* constitutional right to plead not guilty and be tried before a jury, and 'should not and

5. The State makes no argument that the comment by the prosecutor was proper. Accordingly, we do not address that issue.

[can] not be punished for exercising that right.' " *State v. Thompson*, 118 N.C. App. 33, 41, 454 S.E.2d 271, 276, *disc. review denied*, 340 N.C. 262, 456 S.E.2d 837 (1995) (quoting *State v. Langford*, 319 N.C. 340, 345, 354 S.E.2d 523, 526 (1987)). "Reference by the State to a defendant's failure to plead guilty violates his constitutional right to a jury trial." *State v. Larry*, 345 N.C. 497, 524, 481 S.E.2d 907, 923 (1997) (citing *Thompson*, 118 N.C. App. at 41, 454 S.E.2d at 276. In the instant case, the State concedes that the statement by the prosecutor was improper. That, however, does not end our inquiry.

This kind of error is deemed harmless if a curative instruction is given. *United States v. Smith*, 934 F.2d 270, 275 (11th Cir. 1991) (footnote omitted) (the State's argument that the defendant had " 'not taken responsibility for his actions' because he refused to plead guilty" was "improper, but . . . the error was harmless" where a curative instruction was immediately given and "there was ample evidence to convict [the defendant]"). Alternatively, the State can show that the error was harmless beyond a reasonable doubt by showing that the evidence of defendant's guilt was overwhelming. *Thompson*, 118 N.C. App. at 42, 454 S.E.2d at 276. Because we hold that the State has established that the evidence of defendant's guilt was overwhelming, we need not address whether the trial court's curative statement was adequate.

Defendant concedes that the evidence against him for the charge of assaulting Cotton was overwhelming, but argues that the evidence of his specific intent to kill C. Byrd for the charge of assault with a deadly weapon with intent to kill was far short of overwhelming. We disagree.

First, the evidence tended to show that defendant purchased a rifle on the day of the shooting. He drove to C. Byrd's office, parked at the back, and slunk alongside the building towards the front. He opened the office door and said to C. Byrd, " '[t]his is what you want, this is what you want[.]' " He then fired two shots at C. Byrd before she was able to run away. After trying to fire at Cotton, defendant pointed the rifle back towards C. Byrd, who was attempting to flee, and said, " '[w]hat do you think you're doing, you crazy b——?' " Vockley asked defendant not to shoot C. Byrd, but defendant fired two more shots at C. Byrd from behind, striking her once in the head. In short, defendant had ample time to stop shooting, but instead he pointed the gun at C. Byrd for a second time and shot her in the head. This is overwhelming evidence that defendant had a specific intent to kill C. Byrd. Accordingly, we find harmless error as to this issue.

IV.

In summary, we find no error in defendant's conviction of assault with a deadly weapon with intent to kill and the corresponding enhancement imposed by Chapter 50B. We similarly find harmless error in the comments made by the prosecutor during defendant's trial.

No prejudicial error.

Judge CALABRIA concurs.

Judge WYNN dissents in a separate opinion.

WYNN, Judge, dissenting.

I concur with that portion of the majority opinion that finds no prejudicial error in the allegedly improper statements made by the prosecutor at trial. However, because the plain meaning of Chapter 50B of the North Carolina General Statutes necessitates a finding that the temporary restraining order against Defendant does not allow his sentence to be enhanced, I respectfully dissent.

As noted by the majority, "[w]hen the plain meaning of a statute is unambiguous, a court should go no further in interpreting the statute." *Nelson v. Battle Forest Friends Meeting*, 335 N.C. 133, 136, 436 S.E.2d 122, 124 (1993). Thus, "[i]f the statute is clear and unambiguous, we will apply the plain meaning of the words, with no need to resort to judicial construction." *Wiggs v. Edgecombe County*, 361 N.C. 318, 322, 643 S.E.2d 904, 907 (2007) (citation omitted). Nevertheless, this Court will turn to determining the purpose of a statute and "the intent of the legislature in its enactment" when a statute is ambiguous in its language. *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citation and quotation omitted). Accordingly, if a statute is unambiguous, as in the instant case, we have no need to speculate as to the legislative intent, as the majority does here.

Chapter 50B of the North Carolina General Statutes explicitly states that, "[a]s used in this Chapter, the term 'protective order' includes any order entered pursuant to this Chapter *upon hearing by the court* or consent of the parties." N.C. Gen. Stat. § 50B-1(c) (2003) (emphasis added). Further, under Chapter 50B, a sentence enhancement may be imposed for "a person who commits a felony at a time

when the person knows the behavior is prohibited by a valid *protective order*," N.C. Gen. Stat. § 50B-4.1 (d) (2003) (emphasis added), after "a finding . . . that the person knowingly violated the *protective order* in the course of conduct constituting the underlying felony." *Id.* at § 50B-4.1(e) (emphasis added).

Even if, as reasoned by the majority, the temporary restraining order (TRO) at issue in this case was entered pursuant to Chapter 50B, thereby satisfying the first part of Chapter 50B-1(c), no hearing was held in the instant case, such that the second part of the definition of "protective order" was not met. The record before us shows that the trial court issued the TRO against Defendant in an 11 March 2004 *ex parte* order, specifically finding that the TRO was "granted without notice to the Defendant for that insufficient time exists during which to provide Defendant notice as otherwise by law provided . . ." Moreover, the trial court set a hearing date of 15 March 2004 for Ms. Byrd's motion for a preliminary injunction and stated that the TRO "shall terminate at 9:00 o'clock A.M. on the tenth (10th) day next following the date hereof, unless extended as by law provided." On 15 March 2004, when Defendant's attorney moved for a continuance of the hearing on Ms. Byrd's motion for a preliminary injunction, the trial court continued the TRO "pending further order modifying the same."

None of these actions by the trial court constituted a "hearing." Although, as stated by the majority, an *ex parte* proceeding may also be called an *ex parte* hearing, it remains "[a] proceeding in which not all parties are present or given the opportunity to be heard," regardless of the moniker used. Black's Law Dictionary 1241 (8th ed. 2004). Indeed, *ex parte* proceedings are specifically defined as those "[d]one or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested; of or relating to court action taken by one party without notice to the other, usu[ally] for *temporary or emergency relief*." *Id.* at 616 (emphasis added).

Moreover, an *ex parte* temporary restraining order generally serves the sole purpose of maintaining the status quo until a hearing can be held. *Huff v. Huff*, 69 N.C. App. 447, 450, 317 S.E.2d 65, 67 (1984). As we have previously noted, procedural safeguards such as the definite duration of a temporary restraining order ensure that the "drastic" procedure passes constitutional muster, allowing it to "operate[] within an emergency context which recognizes the need for

swift action" but still "immediately affords defendants notice and an opportunity to be heard" at a later, scheduled hearing. *State ex rel. Gilchrist v. Hurley*, 48 N.C. App. 433, 448, 269 S.E.2d 646, 655 (1980), *disc. review denied*, 301 N.C. 720, 274 S.E.2d 233 (1981). Thus, a TRO is designed to provide immediate relief but serve only as a "stopgap" measure until a court may schedule a hearing to consider *both* sides and the full merits of a dispute.

The showing required for a TRO reflects the emergency nature of the order. To secure a TRO, a plaintiff need only argue that "immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition[.]" N.C. Gen. Stat. § 1A-1, Rule 65(b); *see also Taylor v. Centura Bank*, 124 N.C. App. 661, 663, 478 S.E.2d 226, 227 (1996) ("All TROs must be obtained pursuant to N.C. R. Civ. P. 65."). A TRO may then be granted and remain in place for ten days, until the trial court can convene a hearing to consider the full merits and whether the TRO should be transformed into a more permanent preliminary injunction, if the plaintiff can show both a likelihood of irreparable injury and of success on the merits of her claim at trial. *Iredell Digestive Disease Clinic v. Petrozza*, 92 N.C. App. 21, 24-25, 373 S.E.2d 449, 451 (1988), *aff'd per curiam*, 324 N.C. 327, 377 S.E.2d 750 (1989).

Chapter 50B itself allows for such *ex parte* TROs:

> *Prior to the hearing*, if it clearly appears to the court from specific facts shown, that there is a danger of acts of domestic violence against the aggrieved party or a minor child, the court may enter such orders as it deems necessary to protect the aggrieved party or minor children from such acts[.]

N.C. Gen. Stat. § 50B-2(c) (2003) (emphasis added). The statute further provides that "[u]pon the issuance of an *ex parte* order under this subsection, a hearing shall be held within 10 days from the date of issuance of the order or within seven days from the date of service of process on the other party, whichever occurs later." *Id.* From its express terms, then, Chapter 50B recognizes that *ex parte* orders such as the one at issue in this case are remedies available to an aggrieved party "prior to [a] hearing." As such, the plain meaning of the language used to describe "*ex parte* orders" in Chapter 50B precludes their inclusion as "protective orders" "entered pursuant to this Chapter *upon hearing by the court* or consent of the parties." N.C. Gen. Stat. § 50B-1(c).

This distinction is particularly significant in the context of the instant case. Here, the *ex parte* TRO entered against Defendant was used to enhance his sentence for his felony convictions—in other words, the TRO was employed to deprive Defendant of a liberty interest. Perhaps such an outcome would be warranted against Defendant, who was shown at trial to have stalked and severely injured Ms. Byrd and her coworker. Nevertheless, our Constitution requires us to safeguard the liberty of even the most unsavory of defendants, depriving them of such only after due process of law. U.S. Const. amend. XIV, § 1. To increase Defendant's prison term on the basis of a TRO, without affording him the opportunity to be heard as to the allegations of domestic violence against him, would violate his right to due process. I would therefore remand this case for resentencing.

BARNEY BRITT, PLAINTIFF v. STATE OF NORTH CAROLINA, DEFENDANT

No. COA06-714

(Filed 4 September 2007)

1. Firearms and Other Weapons— felony firearm statute—right to bear arms—rational relation—ex post facto—bill of attainder—due process—equal protection

The trial court did not err by granting defendant State's motion for summary judgment and by denying plaintiff's motion for summary judgment thus declaring constitutional N.C.G.S. § 14-415.1 as amended 1 December 2004, which expressly prohibited defendant's possession of any firearm due to his status as a convicted felon, because: (1) the General Assembly has made a determination that individuals who have been convicted of a felony offense shall not be able to possess a firearm, and this statutory scheme which treats all felons the same serves to protect and preserve the health, safety, and welfare of the citizens of this state, and thus rationally related to a legitimate state interest; (2) N.C.G.S. § 14-415.1 does not violate the ex post facto clause under either the North Carolina or United States Constitutions since the intent of the legislature was to create a nonpunitive regulatory scheme, and the result of the statute is not so punitive in nature and effect as to override the legislative intent; (3) N.C.G.S. § 14-415.1 does not constitute a prohibited bill of attainder since there was nothing in the statute to indicate the General Assembly

enacted it as a form of retroactive punishment, nor does such a statute fall within the historical meaning of punishment; and (4) plaintiff's right to possess firearms was not a vested right and thus the statute did not violate his rights to due process or equal protection or his Second Amendment right to bear arms.

2. Firearms and Other Weapons— felony firearm statute— motion for summary judgment

A de novo review revealed that the trial court did not err by granting defendant's motion for summary judgment and by failing to interpret N.C.G.S. § 14-415.1 to allow plaintiff the right to bear firearms, because: (1) there is no dispute between the parties as to the fact that defendant is a convicted felon; (2) N.C.G.S. § 14-415.1 clearly states plaintiff may not possess a firearm for any reason; and (3) the proscription in the statute shows that it is intended to apply to anyone ever convicted of a felony offense in North Carolina without exception.

Judge ELMORE dissenting.

Appeal by plaintiff from order entered 31 March 2006 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 24 January 2007.

Dan L. Hardway Law Office, by Dan L. Hardway, for plaintiff-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General John J. Aldridge, III and Assistant Attorney General Ashby T. Ray, for defendant-appellee.

BRYANT, Judge.

Barney Britt (plaintiff) appeals from an order entered 31 March 2006 granting the State of North Carolina's (defendant's) motion for summary judgment and denying plaintiff's motion for summary judgment, declaring constitutional N.C. Gen. Stat. § 14-415.1, as amended 1 December 2004.

Plaintiff is a resident of Wake County, North Carolina. In 1979, plaintiff was convicted of felony possession with intent to sell and deliver a controlled substance, completed his sentence in 1982 and in 1987 his civil rights, including his right to possess a firearm, were restored by operation of law under that current version of N.C. Gen. Stat. § 14-415.1. In this action plaintiff challenges the 2004 version of

N.C. Gen. Stat. § 14-415.1, which expressly prohibits plaintiff's possession of any firearm due to his status as a convicted felon.

The trial court, based on affidavits submitted by both parties, determined there was sufficient evidence that plaintiff was advised he would be subject to a charge under the 2004 revisions to N.C. Gen. Stat. § 14-415.1 if he were found in possession of firearms. Citing *State v. Johnson*, 169 N.C. App. 301, 610 S.E.2d 739 (2005) and *United States v. Farrow*, 364 F.3d 551 (4th Cir. N.C. 2004), the trial court concluded that N.C.G.S. § 14-415.1, as amended effective 1 December 2004, was rationally related to a legitimate government interest and was not an unconstitutional Ex Post Facto law or Bill of Attainder. The trial court also found N.C. Gen. Stat. § 14-415.1 (2004) constitutional on its face and as applied to plaintiff. The trial court granted defendant's motion for summary judgment and denied plaintiff's motion for summary judgment. Plaintiff appeals.

Plaintiff appeals three issues: whether the trial court erred by (I) concluding the 1 December 2004 version of N.C. Gen. Stat. § 14-415.1 is constitutional; (II) granting defendant's motion for summary judgment; and (III) failing to interpret the statute to allow plaintiff the right to possess firearms.

Felony Firearms Act

In *State v. Johnson*, this Court thoroughly reviewed the history of the N.C. Felony Firearms Act.

> In 1971, the General Assembly enacted the Felony Firearms Act, N.C. Gen. Stat. § 14-415.1, which made unlawful the possession of a firearm by any person previously convicted of a crime punishable by imprisonment of more than two years. N.C. Gen. Stat. § 14-415.2 set forth an exemption for felons whose civil rights had been restored. 1971 N.C. Sess. Laws ch. 954, § 2.
>
> In 1975, the General Assembly repealed N.C. Gen. Stat. § 14-415.2 and amended N.C. Gen. Stat. § 14-415.1 to ban the possession of firearms by persons convicted of *certain* crimes for five years after the date of "such conviction, or unconditional discharge from a correctional institution, or termination of a suspended sentence, probation, or parole upon such convictions, whichever is later." 1975 N.C. Sess. Laws ch. 870, § 1. This was the law in effect in [1982] when defendant was convicted of a felony covered by the statute and in [1987 when his rights were restored].

> In 1995, the General Assembly amended N.C. Gen. Stat. § 14-415.1 to prohibit possession of certain firearms by *all* persons convicted of any felony. 1995 N.C. Sess. Laws ch. 487, § 3. [In 2004, the statute was again amended to provide] "it shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm . . . ." N.C. Gen. Stat. § 14-415.1(a) (2004). The current statute applies to "felony convictions in North Carolina that occur before, on, or after 1 December 1995." N.C. Gen. Stat. § 14-415.1(b)(1).

Johnson, 169 N.C. App. at 303, 610 S.E.2d at 741 (emphasis in original). Effective 23 August 2006, the legislature modified N.C.G.S. § 14-415.1 to exempt "antique firearms" from the proscription of felons possessing firearms. 2006 N.C. Sess. Law, ch. 259, sec. 7(b). It also modified the definition of "antique firearms" in N.C.G.S. § 14-409.11 to exclude conventional cartridge firearms. 2006 N.C. Sess. Law, ch. 259, sec. 7(a).

I

[1] Plaintiff argues the trial court erred by concluding the 1 December 2004 version of N.C. Gen. Stat. § 14-415.1 is constitutional. Specifically, plaintiff contends N.C.G.S. § 14-415.1 (2004) sweeps too broadly and is not reasonably related to a legitimate government interest. Plaintiff argues that because he was not convicted of a *violent* felony and because his conviction is so far in the past, the statute prohibiting all convicted felons from possessing any type of firearm is unconstitutional. We disagree.

RATIONAL RELATION

A convicted felon is prohibited from possessing a firearm if the State shows a rational relation to a legitimate state interest, such as the safety and protection and preservation of the health and welfare of the citizens of this state. *United States v. Farrow*, 364 F.3d 551, 555 (4th Cir. N.C. 2004) (holding N.C. Felony Firearms law intended to protect the public, not further punish felons); *Black v. Snow*, 272 F. Supp. 2d 21 (D.D.C. 2003) (rational relationship exists between the federal statute and maintaining community peace under equal protection analysis); *United States v. O'Neal*, 180 F.3d 115, 123-24 (4th Cir.), *cert. denied*, 528 U.S. 980, 145 L. Ed. 2d 339 (1999) (N.C. Felony Firearms Act was rationally related to the non-punitive intent of the statute); *United States v. McLean*, 904 F.2d 216, 219, *cert. denied*, 498

U.S. 875, 112 L. Ed. 2d 164 (1990) (prohibition applies even if citizenship is restored); *State v. Jackson*, 353 N.C. 495, 502, 546 S.E.2d 570, 573-74 (2001) (holding felons may not possess inoperative firearms for the purpose of preventing felons from making a show of force); *Johnson*, 169 N.C. App. at 309, 610 S.E.2d at 746 (holding N.C. Gen. Stat. § 14-415.1 prohibition of felons possessing a firearm is not an *ex post facto* law); *State v. Tanner*, 39 N.C. App. 668, 670, 251 S.E.2d 705, 706, *appeal dismissed and disc. rev. denied*, 297 N.C. 303, 254 S.E.2d 924 (1979) (equal protection clause does not require exact classification, felons convicted of any violent crime fall under N.C. Gen. Stat. § 14-415.1 in order to protect the public). Legislative classifications will be upheld, provided the classification is founded upon reasonable distinctions, affects all persons similarly situated or engaged in the same business without discrimination, and has some reasonable relation to the public peace, welfare and safety. *In re Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976). A court may not substitute its judgment of what is reasonable for that of the legislative body when the reasonableness of a particular classification is to be determined. *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E.2d 868 (1983). Where the language of an Act is clear and unambiguous the courts must give the statute its plain and definite meaning. *State ex rel. Utilities Com. v. Edmisten*, 291 N.C. 451, 232 S.E.2d 184 (1977).

In this case, plaintiff argues that a more appropriate legislation would allow convicted felons the ability to apply for restoration of the right to possess firearms. Plaintiff also argues that long guns, such as rifles and shotguns should be lawful for certain types of convicted felons to possess. We disagree. The General Assembly has made a determination that individuals who have been convicted of a felony offense shall not be able to possess a firearm. This statutory scheme which treats all felons the same, serves to protect and preserve the health, safety and welfare of the citizens of this State. Here, the legislature intended to prevent convicted felons from possessing firearms in its 2004 amendments. The 2004 amendment to N.C.G.S. § 14-415.1 is rationally related to a legitimate state interest.

EX POST FACTO

Plaintiff contends application of the challenged provision of the Felony Firearms Act would violate the *ex post facto* clauses of the U.S. and N.C. Constitutions arguing the 2004 amendment changed the law to retroactively deprive him of his formerly restored right and punish him for conduct that was previously not criminal. We disagree.

The United States and the North Carolina Constitutions prohibit the enactment of *ex post facto* laws. *See* U.S. Const. art. I, § 10 ("No state shall . . . pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts . . . ."); N.C. Const. art. I, § 16 ("Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no *ex post facto* law shall be enacted.").

This Court previously addressed the *ex post facto* question and found it without merit with respect to the 1995 amendment to N.C. Gen. Stat. § 14-415.1. *See Johnson*, 169 N.C. App. at 307, 610 S.E.2d at 743 (holding N.C. Gen. Stat. § 14-415.1 does not violate either state or federal *ex post facto* clauses adding "the [1995] amendment to N.C. Gen. Stat. § 14-415.1 constituted a retroactive civil or regulatory law, and as such does not violate the *ex post facto* clause"). "North Carolina has made clear that its intent was to enact a civil disability to protect the public from those felons whose possession of guns there was the most reason to fear, not to impose any punishment or penalty on felons." *Farrow*, 364 F.3d at 554-55 (citing *O'Neal*, 180 F.3d at 123); *see also Tanner*, 39 N.C. App. at 670, 251 S.E.2d at 706; *State v. Cobb*, 18 N.C. App. 221, 225, 196 S.E.2d 521, 524 (1973), *rev'd on other grounds*, 284 N.C. 573, 201 S.E.2d 878 (1974).

We find *Melvin v. United States*, 78 F.3d 327 (7th Cir. Ill. 1996), *cert. denied*, 519 U.S. 963, 136 L. Ed. 2d 301 (1996) to be an instructive analysis of felony firearm statutes. In *Melvin*, the defendant was convicted of felony offenses in 1974 and 1975. He was released from prison on 27 May 1977 and his firearm rights were restored as of 27 May 1982, under Illinois law. In 1984, Illinois enacted a firearms statute making it illegal for felons to possess weapons regardless of their date of conviction. In other words, "[t]he Illinois felon in possession law clearly forbids all convicted felons from possessing guns, regardless of whether they were convicted before or after 1984." *Melvin*, 78 F.3d at 330. The Seventh Circuit U.S. Court of Appeals held the defendant's prior convictions were predicate offenses under Illinois' "felon in possession" law. The court reasoned that even though the defendant could have legally possessed firearms between 27 May 1982 (five years from prison release) and 1 July 1984 (the date of the enactment of the current Illinois statute), the Illinois law as modified did not permanently exclude his three Illinois convictions as predicate offenses. *Id.*

Here, as in *Melvin*, even though plaintiff could have lawfully possessed firearms before the 2004 amendment to N.C. Gen. Stat. § 14-415.1, an ex-felon would still have been "convicted" within the meaning of 18 U.S.C. § 921(a)(20)[1] and within the meaning of N.C.G.S. § 14-415.1 (as amended 2004), which both expressly prohibit the possession of firearms regardless of the date of felony conviction. The General Assembly clearly intended its application to be retroactive by specifically stating that prohibited convictions are those convictions occurring before, on, or after 1 December 2004. In other words, all felony convictions are subject to N.C. Gen. Stat. § 14-415.1 (2004).

In the instant case, the General Assembly did not intend to punish plaintiff for actions that occurred prior to the 2004 amendment to N.C.G.S. § 14-415.1. Because the intent of the legislature was to create a non-punitive, regulatory scheme by amending N.C.G.S. § 14-415.1, and because the result of the amended statute is not so punitive in nature and effect as to override the legislative intent, N.C.G.S. § 14-415.1 is a non-punitive, regulatory scheme that does not violate the *ex post facto* clause under either the North Carolina Constitution or the United States Constitution. *See O'Neal*, 180 F.3d at 124 ("[T]he rational connection between the [N.C. Felony Firearms] law and its intent is undeniable. A legislature's judgment that a convicted felon . . . is among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness is rational."). Here, as in *Johnson*, plaintiff has the status of a convicted offender; even though plaintiff's status as a felon was acquired prior to the amendment, N.C.G.S. § 14-415.1 applies to plaintiff. This assignment of error is overruled.

BILL OF ATTAINDER

Plaintiff also argues the 2004 amendment to N.C.G.S. § 14-415.1 amounts to an unconstitutional Bill of Attainder because it "stripped him" of his restored right to possess a firearm. We disagree.

Article I, Section 10 of the United States Constitution prohibits states from enacting bills of attainder defined as bills of pains and penalties which are legislative acts inflicting punishment on a person

1. 18 U.S.C. § 921(a)(20) states in relevant part: "Any conviction which has been expunged, or set aside or for which a person has . . . had civil rights restored shall not be considered a conviction . . . unless such . . . restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. § 921(a)(20).

without a trial. *Citicorp v. Currie*, 75 N.C. App. 312, 316, 330 S.E.2d 635, 638, *appeal dismissed and disc. rev. denied*, 314 N.C. 538 (1985); *see* N.C. Const. art. I, § 16. The United States Supreme Court has addressed the test for determining whether a legislative act amounts to a bill of pains and penalties:

> In deciding whether a statute inflicts forbidden punishment, we have recognized three necessary inquiries: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish.

Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 852, 82 L. Ed. 2d 632, 643 (1984) (quotation marks and citations omitted).

There is nothing in N.C. Gen. Stat. § 14-415.1 (2004) to indicate the General Assembly enacted such statute as a form of retroactive *punishment*, nor does such a statute fall within the "historical meaning of punishment." Furthermore, plaintiff's status as a convicted felon was not "punishment imposed without judicial process." Plaintiff would not be prohibited from possessing a firearm for belonging to a designated class of people, but for his violation of a statute which the legislature enacted to lessen the danger to the public of convicted felons who possess firearms. *See Johnson*, 169 N.C. App. at 310, 610 S.E.2d at 740 ("the statutory prohibition of N.C. Gen. Stat. § 14-415.1 against felons possessing firearms outside of their home or business does not constitute a prohibited bill of attainder"). Consequently, we find the 2004 amended version of N.C.G.S. § 14-415.1 does not constitute a prohibited bill of attainder. This assignment of error is overruled.

DUE PROCESS & EQUAL PROTECTION

Plaintiff argues that application of the 2004 version of N.C.G.S. § 14-415.1 violates his right to due process, equal protection under the state and federal constitutions and his second amendment right to bear arms. Plaintiff contends in 1987 his right to possess firearms became vested and that the 2004 amendment took away those vested rights. Plaintiff alleges that N.C.G.S. § 14-415.1, as amended in 2004, violates the Fourteenth Amendment to the United States Constitution and Article 1, Section 19 of the North Carolina State Constitution. Further, plaintiff asserts that N.C.G.S. § 14-415.1 violates the Second

Amendment to the United States Constitution and Article I, Section 30 of the North Carolina State Constitution. We disagree.

A statute cannot be applied retrospectively if it "will interfere with rights that have 'vested.' " *Gardner v. Gardner*, 300 N.C. 715, 718-19, 268 S.E.2d 468, 471 (1980). "A vested right is a right 'which is otherwise secured, established, and immune from further legal metamorphosis.' " *Bowen v. Mabry*, 154 N.C. App. 734, 736, 572 S.E.2d 809, 811 (2002) (quoting *Gardner*, 300 N.C. at 718-19, 268 S.E.2d at 471), *disc. rev. improvidently allowed*, 357 N.C. 574 (2003). Plaintiff's right to possess firearms was not a vested right. Our case law has "consistently pointed out that the right of individuals to bear arms is not absolute, but is subject to regulation." *State v. Dawson*, 272 N.C. 535, 546, 159 S.E.2d 1, 9 (1968) (the basic requirement of the Felony Firearms Act was that the regulation must be reasonable and related to the achievement of public peace and safety); see *State v. Fennell*, 95 N.C. App. 140, 143, 382 S.E.2d 231, 232-33 (1989).

The General Assembly made a determination that individuals who have been convicted of a felony offense shall not be able to possess most firearms. This statutory scheme, which treats all felons the same, serves to protect and preserve the health, safety and welfare of the citizens of this State. *See Johnson* 169 N.C. App. at 311, 610 S.E.2d at 746; *Farrow*, 364 F.3d at 555. This assignment of error is overruled.

II & III

[2] Plaintiff argues the trial court erred by granting defendant's motion for summary judgment and by failing to interpret the statute to allow plaintiff the right to possess firearms. This Court reviews *de novo* a trial court's grant of summary judgment. *Virginia Electric & Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986) ("Under a *de novo* review, the court considers the matter anew and freely substitute[s] its own judgment for [that of] the trial court.").

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). When reviewing the trial court's grant of summary judgment, our standard of review is *de novo*, and we view all evidence in the light most favorable to the non-moving party. *Stafford v. County of Bladen*, 163 N.C. App. 149, 592

S.E.2d 711, *appeal dismissed and disc. review denied*, 358 N.C. 545, 599 S.E.2d 409 (2004).

Plaintiff asserts that in an October 2004 meeting with Wake County Sheriff, Donnie Harrison, Sheriff Harrison told plaintiff that if he saw plaintiff with a firearm on his own property, plaintiff would be charged under N.C.G.S. § 14-415.1 (2004) as a felon in possession of a firearm. Sheriff Harrison asserts that his comments were in response to a hypothetical question posed by plaintiff. Sheriff Harrison stated in an affidavit that he did not threaten plaintiff with an arrest, but rather, in response to plaintiff's hypothetical question at the end of their meeting, plaintiff was advised that he could be subject to a charge under the 2004 revisions to N.C.G.S. § 14-415.1, if he were found in unlawful possession of firearms. Plaintiff contends that, having voluntarily dispossessed himself of all firearms after his conversation with Sheriff Harrison, he has been deprived of the ability to hunt on his land.

Taking the evidence in the light most favorable to plaintiff, the trial court did not err in granting defendant's motion for summary judgment. There is no dispute between the parties as to the fact that plaintiff is a convicted felon. Moreover, pursuant to N.C. Gen. Stat. § 14-415.1 (2004), the law at issue in this case clearly states plaintiff may not possess a firearm for any reason. North Carolina General Statute, Section 14-415.l(b)(1) provides that, "[p]rior convictions which cause disentitlement under this section shall only include felony convictions in North Carolina that occur before, on, or after December 1, 1995." Given its plain meaning, this proscription is intended to apply to anyone ever convicted of a felony offense in North Carolina, without exception. N.C. Gen. Stat. § 14-415.1 (2004). The trial court properly ruled that plaintiff is prohibited from possessing firearms. These assignments of error are overruled.

Affirmed.

Judge McGEE concurs.

Judge ELMORE dissents in a separate opinion.

ELMORE, Judge, dissenting.

Because I would hold that the 2004 amendment to N.C. Gen. Stat. § 14-415.1 is unconstitutional, I respectfully dissent from the majority opinion.

As this Court stated in *Johnson*, we apply a two-part test to analyze whether a law imposes punishment retroactively:

> First, the court must determine whether it was the legislature's intent to impose a punishment or merely enact a civil or regulatory law. In reaching this determination, the court may consider the structure and design of the statute along with any declared legislative intent. Second, where it appears the legislature did not intend to impose a punishment, we must then consider whether the effect of the law is so punitive as to negate any intent to deem the scheme civil. Stated another way, the second prong of the test focuses upon whether the sanction or disability that the law imposes may rationally be connected to the legislature's non-punitive intent, or rather appears excessive in light of that intent.

Johnson, 169 N.C. App. at 307, 610 S.E.2d at 743-44 (quotations and citations omitted).

In *Johnson*, on which the majority bases much of its opinion, we held that the 1995 statute was constitutional. At that time, it was clear to this Court that the intent of legislature was to regulate the possession of dangerous weapons. Likewise, we held "that the law [was] not so punitive in effect that it should be considered punitive rather than regulatory." *Id.* at 308, 610 S.E.2d at 744. In so holding, this Court relied on the following facts: "[The law] continue[d] to exempt the possession of firearms within one's home or lawful place of business. The prohibition remain[ed] limited to weapons that, because of their concealability, pose a unique risk to public safety." *Id.* (quoting *Farrow*, 364 F.3d at 555) (citations, quotations, and alterations omitted).

Applying the same analysis to the statute as amended, I would reach a different result. The amended statute does not exempt the possession of firearms within one's home or business. Furthermore, rather than limiting the proscription "to weapons that, because of their concealability, pose a unique risk to public safety," the legislature broadened the ban to essentially all weapons.[2] *Id.* (citations and

2. I note that the State made much at oral argument of the exception for "antique firearms" added to the statute in its latest amendment. I would hold that this exception merely serves to underscore the unreasonableness of the law. There is no rational basis, in my view, for allowing felons to possess some deadly weapons because they are old (or replicas thereof) while forbidding the use of equally conspicuous firearms based purely on the fact that they are new.

quotations omitted). The result is that the statute is no longer "narrowly tailored to regulate only the sorts of firearm possession by felons that, because of the concealability, power, or location of the firearm, are most likely to endanger the general public," as it was when the *Farrow* court reached its decision. *Farrow*, 364 F.3d at 555 (citation and quotations omitted).[3] The exceptional broadness of the statute serves to undermine the legislature's stated intent of regulation and serves instead as an unconstitutional punishment.

I would also hold that the application of the statute to plaintiff violated plaintiff's due process rights. I recognize that "the right of individuals to bear arms is not absolute, but is subject to regulation." *Johnson*, 169 N.C. App. at 311, 610 S.E.2d at 746 (quoting *State v. Dawson*, 272 N.C. 535, 546, 159 S.E.2d 1, 9 (1968)). Despite the majority's attempted reliance on *Johnson* for support of a rational relationship test, however, I believe that the proper standard, as articulated in *Johnson*, requires "that the regulation must be reasonable and be related to the achievement of preserving public peace and safety." *Id.* (citing *Dawson*, 272 N.C. at 547, 159 S.E.2d at 10). Rather than simply requiring that the statute be rationally related to a legitimate government purpose, I therefore would require that the regulation also be reasonable.

The major differences between the 1995 and current versions of the statute lead me to conclude that the statute in its current form is no longer a reasonable regulation. Instead, I would hold that the current statute operates as an outright ban, completely divesting plaintiff of his right to bear arms without due process of law. *Cf. id.* (holding that the *Johnson* defendant was not "completely divested of his right to bear arms as [the then current] N.C. Gen. Stat. § 14-415.1 allow[ed] him to possess a firearm at his home or place of business.").

In enacting the 2004 amendment, the legislature simply overreached. Thereafter, the statute operated as a punishment, rather than a regulation. Moreover, the statute as amended stripped plaintiff of his constitutional right to bear arms without the benefit of due process. I would therefore reverse the trial court's grant of summary judgment.

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3. Although the Fourth Circuit stated that its *Farrow* decision also applied to the 2005 amendment in *United States v. Newbold*, 215 Fed. Appx. 289, 295 n.3 (4th Cir. 2007), it did so without comment or analysis. Additionally, I note that federal case law is not binding on this Court.

KNIEP v. TEMPLETON

[185 N.C. App. 622 (2007)]

ANGELA M. KNIEP AND DARYL R. KNIEP, PLAINTIFFS v. HUFF T. TEMPLETON, DEFENDANT

No. COA06-967

(Filed 4 September 2007)

1. Appeal and Error— preservation of issues—appeal from summary judgment—failure to comply with appellate rule 10—motion to dismiss

The trial court did not err in a breach of contract case by denying plaintiffs' motion to dismiss defendant's appeal even though plaintiffs contend that defendant's first and second assignments of error are overly broad and vague in violation of N.C. R. App. P. 10(c)(1), because: (1) in reviewing a trial court's grant of summary judgment, the purpose of the Rule 10 requirements is no longer applicable since exceptions and assignments of error add nothing; (2) defendant's appeal from a summary judgment order is not subject to dismissal even though his second assignment of error does not comport with the requirements of Rule 10; and (3) defendant's first assignment of error has been abandoned under N.C. R. App. P. 28(b)(6) since defendant did not contest the propriety of the trial court's entry of default judgment in his brief.

2. Appeal and Error— preservation of issues—assigning error to both summary judgment and default judgment not necessary—motion to dismiss

The trial court did not err in a breach of contract case by denying plaintiffs' motion to dismiss defendant's appeal even though plaintiffs contend that defendant's third assignment of error only addresses the trial court's entry of summary judgment and fails to address the entry of default judgment, because it was not necessary to assign error to both.

3. Appeal and Error— preservation of issues—arguments in brief exceeding issues raised by assignments of error—motion to dismiss

The trial court did not err in a breach of contract case by denying plaintiffs' motion to dismiss defendant's appeal even though plaintiffs contend the arguments in appellant's brief exceed the issues raised by defendant's assignments of error, because although a plain reading of the third assignment of error demonstrated that defendant preserved an argument regarding

the procedural timing of the summary judgment order but failed to preserve a substantive argument regarding the basis for the trial court's order, defendant's second assignment of error preserved his substantive argument as to the trial court's decision to enter summary judgment in plaintiffs' favor.

4. Appeal and Error— preservation of issues—failure to cite to specific paragraph of judgment—vagueness—not confined to single legal issue—motion to dismiss

The trial court did not err in a breach of contract case by denying plaintiffs' motion to dismiss defendant's appeal even though plaintiffs contend defendant's fourth assignment of error violated the North Carolina Rules of Appellate Procedure when it failed to cite to the specific paragraph of the judgment which is raised as error, refered vaguely to what would be required under North Carolina law, and was not confined to a single legal issue, because the assignment of error sufficiently directed the Court's attention to the particular error as required by N.C. R. App. P. 10(c)(1).

5. Judgments— default judgment—failure to answer requests for admissions—summary judgment

The trial court did not err in a breach of contract case by entering summary judgment against defendant based on defendant's failure to answer requests for admissions when default had already been entered prior to the deadline of defendant's responses, because: (1) the entry of default did not preclude defendant from responding to plaintiffs' requests for admissions since defendant was free to contest the sufficiency of plaintiffs' complaint to state a claim for recovery; (2) by not responding to the requests, defendant admitted the matters requested and from these admissions defendant established the elements of plaintiffs' breach of contract claim; and (3) the admissions were not withdrawn or amended.

6. Civil Procedure— default judgment—summary judgment—simultaneous entry

The trial court did not err in a breach of contract case by simultaneously entering both default judgment and summary judgment, because: (1) defendant was not forestalled from seeking relief from the trial court; (2) defendant's good cause argument is misplaced when he never made a N.C.G.S. § 1A-1, Rule 55(d) motion to have the entry of default set aside, and thereafter

defendant could only have sought relief from the trial court under Rule 60(b); and (3) defendant's burden would be the same regardless of which judgment he moved to set aside.

7. Specific Performance— scope—breach of contract

The trial court did not err in a breach of contract case by ordering specific performance in a form that allegedly exceeded the actual terms of the contract, because: (1) the judgment does not require defendant to convey title of the subject property prior to receipt of payment, but instead the trial court ordered defendant to deliver a general warranty deed to plaintiffs' attorney to ensure that the closing would occur; (2) the actual transfer of title and funds will occur at the closing; and (3) the trial court's judgment requiring defendant to deliver clear title did not alter the terms of the agreement since "clear title" and "marketable title" are synonymous terms both referring to a title that is free from major defect such as a judgment or lien and can be freely conveyed to a reasonable buyer.

Appeal by Defendant from judgment entered 9 March 2006 by Judge Gary Locklear in Brunswick County Superior Court. Heard in the Court of Appeals 22 February 2007.

The McGee Law Firm, PLLC, by Sam McGee, for Plaintiffs-Appellees.

Kennedy Covington Lobdell & Hickman, L.L.P., by Eric M. Braun and Ann M. Anderson, for Defendant-Appellant.

STEPHENS, Judge.

On 28 November 2005, Plaintiffs filed a complaint in Brunswick County Superior Court alleging that "[o]n or about February 12, 2005, Plaintiffs and Defendant entered into a valid contract for the sale of a parcel of real property" located on Oak Island. Plaintiffs further alleged that although a closing date had been established, "Defendant did not attend the closing as scheduled, but instead refused to close." Plaintiffs claimed they were "ready, willing and able to close" pursuant to said contract on the closing date. Plaintiffs further alleged that by failing to appear for the closing, Defendant breached the contract, thus entitling Plaintiffs to specific performance and monetary damages. Along with the complaint, Plaintiffs served requests for admissions. On 9 December 2005, Defendant acknowledged receipt of the documents.

On 11 January 2006, after Defendant failed to file a responsive pleading, Plaintiffs moved for entry of default and default judgment. That same date, pursuant to Rule 55 of the North Carolina Rules of Civil Procedure, default was entered against Defendant. On 14 February 2006, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, Plaintiffs moved for summary judgment, alleging that "Defendant . . . failed to respond to . . . Requests for Admissions, and the time period for filing of said pleadings has expired." Plaintiffs also alleged that because of Defendant's failure to reply to the requests for admissions, "[t]he matters requested to be admitted . . . are now conclusively admitted pursuant to Rule 36 of the North Carolina Rules of Civil Procedure."

On 27 February 2006, the matter was heard before the Honorable Gary Locklear in Brunswick County Superior Court. By order filed 9 March 2006, Judge Locklear entered default judgment and summary judgment in favor of Plaintiffs on their claim for specific performance. Judge Locklear ordered Defendant

> to deliver to Plaintiffs['] counsel a duly executed General Warranty Deed conveying [the] property to the Plaintiffs, an executed IRS Form 1099, an executed lien waiver affidavit satisfactory to the title insurance company of Plaintiffs' choosing, and any and all other documents and/or things necessary to deliver clear and marketable title to Plaintiffs to the property in question. Defendant shall deliver said executed documents to Plaintiffs' counsel within thirty (30) days of the date of this Judgment, and closing shall occur within ninety (90) days of the date of this Judgment.

From Judge Locklear's order, Defendant appeals. We affirm the judgment of the trial court.

As a threshold matter, we address Plaintiffs' motion to dismiss Defendant's appeal. For the reasons which follow, this motion is denied.

[1] Plaintiffs first contend that Defendant's first and second assignments of error are overly broad and vague, and therefore, in violation of N.C. R. App. P. 10(c)(1). The assignments of error in question state:

> 1. The trial court's grant of default judgment to Plaintiff[s] by its Judgment of March 9, 2006 was in violation of the North Carolina Rules of Civil Procedure and was arbitrary and capricious and an abuse of discretion.

> 2. The trial court's grant of summary judgment to Plaintiff[s] by its Judgment of March 9, 2006 was in violation of the North Carolina Rules of Civil Procedure and was arbitrary and capricious and an abuse of discretion.

Assignments 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). A primary purpose of Rule 10 is to "identify for the appellee's benefit all the errors possibly to be urged on appeal . . . so that the appellee may properly assess the sufficiency of the proposed record on appeal to protect his position." *Rogers v. Colpitts*, 129 N.C. App. 421, 422, 499 S.E.2d 789, 790 (1998) (quotation marks and citation omitted). Furthermore, Rule 10 is intended to relieve some of the burden on the judiciary by allowing appellate courts to determine the legal questions involved in the case "fairly and expeditiously[,]" without having to make a "voyage of discovery" through the record. *Id.* In reviewing a trial court's grant of summary judgment, however, the purpose of the Rule 10 requirements is no longer applicable. Addressing this point, our Supreme Court has held:

> 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) (emphasis added); *see 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 because Defendant is appealing from a summary judgment order, his second assignment of error is sufficient, and thus, his appeal is not subject to dismissal, under *Ellis* and *Nelson*, on grounds that his second assignment of error did not comport with the requirements of Rule 10.

With regard to Defendant's first assignment of error, we note that Defendant does not contest the propriety of the trial court's entry of default judgment in his brief to this Court. Therefore, Defendant's first assignment of error has been abandoned. *See* N.C. R. App. P.

28(b)(6) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

[2] Plaintiffs next argue that Defendant's appeal is moot because his third assignment of error addresses only the trial court's entry of summary judgment and fails to address the entry of default judgment. We disagree. This portion of Plaintiffs' motion to dismiss fails to comprehend the nature of Defendant's argument. Defendant argues that the allegedly improper entry of summary judgment precluded him from seeking certain procedural remedies before the trial court and thus forced him to immediately seek redress in the appellate division. Under Defendant's argument, if we agreed with his position we would reverse the trial court's entry of summary judgment and remand the case to the trial court, where Defendant could seek trial level remedies to set aside the default judgment. Therefore, it was not necessary for Defendant to assign error both to the trial court's entry of summary judgment and default judgment. Accordingly, Plaintiffs' argument is without merit.

[3] Plaintiffs next contend that "the arguments in Appellant's Brief exceed the issues raised by" Defendant's assignments of error. Specifically, Plaintiffs allege that Defendant's argument regarding the basis upon which the trial court relied to enter summary judgment was not preserved by Defendant's third assignment of error. Furthermore, Plaintiffs contend that although Defendant's second assignment of error may preserve the argument, that assignment of error is overly broad and vague. We disagree.

Defendant's second and third assignments of error state:

> 2. The trial court's grant of summary judgment to Plaintiff[s] by its Judgment of March 9, 2006 was in violation of the North Carolina Rules of Civil Procedure and was arbitrary and capricious and an abuse of discretion.
>
> 3. The trial court erred in entering both a default judgment and a summary judgment in the same matter, as the procedural posture of this matter was not suitable for both types of judgments, and the improper rendering of summary judgment removed a trial-court-level procedural remedy otherwise available to Defendant, instead forcing him to pursue an appeal.

A plain reading of the third assignment of error demonstrates that Defendant preserved an argument regarding the procedural timing

of the summary judgment order, but failed to preserve a substantive argument regarding the basis for Judge Locklear's order. *See* N.C. R. App. P. 10(a) ("[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal . . . ."). However, for the reasons discussed *supra*, Defendant's second assignment of error preserves his substantive argument as to Judge Locklear's decision to enter summary judgment in favor of Plaintiffs. Plaintiffs' contention is thus without merit and is overruled.

[4] By their final argument in their motion to dismiss, Plaintiffs contend that Defendant's fourth assignment of error violates the North Carolina Rules of Appellate Procedure because "it fails to cite to the specific paragraph of the Judgment which is raised as error, refers vaguely to 'what would be required under North Carolina law,' and is not confined to a single legal issue."

Defendant's fourth assignment of error states:

> 4. The trial court's Judgment of March 9, 2006 ordering Defendant to convey real property well in advance of receiving payment for same was in error as it exceeded the express terms of the contract Plaintiff[s] [were] seeking to enforce and exceeded what would be required of Defendant under North Carolina law.

This assignment of error sufficiently directs our attention "to the particular error about which the question is made" and therefore complies with our appellate rules. N.C. R. App. P. 10(c)(1). Accordingly, Plaintiffs' motion to dismiss Defendant's fourth assignment of error is denied.

In sum, because all of Plaintiffs' arguments to dismiss Defendant's appeal lack merit, the motion is denied. For the reasons stated, we address Defendant's second, third, and fourth assignments of error.

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[5] By his second assignment of error, Defendant contends the trial court erred in entering summary judgment against him. Specifically, Defendant asserts that it was improper for the trial court to base "a summary judgment ruling on Defendant's failure to answer requests for admission when default had already been entered prior to the deadline for his responses[,]" and thus, he was prohibited from defending the merits of his case. We disagree.

An entry of default is proper "[w]hen a party against whom a judgment for affirmative relief is sought has failed" to file a responsive pleading. N.C. Gen. Stat. § 1A-1, Rule 55(a) (2005). "The effect of an entry of default is that the defendant against whom entry of default is made is deemed to have admitted the allegations in plaintiff's complaint . . . ." *Spartan Leasing, Inc. v. Pollard*, 101 N.C. App. 450, 460, 400 S.E.2d 476, 482 (1991) (citations omitted).

> When an entry of default is made *and the allegations of the complaint are sufficient to state a claim*, "the defendant has no further standing to contest the merits of plaintiff's right to recover. His only recourse is to show good cause for setting aside the default and, failing that, to contest the amount of the recovery."

Hartwell v. Mahan, 153 N.C. App. 788, 790-91, 571 S.E.2d 252, 253 (2002) (emphasis added) (quoting *Spartan Leasing, Inc.*, 101 N.C. App. at 460, 400 S.E.2d at 482 (citation omitted)), *disc. review denied*, 356 N.C. 671, 577 S.E.2d 118 (2003). Since the entry of default only admits the allegations in a plaintiff's complaint but does not admit the sufficiency of those allegations to state a cause of action, it is proper for a defendant to serve responsive pleadings to protect his or her interests.

With regard to requests for admissions, the North Carolina Rules of Civil Procedure provide that when a request for admissions is made,

> [t]he matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney[.]

N.C. Gen. Stat. § 1A-1, Rule 36(a) (2005). Moreover, "[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." N.C. Gen. Stat. § 1A-1, Rule 36(b) (2005). "Facts that are admitted under Rule 36(b) are sufficient to support a grant of summary judgment." *Goins v. Puleo*, 350 N.C. 277, 280, 512 S.E.2d 748, 750 (1999) (citation omitted).

In this case, the entry of default did not preclude Defendant from responding to Plaintiffs' requests for admissions because Defendant was free to contest the sufficiency of Plaintiffs' complaint to state a claim for recovery. *See Hartwell, supra*. However, by not responding

to the requests, Defendant admitted the matters requested, including, *inter alia*, that (1) there was a valid contract for the sale of the property that is the subject of this litigation, (2) Plaintiffs were ready, willing, and able to close on the agreed upon date or within a reasonable time thereafter, and (3) Defendant failed to appear for the scheduled closing or to sign the documents necessary for the closing to be completed, as required by the contract. From these admissions, Plaintiffs established the elements of their breach of contract claim against Defendant. *See Lake Mary Ltd. P'ship v. Johnston*, 145 N.C. App. 525, 536, 551 S.E.2d 546, 554 (quotation marks and citation omitted) (recognizing that "[t]he elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract"), *disc. review denied*, 354 N.C. 363, 557 S.E.2d 538 (2001). Furthermore, since the admissions were not withdrawn or amended, summary judgment in favor of Plaintiffs was properly entered by the trial court. *See Goins*, *supra*. Accordingly, this argument is overruled.

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[6] By his third assignment of error, Defendant contends that the trial court committed reversible error because the "posture of the case was not appropriate for the granting of a summary judgment motion, and the court's entry of both [default judgment and summary judgment] simultaneously . . . is an error of law that deprived Defendant of his right . . . to move to have the default judgment set aside for good cause." We disagree.

An entry of default may be set aside "[f]or good cause shown[.]" N.C. Gen. Stat. § 1A-1, Rule 55(d) (2005). However, "if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b)." *Id.* Pursuant to Rule 60(b):

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) The judgment is void;

(5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) Any other reason justifying relief from the operation of the judgment.

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2005).

On 11 January 2006, Plaintiffs obtained an entry of default against Defendant for failure to file an answer to the complaint. Defendant never made a Rule 55(d) motion to have the entry of default set aside, and on 9 March 2006, Judge Locklear entered default judgment and summary judgment against Defendant. After entry of these judgments, Defendant could only have sought relief from the trial court pursuant to Rule 60(b). Accordingly, it is clear that Defendant's "good cause" argument is misplaced. Additionally, Defendant's burden would be the same regardless of which judgment he moved to set aside. Therefore, the trial court's simultaneous entry of default judgment and summary judgment did not forestall Defendant from seeking relief from the trial court. Defendant's argument is overruled.

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[7] By his fourth and final assignment of error, Defendant contends that the trial court erred by ordering specific performance "in a form that exceeded the actual terms of the contract." We do not agree.

"Judgments must be interpreted like other written documents, not by focusing on isolated parts, but as a whole. The interpreting court must take into account the pleadings, issues, the facts of the case, and other relevant circumstances." *Reavis v. Reavis*, 82 N.C. App. 77, 80, 345 S.E.2d 460, 462 (1986) (internal citations omitted). "[W]here a judicial ruling is susceptible of two interpretations, the court will adopt the one which makes it harmonize with the law properly applicable to the case." *Alexander v. Brown*, 236 N.C. 212, 215, 72 S.E.2d 522, 524 (1952) (citations omitted).

"The remedy of specific performance is an equitable remedy of ancient origin. Its sole function is 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) (citation omitted). However, specific performance "is not used to rewrite a contract or to create new contractual duties." *Mizell v. Greensboro*

Jaycees-Greensboro Junior Chamber of Commerce, Inc., 105 N.C. App. 284, 289, 412 S.E.2d 904, 908 (1992). Therefore, it is reversible error if the "trial court's order enforcing the agreement does not accurately reflect the terms to which the parties agreed[.]" *Laing v. Lewis*, 133 N.C. App. 172, 176, 515 S.E.2d 40, 43 (1999).

Defendant argues that the trial court altered the terms of the parties' contract to require Defendant to convey his land to Plaintiffs before Plaintiffs are required to pay him for it. Specifically, Defendant contends that Judge Locklear's order "requires Defendant essentially to convey title on one date, and then to wait another sixty days for closing . . . [although] the actual contract calls for the conveyance of the deed 'at closing', not before." We find Defendant's argument without merit.

The contract between the parties requires the property to be conveyed by "General Warranty Deed[.]" To meet this requirement, the judgment requires Defendant to "deliver [a duly executed General Warranty Deed] to Plaintiffs' counsel within thirty (30) days of the date of this Judgment, [with] closing [to] occur within ninety (90) days of the date of this Judgment." It is clear that the judgment does not require Defendant to *convey* title of the subject property prior to receipt of payment; rather, Judge Locklear ordered Defendant to *deliver* a General Warranty Deed to Plaintiffs' attorney to ensure that the closing would occur. The actual transfer of title and funds will occur at the closing. Therefore, Judge Locklear did not order specific performance outside the terms of the contract entered by the parties.

Defendant also argues that the trial court erred by requiring Defendant to convey to Plaintiffs "clear and marketable title" to his property when the contract calls for the conveyance of "marketable and insurable title[.]" In particular, Defendant contends that rather "than requiring 'clear' title, the . . . contract provides for the existence of such encumbrances as ad valorem taxes, utility easements, certain restrictive covenants, and 'such other encumbrances as may be assumed or specifically approved by Buyer.' " Again, we disagree.

Black's Law Dictionary defines clear title as "**1.** A title free from any encumbrances, burdens, or other limitations. **2.** See *marketable title.*—Also termed *good title.*" *Black's Law Dictionary* 1522 (8th ed. 2004). Furthermore, *Black's* indicates that the term "See" is used to "refer to closely related terms" or "to a synonymous subentry[,]" and that "[t]he phrase *also termed* at the end of an entry signals a syn-

onymous word or phrase." *Id.* at xxi-xxii. Therefore, it is instructive to examine the definitions of "marketable title" and "good title."

Marketable title is "[a] title that a reasonable buyer would accept because it appears to lack any defect and to cover the entire property that the seller has purported to sell. . . .—Also termed *good title*; *merchantable title*; *clear title*." *Id.* at 1523. "A 'marketable title' is one free from reasonable doubt in law or fact as to its validity." *Pack v. Newman*, 232 N.C. 397, 400, 61 S.E.2d 90, 92 (1950) (citation omitted). Good title is defined as "**1.** A title that is legally valid or effective. **2.** See *clear title* (1). **3.** See *marketable title*." *Black's* at 1523.

We conclude that "clear title" and "marketable title" are synonymous. Both terms refer to a title that is free from major defect, such as a judgment or lien, and can be freely conveyed to a reasonable buyer. Furthermore, Defendant makes no showing, and the record fails to demonstrate, that the subject property is somehow encumbered. Therefore, the trial court's judgment that required Defendant to deliver "clear title" to Plaintiffs did not alter the terms of the agreement, and thus, was not error. Accordingly, this argument is overruled.

For the reasons stated, Plaintiffs' motion to dismiss Defendant's appeal is denied and the judgment of the trial court is affirmed.

AFFIRMED.

Judges McGEE and CALABRIA concur.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. FERNWOOD HILL TOWNHOME HOMEOWNERS' ASSOCIATION, INC., DEFENDANT

No. COA06-964

(Filed 4 September 2007)

1. Appeal and Error— appealability—condemnation—order to revise plat

DOT was entitled to an immediate review of a superior court order in a condemnation action requiring it to prepare a revised plat showing a unified tract, even though it was interlocutory. It has been held that orders concerning title or area taken are vital preliminary issues involving substantial rights.

2. Eminent Domain— condominium owners—necessary parties

The superior court correctly determined that individual owners within a condominium association were necessary parties to a condemnation suit.

3. Eminent Domain— condominium common area—unity of ownership

The common area and individually owned townhouse lots in a condominium development constituted a "single, unified tract" for purposes of awarding damages for the condemnation of a portion of the common area where each individual unit owner had an estate in fee simple in his or her unit, had a property interest in the entire common area by virtue of the recorded easement, and had a property interest in the other units as a result of the restrictive covenants.

Appeal by plaintiff from order entered 24 February 2006 by Judge Narley S. Cashwell in Vance County Superior Court. Heard in the Court of Appeals 7 March 2007.

Attorney General Roy Cooper, by Assistant Attorney General James M. Stanley, Jr., for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Stephanie Hutchins Autry, for defendant-appellee.

GEER, Judge.

Plaintiff, the state Department of Transportation ("DOT"), appeals from an order pursuant to N.C. Gen. Stat. § 136-108 (2005), in which the trial court determined (1) that the individual owners within the Fernwood Hill Townhome development are necessary parties to this condemnation action and (2) that Fernwood Hill's common area, together with the individually-owned residential units, constitute "a single, unified tract" for the purpose of awarding damages. With respect to the first issue, we are bound by our recent decision in *N.C. Dep't of Transp. v. Stagecoach Village*, 174 N.C. App. 825, 622 S.E.2d 142 (2005), *disc. review denied*, 360 N.C. 483, 630 S.E.2d 929 (2006) ("*Stagecoach Village II*"). The second issue, however, presents a novel question: whether there is sufficient unity of ownership within the townhouse development to support treating the development as "a single, unified tract" for the purpose of awarding condemnation damages. The parties to this appeal have not cited any authority—nor

in our own research have we uncovered any—that specifically resolves this issue. After careful review, we agree with the trial court that the property interests in this case are sufficient to create the requisite unity of ownership. Accordingly, we affirm.

Facts

On 18 August 2004, DOT initiated a condemnation action by filing a complaint and declaration of taking along with a deposit of $5,300.00 representing the amount DOT estimated to be just compensation for the planned taking. The area that DOT seeks to acquire—for a highway project in Henderson, North Carolina—is a 0.14 acre portion of the common area of the Fernwood Hill townhouse development. Defendant Fernwood Hill Homeowner's Association ("the Association") holds title to the entire common area in fee simple. The common area consists of grassy and wooded sections, parking areas, and sidewalks.

The development contains six individual residential units. The common area completely surrounds and is physically contiguous to the individually-owned residential units. In this condemnation proceeding, DOT does not seek to directly acquire, either in full or in part, any of the individually-owned properties.

The development is governed by a Declaration of Covenants, Conditions and Restrictions ("Declaration"), which includes a provision stating that the common area is "owned by the Association for the common use and enjoyment of the owners." The Declaration affirmatively grants every townhouse owner "a right and easement of enjoyment in and to the Common Area which shall be appurtenant to and shall pass with the title to every lot." The Declaration also includes a number of restrictive covenants relating to such matters as architectural control, animals on the premises, use of the parking lot, display of signs, window-mounted air conditioners, "offensive" activity, and a restriction "for residential purposes only." Article IX of the Declaration grants each individual owner, as well as the Association itself, "the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration."

The Association answered DOT's complaint and moved pursuant to N.C.R. Civ. P. 19 and 20 to add all the individual townhouse owners as necessary and proper parties. Subsequently, on 30 August 2005, the Association filed a motion, pursuant to N.C. Gen. Stat. § 136-108,

seeking a determination of "all issues raised by the pleadings other than the issue of damages." In addition to asking the trial court to find that the individual owners were necessary and proper parties, the Association contended that the "subject tract" for determining just compensation consisted not merely of the common area but the *whole* townhouse community, including the individually-owned properties.

On 24 February 2006, the trial court entered an order in the Association's favor on both issues presented. The court ordered that the individual townhouse owners be added as defendants and concluded that "[t]he common area and the individual lots, with the townhomes on them, possess substantial unity of ownership, physical unity and unity of use such that they constitute a single, unified tract for the purpose of awarding damages or offsetting benefits." The trial court ordered DOT to prepare a revised plat "show[ing] the unified tract." DOT appealed the order to this Court.

Discussion

[1] As a preliminary matter, we note that this appeal is interlocutory because the trial court's order "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). Our Supreme Court has held, however, with respect to condemnation actions, that "interlocutory orders concerning title or area taken must be immediately appealed" because these matters are " 'vital preliminary issues' involving substantial rights." *N.C. Dep't of Transp. v. Stagecoach Village*, 360 N.C. 46, 48, 619 S.E.2d 495, 496 (2005) (quoting *Dep't of Transp. v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 709 (1999)). *See also Dep't of Transp. v. Airlie Park, Inc.*, 156 N.C. App. 63, 65-66, 576 S.E.2d 341, 343 ("Orders from a condemnation hearing concerning title and area taken are 'vital preliminary issues' that must be immediately appealed pursuant to section 1-277 of the General Statutes, which permits interlocutory appeals of determinations affecting substantial rights." (quoting *Rowe*, 351 N.C. at 176, 521 S.E.2d at 709)), *appeal dismissed*, 357 N.C. 504, 587 S.E.2d 417 (2003). Since the superior court's order concerns the "area taken" in the condemnation action, DOT is entitled to immediate appellate review of this order.

I

[2] Although DOT contends that the trial court erred in ordering the joinder of all the individual townhouse owners as necessary parties,

DOT also concedes "that this Court previously decided a similar issue adversely to the Department" in *Stagecoach Village II* and indicates that the purpose of its argument is "to preserve these questions for possible further review by the North Carolina Supreme Court." Indeed, our prior decision in *Stagecoach Village II* is dispositive.

In that case, DOT sought to condemn part of the common area of a townhouse development and filed suit against the homeowner's association, the fee owner of the common area. In response, the homeowner's association "asserted the individual lot owners were necessary parties to the condemnation action inasmuch as each lot owner's property rights were adversely affected by the taking." *Stagecoach Village II*, 174 N.C. App. at 826, 622 S.E.2d at 143-44. Similar to the individual owners within the Fernwood Hill development, the individual townhouse owners in *Stagecoach Village II* had a recorded easement in the common area affected by the taking. Because "those owners of the easement have a material interest in the subject matter of the controversy, receiving just compensation for their individual easement, and their interest will be directly affected by the trial court's decision," this Court held that the individual owners "are necessary and proper parties." *Id.* at 826, 622 S.E.2d at 143.

We see no basis to distinguish *Stagecoach Village II* from this case. Bound as we are by our prior decision addressing the same issue, we affirm the superior court's determination that the individual owners within Fernwood Hill are necessary parties to the condemnation suit. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

II

[3] We now turn to the crux of this appeal: the trial court's conclusion of law that "[t]he common area and the individual lots, with the townhomes on them, possess substantial unity of ownership, physical unity and unity of use such that they constitute a single, unified tract for the purpose of awarding damages or offsetting benefits." As this Court recognized in *Dep't of Transp. v. Roymac P'ship*, 158 N.C. App. 403, 407, 581 S.E.2d 770, 773 (2003), *appeal dismissed*, 358 N.C. 153, 592 S.E.2d 555 (2004), "[t]he distinction between whether the condemned lots are part of a unified parcel of land or instead independent parcels is significant because, if treated as a unified parcel, the

damages from the condemnation are calculated by the effect on the property as a whole and not based solely on the value of the condemned lots." The question whether the common area and the individual townhouse lots constitute a "single, unified tract" is an issue of law subject to de novo review. *See Barnes v. N.C. State Highway Comm'n*, 250 N.C. 378, 384, 109 S.E.2d 219, 224 (1959) ("Ordinarily the question, whether two or more parcels of land constitute one tract for the purpose of assessing damages for injury to the portion not taken . . . is one of law for the court.").

North Carolina courts look for the presence or absence of three "unities" to determine whether a condemned tract is part of a larger, unified tract:

> There is no single rule or principle established for determining the unity of lands for the purpose of awarding damages or offsetting benefits in eminent domain cases. The factors most generally emphasized are *unity of ownership, physical unity and unity of use*. Under certain circumstances the presence of all these unities is not essential. The respective importance of these factors depends upon the factual situations in individual cases. Usually unity of use is given greatest emphasis.

Id., 109 S.E.2d at 224-25 (emphasis added). *See also Roymac P'ship*, 158 N.C. App. at 407, 581 S.E.2d at 773 ("In determining whether condemned land is part of a unified tract, North Carolina courts consider three factors: (1) unity of ownership, (2) physical unity, and (3) unity of use.").

In this case, the superior court determined that the common area and the individual townhouses constituted a "single, unified tract" based on the presence of all three unities—substantial unity of ownership, physical unity, and unity of use. On appeal, DOT does not contest the court's conclusion that there was a unity of use and physical unity between the common area and the individual townhouse lots. Instead, DOT focuses exclusively on the unity of ownership issue.[1]

The Association, as an initial matter, urges that this Court need not reach DOT's arguments. Relying on *Barnes*, the Association contends that there was no need to show a unity of ownership since (1)

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1. Given DOT's decision to only appeal the trial court's determination on the unity of ownership issue, we have not reviewed the unity of use or physical unity determinations. Accordingly, nothing in this opinion should be construed as expressing a view on the question whether this townhouse development meets the requirement of those other two unities.

the presence of all three unities is not required, and (2) in any event, the unity of use is the most important factor. The Supreme Court, however, in a decision subsequent to *Barnes*, specifically foreclosed this argument by holding that a unity of ownership is indispensable: "Absent unity of ownership . . . two parcels of land cannot be regarded as a single tract for the purpose of determining a condemnation award." *Bd. of Transp. v. Martin*, 296 N.C. 20, 26, 249 S.E.2d 390, 395 (1978). *See also City of Winston-Salem v. Slate*, 185 N.C. App. 33, 42, 647 S.E.2d 643, 649 (2007) ("Although all three factors need not be present, some unity of ownership must be established when separate parcels of land are involved.").

In *Barnes*, our Supreme Court described the unity of ownership factor:

> The parcels claimed as a single tract must be owned by the same party or parties. It is not a requisite for unity of ownership that a party have the same quantity or quality of interest or estate in all parts of the tract. But where there are tenants in common, one or more of the tenants must own some interest and estate in the entire tract. Under some circumstances the fact that the land is acquired in a single transaction will strengthen the claim of unity. But the fact that the land was acquired in small parcels at different times does not necessarily render the parcels separate and independent. However, there must be a substantial unity of ownership. Different owners of adjoining parcels may not unite them as one tract, nor may an owner of one tract unite with his land adjoining tracts of other owners for the purpose of showing thereby greater damages.

250 N.C. at 384, 109 S.E.2d at 225 (internal citations omitted). *See also City of Winston-Salem v. Tickle*, 53 N.C. App. 516, 528, 281 S.E.2d 667, 674 (1981) ("The test of substantial unity of ownership appears, then, to be whether some one of the tenants in the land taken owns some quantity and quality of interest and estate in all of the land sought to be treated as a unified tract."), *disc. review denied*, 304 N.C. 724, 288 S.E.2d 808 (1982). In *Tickle*, we observed that *Barnes*' reference to "tenants in common" was not meant to preclude unities of ownership based on "other forms of ownership where more than one person holds an interest and estate in property." *Id.*

DOT argues in these proceedings that no unity of ownership may be found unless it can be shown that one of the parties has both an

interest *and* an estate in the entire tract. According to DOT, it is insufficient just to have an interest in the entire tract; a party must have an estate as well. This position is contrary to our holding in *City of Winston-Salem v. Yarbrough*, 117 N.C. App. 340, 345, 451 S.E.2d 358, 362 (1994), *disc. review denied*, 340 N.C. 110, 456 S.E.2d 311 (1995), that an inchoate dower interest—which is not an estate—was sufficient to create a substantial unity of ownership between contiguous lands owned separately by a husband and wife. *Yarbrough* acknowledged that " '[a]n inchoate dower interest is not an estate in land nor a vested interest,' " *Id.* (quoting *Taylor v. Bailey*, 49 N.C. App. 216, 219, 271 S.E.2d 296, 298 (1980), *appeal dismissed*, 301 N.C. 726, 274 S.E.2d 235 (1981)), but nonetheless observed that an inchoate dower interest " 'acts as an encumbrance upon real property,' " *id.* (quoting *Taylor*, 49 N.C. App. at 219, 271 S.E.2d at 298), and is "a 'substantial right of property,' " *id.* (quoting *Shelton v. Shelton*, 225 S.C. 502, 505, 83 S.E.2d 176, 177 (S.C. 1954)). Consequently, "[w]e conclude[d] that a person's inchoate dower interest in his spouse's real property is 'some quality' of interest" such that "there was substantial unity of ownership among the [spouses'] tracts." *Id.*, 451 S.E.2d at 362-63. Accordingly, under *Yarbrough*, the Association was required only to show that at least one party had some interest *or* estate in the entire tract.

DOT contends further that no unity of ownership can exist in this case given the Supreme Court's ruling in *Martin*. The *Martin* Court confronted the question whether two parcels satisfied the unity of ownership requirement when one parcel was owned jointly by two individuals and an adjacent parcel was owned by a corporation in which one of those individuals was the sole shareholder. 296 N.C. at 26, 249 S.E.2d at 394-95. *Martin* held that the two parcels "cannot be treated as a unified tract for the purpose of assessing condemnation damages," because "[a] corporation is an entity distinct from the shareholders which own it" and "[w]here persons have deliberately adopted the corporate form to secure its advantages, they will not be allowed to disregard the existence of the corporate entity when it is to their benefit to do so." *Id.* at 28-29, 249 S.E.2d at 396. DOT asserts that this case rests on a straightforward application of *Martin*—namely, that the Association and the individual townhouse owners should not be allowed to disregard the legal distinction between them in order to unite their different parcels and thereby attempt to show greater damages.

This case, however, is different from *Martin*. Here, the condemnees, the Association and now the individual owners, contend that the multiple parcels at issue—the common area and the six individual townhouses—possess a sufficient unity of ownership because the townhouse owners have an interest in both the common area and all of the individual units. Thus, unlike *Martin*, the claimed unity of ownership does not arise out of the closeness of the relationship between the homeowner's association and the individual townhouse owners. Instead, the claimed unity is premised on each townhouse owner holding not only a fee simple estate in his or her unit, but also (1) an interest in the common area by virtue of the general easement and (2) an interest in the other individual townhouses by virtue of the restrictive covenants. According to the Association, the easement and restrictive covenants provide the townhouse owners with sufficient interest in the entire tract to support a substantial unity of ownership.

Here, we note the well-established principle that an easement is an "interest in land." *Shingleton v. State*, 260 N.C. 451, 458, 133 S.E.2d 183, 189 (1963). *Accord Braswell v. State Highway & Public Works Comm'n*, 250 N.C. 508, 512, 108 S.E.2d 912, 915 (1959). Even DOT does not dispute that the direct taking of an easement interest requires payment of just compensation. *See French v. State Highway Comm'n*, 273 N.C. 108, 112, 159 S.E.2d 320, 323 (1968) (noting that an easement is a "property right" and that while defendant "could take this property right from the plaintiff and terminate it, the defendant could not do so without the payment of compensation to the plaintiff for his property so taken"). The easement held by the individual owners is not an easement in some portion of the common area, but in the entire common area.

In addition, "[a] restrictive covenant constitutes an interest in land in the nature of a negative easement." *Dunes South Homeowners Ass'n v. First Flight Builders, Inc.*, 341 N.C. 125, 132, 459 S.E.2d 477, 481 (1995). "The servitude imposed by restrictive covenants is a species of incorporeal right. It restrains the owner of the servient estate from making certain use of his property." *Sheets v. Dillon*, 221 N.C. 426, 431, 20 S.E.2d 344, 347 (1942). *See also Armstrong v. Ledges Homeowners Ass'n*, 360 N.C. 547, 554, 633 S.E.2d 78, 85 (2006) ("Covenants accompanying the purchase of real property are contracts which create private incorporeal rights, meaning non-possessory rights held by the seller, a third-party, or a group of people, to use or limit the use of the purchased property."). The Supreme Court has also stated that "[i]t is clear in our minds that res-

idential restrictions generally constitute a property right of distinct worth . . . .” *Tull v. Doctors Bldg., Inc.*, 255 N.C. 23, 41, 120 S.E.2d 817, 829 (1961). Each of the individual owners therefore has an interest in the other owners’ townhouses.

Based on the language in *Barnes*, requiring “some interest” in the entire tract, and other North Carolina cases construing *Barnes*, we conclude that the Association has met the requirement of a “substantial unity” of ownership for the entire tract. *Tickle*, 53 N.C. App. at 528, 281 S.E.2d at 674. Each individual unit owner has an estate in fee simple in his or her unit, has a property interest in the entire common area by virtue of the recorded easement, and has a property interest in the other units as a result of the restrictive covenants. The Association, therefore, has established a substantial unity of ownership across the entire development.[2] Accordingly, we affirm the order of the superior court.

Affirmed.

Judges TYSON and CALABRIA concur.

JANET L. YOUNG, PLAINTIFF v. HOWARD L. GUM, GUM & HILLIER, P.A., AND DONNA COOPER, DEFENDANTS

No. COA06-1131

(Filed 4 September 2007)

Attorneys— legal malpractice—representation for equitable distribution—failure to show alleged negligence proximately caused damage

The trial court did not err in a legal malpractice case arising out of representation during an equitable distribution proceeding by entering summary judgment in favor of defendants, because:

2. Although the Association argues that its right to collect assessments from the unit owners constitutes a significant property interest and is therefore relevant to the unity of ownership question, we do not address this contention. In addition, the Association seems to assume that damages will be determined by the decrease in value for each individual lot without considering the possible consequences of the court’s order that there be only “a single, unified tract” for purposes of awarding damages. Because neither party has addressed the consequences of this conclusion for the remaining proceedings, we have not considered it, and nothing in this opinion should be viewed as expressing an opinion on that question.

(1) plaintiff failed to provide legal authority to support her claim that defendants were negligent in advising her to enter into a retainment agreement with another attorney; (2) plaintiff failed to show that her attorney was negligent when he did not advise her that the underlying consent judgment could be set aside under *Tevepaugh*, 135 N.C. App. 489 (1999); and (3) plaintiff failed to show that any other alleged negligence on the part of defendants proximately caused her damage when she did not forecast evidence regarding identification, classification, and value of marital property as of the date of separation which would permit the court to understand how and why she might have been able to prevail on an equitable distribution claim to obtain a judgment in excess of the 4.5 million dollars she received pursuant to the consent judgment.

Appeal by plaintiff from judgment entered 26 May 2006 by Judge Gary E. Trawick in Buncombe County Superior Court. Heard in the Court of Appeals 21 March 2007.

William E. Loose for plaintiff-appellant.

Long, Parker, Warren, & Jones, P.A., by Robert B. Long, Jr., and William A. Parker, for defendant-appellee.

STROUD, Judge.

Plaintiff appeals from the trial court's entry of summary judgment in favor of defendants in an action for legal malpractice. We conclude that plaintiff failed to provide legal authority to support her claim that defendants were negligent in advising her to retain another attorney. She also failed to show that her attorney was negligent when he did not advise her that the underlying consent judgment could be set aside. Finally, plaintiff failed to show that any alleged negligence on the part of defendants proximately caused damage to her. Accordingly, we affirm the order of the trial court granting summary judgment to defendants.

I. Background

On 2 May 2000, plaintiff filed a complaint against her husband, Paul M. Young, seeking equitable distribution of their marital estate. Plaintiff reached a settlement with her husband on 8 May 2000. In the settlement, plaintiff agreed to receive assets worth approximately four and one-half million dollars as a "full and final settlement of all

issues between [the] parties arising from their marriage." The settlement agreement was read into the record of the trial court as a consent judgment. The agreement was reduced to writing, signed by plaintiff and her husband, and entered by the trial court as a Consent Judgment on 24 May 2000. On 12 March 2001, plaintiff and her husband amended the Consent Judgment to transfer interest in a timeshare in Mexico to him. The amendment to the Consent Judgment stated that "except as amended [herein], all other provisions of the Consent Judgment dated May 24, 2000, shall remain in full force and effect." Plaintiff subsequently received the assets which the Consent Judgment specified to be transferred to her.

On 8 February 2002, plaintiff moved, pursuant to Rule 60, to set aside the Consent Judgment on the grounds

> that the consent judgment (1) was void because it "recites materials and events that never occurred" in that "[t]he terms of the document were never reviewed by the court with the parties," and that it (2) included terms "that were never discussed between the parties at the time they all met at the courthouse."

Young v. Young, 161 N.C. App. 541, 589 S.E.2d 750 (2003) (unpublished), *cert. denied*, 358 N.C. 242, 594 S.E.2d 195 (2004). After a hearing on 16 May 2002, the trial court entered an order on 6 June 2002 denying plaintiff's motion to set aside the Consent Judgment. Plaintiff appealed to this Court. The 6 June 2002 order of the trial court was affirmed by this Court. 161 N.C. App. 541, 589 S.E.2d 750.

Plaintiff subsequently filed this malpractice claim against her attorney, Howard L. Gum, and the firm that represented her during the equitable distribution proceedings, Gum & Hillier, P.A.[1] Plaintiff alleged that but for defendants' negligence, she would have received at least eight million dollars from the marital estate. Defendants moved for summary judgment on 2 May 2006. The trial court granted defendants' motion for summary judgment on 26 May 2006. Plaintiff appeals.

II. 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

1. Donna Cooper was named as a defendant in the original complaint, but plaintiff filed a voluntary dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) of her claim against Cooper on 17 February 2005. Plaintiff did not commence a new action against Cooper within one year and the dismissal as to Cooper is therefore final. Cooper is therefore not a party to this appeal.

and . . . any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). On appeal, this Court reviews an order granting summary judgment *de novo*. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). A defendant may show he is entitled to summary judgment "by (1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim." *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828 (citation omitted), *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995).

III. Issues

Plaintiff alleged in her complaint that defendants were negligent in the following respects: (1) advising her to enter into a retainer agreement with another attorney, Mr. Graham, in addition to defendants; (2) failing to advise her that she had the right to set aside the consent judgment under *Tevepaugh v. Tevepaugh*, 135 N.C. App. 489, 521 S.E.2d 117 (1999); (3) failing to properly investigate the value of her marital estate; (4) failing to advise her that she would be entitled to at least fifty percent of all marital property in an equitable distribution action. Plaintiff claims that but for defendants' negligence, she would not have entered into the settlement and would have received at least eight million dollars from the marital estate based upon her equitable distribution claim. She also claims that she paid "more than $21,000" in attorney fees to Mr. Graham.

IV. Analysis

Plaintiff did not argue in her brief regarding the allegation of defendants' negligence as to advising her to enter into a retainer agreement with Mr. Graham. She has not cited any authority to support a claim that simply advising her to enter into an attorney-client retainer agreement with another attorney is negligent, and we are not aware of any such authority. Summary judgment was therefore proper as to this alleged ground for negligence.

Plaintiff's contentions regarding the entry of the consent judgment and her claim that defendants were negligent by failing to advise her that the consent judgment could have been set aside pursuant to *Tevepaugh* were fully addressed in this court's prior opinion in plaintiff's first appeal. 161 N.C. App. 541, 589 S.E.2d 750. It has already been established as the law of the case that the consent order

was in fact entered properly under *Tevepaugh*, and therefore it could not have been negligent of defendants to fail to advise plaintiff that it was not. *See N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 567, 299 S.E.2d 629, 631 (1983) (["W]e conclude that once a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case.").

Plaintiff's remaining contentions regarding defendants' negligence fail because plaintiff has failed to forecast evidence as to damages proximately caused by the alleged negligence. Even if we assume, for purposes of summary judgment, that defendants negligently failed to investigate the value of the plaintiff's marital estate[2] and/or to advise her regarding her rights, "[i]n a legal malpractice case, a plaintiff is required to prove that [s]he would not have suffered the harm alleged absent the negligence of [her] attorney." *Hummer v. Pulley, Watson, King & Lischer, P.A.*, 157 N.C. App. 60, 66, 577 S.E.2d 918, 923, *disc. review denied*, 357 N.C. 459, 585 S.E.2d 758 (2003). It is well-settled that if a party loses a suit as a result of her attorney's negligence, the party proves this causation element by showing that: "(1) the original claim was valid; (2) [the claim] would have resulted in a judgment in [the plaintiff's] favor; and (3) the judgment would have been collectible." *Rorrer v. Cooke*, 313 N.C. 338, 361, 329 S.E.2d 355, 369 (1985) (citation omitted). This rule has been referred to as having to prove a "case within a case." *Kearns v. Horsley*, 144 N.C. App. 200, 211, 552 S.E.2d 1, 8, *disc. review denied*, 354 N.C. 573, 559 S.E.2d 179 (2001).

The "case within a case" rule applies in cases considering the propriety of an order granting summary judgment in favor of the defendant in a legal malpractice action. *See Bamberger v. Bernholz*, 326 N.C. 589, 391 S.E.2d 192 (1990) (adopting dissenting opinion of Lewis, J., in the Court of Appeals, 96 N.C. App. 555, 386 S.E.2d 450 (1989)). The rule applies even if the negligent actions of the attorney resulted in a total foreclosure of the underlying case being heard on its merits. *See id.* at 211-12, 552 S.E.2d at 8-9; *Hummer*, 157 N.C. App. at 60, 577 S.E.2d at 918. The same rule would therefore apply when a plaintiff

2. We note that although plaintiff contends that defendants did not do investigation necessary to value her marital estate, she states in her own affidavit that at the time she entered the settlement, she believed the estate to be worth between 15 and 20 million dollars. Thus, plaintiff is not claiming that she did not know the approximate value of the marital estate when she entered the settlement—by her own admission, she did—yet she is still claiming that defendants were negligent by failing to do more investigation as to the value of the estate.

alleges that her attorney's negligence in handling her equitable distribution claim caused her to settle the claim to her detriment. *See Harris v. Maready*, 84 N.C. App. 607, 612, 353 S.E.2d 656, 660, *disc. review denied*, 320 N.C. 168, 358 S.E.2d 50 (1987); *accord Thomas v. Bethea*, 718 A.2d 1187, 1196-97 (Md. 1998).

In this case, plaintiff claims that her attorney negligently failed to properly advise regarding her legal rights if the claim had been fully litigated. Therefore, plaintiff must make a forecast of evidence sufficient to demonstrate that (1) her original equitable distribution claim was valid; (2) the equitable distribution claim would have resulted in a judgment in her favor (i.e., in an amount in excess of the 4.5 million dollars she received in the settlement); and (3) the equitable distribution judgment would have been collectible.

Plaintiff has met the first part of this test by her allegations that she filed a complaint for equitable distribution and her allegations that she and her husband accumulated marital property during their marriage. For purposes of summary judgment, viewing the evidence in the light most favorable to plaintiff, we assume that she and Mr. Young did in fact have marital property. Plaintiff is also entitled to the benefit of the presumption that marital and divisible property will be distributed half to each spouse. N.C. Gen. Stat. § 50-20(c) (2005). In fact, defendants do not dispute that plaintiff had a valid equitable distribution claim. However, having a valid equitable distribution claim alone is not enough to survive summary judgment; plaintiff must also forecast evidence sufficient to demonstrate that her equitable distribution claim would have resulted in judgment in her favor in excess of 4.5 million dollars and that it would have been collectible.

As noted above, a legal malpractice claim is considered as a "case within a case." Therefore, to determine the facts which plaintiff must forecast regarding her equitable distribution claim, we look to the substantive law defining an equitable distribution claim. In an action for equitable distribution of marital property,

> [t]he burden of proof is upon the party claiming that property is marital property to show by a preponderance of the evidence that the property: (1) was acquired by either spouse or both spouses; (2) during the marriage; (3) before the date of the separation of the parties; and (4) is presently owned.

Caudill v. Caudill, 131 N.C. App. 854, 857, 509 S.E.2d 246, 248 (1998) (citing N.C. Gen. Stat. 50-20(b)(1)). The party claiming that property

is marital property must also provide evidence by which that property is to be valued by the trial court. *Miller v. Miller*, 97 N.C. App. 77, 80, 387 S.E.2d 181, 184 (1990).

> The requirements that the trial court (1) classify and value all property of the parties, both separate and marital, (2) consider the separate property in making a distribution of the marital property, and (3) distribute the marital property, necessarily exist only when evidence is presented to the trial court which supports the claimed classification, valuation and distribution.

Id.

N.C. Gen. Stat. § 50-21(b) requires that marital property be valued "as of the date of the separation of the parties" while divisible property and divisible debt are "valued as of the date of distribution." The plaintiff is required in an equitable distribution action to provide detailed information regarding her allegations as to the identification, classification, and value of marital and separate property as of the date of separation by filing an equitable distribution inventory affidavit within 90 days after service of the equitable distribution claim. N.C. Gen. Stat. § 50-21(a).[3] A party who fails to file the required equitable distribution inventory affidavit can be subject to sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 37, up to and including dismissal of the claim. N.C. Gen. Stat. § 50-21(a); N.C. Gen. Stat. § 1A-1, Rule 37(b)(2).

In addition, N.C. Gen. Stat. § 50-20(e) (2005) establishes a presumption in all equitable distribution actions that an "in-kind distribution of marital or divisible property is equitable." In order to obtain a distributive award, this presumption must be "rebutted by the greater weight of the evidence" or by evidence that a property is a "closely held business entity or is otherwise not susceptible of division in-kind." N.C. Gen. Stat. § 50-20(e).

Therefore, plaintiff was required to forecast evidence that would be sufficient to demonstrate not only that defendants were negligent in advising her, but also evidence which would support plaintiff's

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3. N.C. Gen. Stat. § 50-21(a) states, in pertinent part:

> Within 90 days after service of a claim for equitable distribution, the party who first asserts the claim shall prepare and serve upon the opposing party an equitable distribution inventory affidavit listing all property claimed by the party to be marital property and all property claimed by the party to be separate property, and the estimated date-of-separation fair market value of each item of marital and separate property.

underlying equitable distribution claim and her allegation that an equitable distribution judgment in her favor would have exceeded the 4.5 million dollars she received by the settlement and that this judgment would have been collectible. As stated above, plaintiff has not forecast any evidence which would permit the court to identify, value or classify marital and separate property of the parties, and in the absence of this evidence, the court could not value or classify the property. *Miller*, 97 N.C. App. at 80, 387 S.E.2d at 184.

It is not clear from plaintiff's pleadings or affidavits whether plaintiff claimed she was entitled to a distributive award in excess of 8 million dollars or an in-kind distribution of property valued in excess of 8 million dollars. If she was seeking a distributive award, plaintiff has failed to forecast any evidence to rebut the presumption of an in-kind distribution, or to demonstrate why she would have been entitled to a distributive award in excess of 4.5 million dollars. N.C. Gen. Stat. § 50-20(e). If plaintiff was seeking an in-kind distribution, she has failed to forecast any evidence of what property she claims should have been distributed to her. She has failed to forecast any evidence regarding whether a judgment in excess of 4.5 million dollars would be collectible.

For purposes of equitable distribution, marital property must be valued as of the date of separation. N.C. Gen. Stat. § 50-21(b). We note that plaintiff has not even mentioned any date of valuation of marital property in the record. The record contains only bare assertions as to the total value of plaintiff's property, without any allegation of the date of valuation or what portion of the property is marital or separate or divisible. Plaintiff's only statements regarding value of the marital estate in her affidavit are as follows:

> In my initial meeting with Mr. Gum, I informed him about the extent of my estate. While I had some idea of what assets Mr. Young and I had and I gave some estimate with respect to their value no valuation of my estate was completed. . . . At the time of my meeting with Mr. Gum in March 2000 I had estimated my assets to be worth between $15 million to $20 million.

There is no mention of the date of separation in the record except as a finding of fact in the Consent Judgment, which states that the parties separated on 31 March 2000. The only other evidence in the record as to the alleged value of the marital estate is contained in the affidavit of Michael E. Casterline, an attorney, submitted in opposition to the summary judgment motion. Mr. Casterline states that "I am

also aware that the marital estate has been valued at approximately $20 million." We note first that this statement does not give any date for this valuation. Furthermore, "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." N.C. Gen. Stat. § 1A-1, Rule 56(e); *see also Talbert v. Choplin*, 40 N.C. App. 360, 364, 253 S.E.2d 37, 40 (1979) (applying Rule 56(e)). Mr. Casterline's affidavit addresses the legal standard of care, not valuation. There is no indication that Mr. Casterline is competent to testify as to the value of the marital estate or that he has personally determined the value of the estate. In fact, the statement in his affidavit that the estate "has been valued at approximately $20 million" indicates that someone else has valued the estate, so this is hearsay and not admissible evidence as to value.

We are aware that equitable distribution cases can be very complex and require extensive and detailed evidence regarding marital property, debts, separate property, divisible property and many other issues. We are not holding that plaintiff would have had to forecast every detail of her entire equitable distribution case to survive summary judgment or even that she would have had to file an equitable distribution inventory affidavit detailing the property for which she sought equitable distribution. However, she must present some forecast of evidence regarding the identification, classification, and value of marital property as of the date of separation which would permit the court to understand how and why she might have been able to prevail on an equitable distribution claim and in particular, to obtain a judgment in excess of 4.5 million dollars. Here, even assuming that defendants negligently failed to advise plaintiff or to value her estate properly, she has made no such forecast at all of the value of the marital estate as of the date of separation and therefore as to the value of her equitable distribution claim, and thus has failed to show that any alleged negligence on the part of defendants proximately caused damage to her.

V. Conclusion

Plaintiff failed to provide legal authority to support her claim that defendants were negligent in advising her to retain another attorney. She also failed to show that her attorney was negligent when he did not advise her that the underlying consent judgment could be set aside under *Tevepaugh*. Finally, plaintiff failed to show that any other alleged negligence on the part of defendants proximately caused

damage to her. Accordingly, the order of the trial court granting summary judgment to defendants is affirmed.

AFFIRMED.

Judges McCULLOUGH and CALABRIA concur.

JON-PAUL CRAIG, BY HIS MOTHER AND NEXT FRIEND, KIMBERLY CRAIG, PLAINTIFF v. NEW HANOVER COUNTY BOARD OF EDUCATION, AND ANNETTE REGISTER, IN HER OFFICIAL AND INDIVIDUAL CAPACITY, DEFENDANTS

No. COA07-80

(Filed 4 September 2007)

1. **Appeal and Error— appealability—sovereign immunity—substantial right**

   Although the denial of a summary judgment motion is interlocutory and thus ordinarily not immediately appealable, defendant board of education's sovereign immunity defense affects a substantial right and allows for immediate appeal of the order.

2. **Immunity; Schools and Education— board of education—common law negligence—sovereign immunity not waived**

   In a common law negligence action based upon failure to supervise brought on behalf of a middle school student who was sexually assaulted by another student, defendant board of education did not waive its sovereign immunity up to $150,000 by its purchase of indemnification coverage in that amount through the North Carolina School Boards Trust (NCSBT) because a school board's participation in NCSBT does not qualify as a purchase of liability insurance as defined by N.C.G.S. § 115C-42. Furthermore, an excess liability policy purchased by the board of education did not provide coverage of $850,000 for the amount of the claim exceeding $150,000 because the excess policy specifically excluded coverage for claims of negligent failure to supervise.

3. **Constitutional Law; Schools and Education— right to and liberty interest in education free from harm—adequate remedy at law**

   The trial court erred by denying defendant board of education's motion for summary judgment on plaintiff's constitutional

claim alleging a denial of plaintiff's right to and liberty interest in education free from harm arising from defendant's alleged negligence in failing to provide adequate protection for plaintiff from a fellow student, based on the fact that an adequate state remedy existed, because: (1) our Supreme Court used the term "adequate remedy" to mean "available, existing, and applicable remedy;" and (2) such a remedy is available here in the form of a common law negligence claim even though defendant board of education has sovereign immunity for such claim.

Judge BRYANT concurring in part and dissenting in part.

Appeal by defendant from an order entered 15 December 2006 by Judge Paul L. Jones in New Hanover County Superior Court. Heard in the Court of Appeals 5 June 2007.

Bruce Robinson for plaintiff-appellee.

Hogue Hill Jones Nash & Lynch, LLP, by David A. Nash, for defendant-appellant New Hanover County Board of Education.

HUNTER, Judge.

The New Hanover County Board of Education ("defendant" or "the Board") appeals from an order denying its motion for summary judgment. After careful review, we reverse.

Jon-Paul Craig ("plaintiff") is a 14-year-old mentally disabled boy. Beginning in sixth grade, he was enrolled in the mainstream school Roland Grise Middle School. In December 2003, he and his mother moved to a new home, putting plaintiff's placement in the school at risk due to transportation issues. Before this issue could be resolved, on 6 January 2004, plaintiff's mother, Kimberly Craig, was called by an assistant principal from Roland Grise and told there had been some " 'sexual experimentation' " between plaintiff and another boy in his class. The following day, the same assistant principal informed Ms. Craig that plaintiff was being suspended for ten days; eventually, defendant decided to deny him placement at Roland Grise for the remainder of the school year.

Plaintiff's mother and next friend, Ms. Craig, brought suit against defendant, making two claims: First, that plaintiff was denied his constitutional right to and liberty interest in education free from harm, and second, that defendant and its employees had negligently

allowed the assault to occur.[1] Defendant moved for summary judgment, and the trial court denied the motion. Defendant appeals that ruling.

[1] While denial of a summary judgment motion is interlocutory and thus ordinarily not appealable at this stage, because defendant is claiming sovereign immunity as a complete defense, it can immediately appeal the order per N.C. Gen. Stat. § 7A-27(d)(1) (2005). *See, e.g.*, *Williams v. Scotland Cty.*, 167 N.C. App. 105, 106, 604 S.E.2d 334, 335 (2004) (holding that denial of a city's summary judgment motion constituted a "substantial right" for purposes of the statute), *disc. review denied*, 359 N.C. 327, 611 S.E.2d 168 (2005).

Defendant makes two arguments to this Court, each of which applies to only one of its claims: The argument that defendant has not waived its immunity to suit applies only to plaintiff's common-law negligence claim, and the argument that plaintiff has an adequate remedy at state law applies only to plaintiff's constitutional claim. We consider each argument in turn.

I.

[2] First, defendant argues that it has not waived its immunity to suit, including plaintiff's potential suit for common-law negligence, because its insurance policy does not cover the actions at issue. "A county or city board of education is a governmental agency and its employees are not ordinarily liable in a tort action unless the board has waived its sovereign immunity." *Herring v. Liner*, 163 N.C. App. 534, 537, 594 S.E.2d 117, 119 (2004) (citations omitted). This immunity may be waived if the conditions in N.C. Gen. Stat. § 115C-42 (2005) are met. That statute provides in pertinent part:

> Any local board of education, by securing liability insurance as hereinafter provided, is hereby authorized and empowered to waive its governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of such board of education when acting within the scope of his authority or within the course of his employment. Such immunity shall be deemed to have been waived by the act of obtaining such insurance, *but such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort.*

1. Plaintiff also brought suit against the principal of the school, but this claim was dismissed by the trial court.

Id. (emphasis added). Both parties agree that defendant has purchased liability insurance: Defendant has $150,000.00 of indemnification through the North Carolina School Boards Trust ("NCSBT"), as well as $850,000.00 through Folksamerica Reinsurance Policy (both parties refer to this as the "excess insurance policy") for certain claims of negligence against defendant and its employees that exceed $150,000.00. Both parties agree, as do this Court's prior holdings, that the purchase of insurance through NCSBT does not constitute waiver because NCSBT does not qualify as liability insurance under the definition given in N.C. Gen. Stat. § 115C-42. *See*, *e.g.*, *Ripellino v. N.C. School Bds. Ass'n*, 158 N.C. App. 423, 428, 581 S.E.2d 88, 92 (2003), *cert. denied*, 358 N.C. 156, 592 S.E.2d 694-95 (2004) (holding that a school board's participation in NCSBT did not qualify as a purchase of insurance per definition in N.C. Gen. Stat. § 115C-42); *Lucas v. Swain Cty. Bd. of Educ.*, 154 N.C. App. 357, 361-62, 573 S.E.2d 538, 540-41 (2002) (same); *Hallman v. Charlotte-Mecklenburg Bd. of Educ.*, 124 N.C. App. 435, 439, 477 S.E.2d 179, 181 (1996) (holding that a school board's participation in a risk management program similar to NCSBT did not constitute the purchase of liability insurance as defined by N.C. Gen. Stat. § 115C-42). As such, defendant has not waived immunity for the first $150,000.00 of coverage. Thus, we are concerned only with the terms of the excess insurance policy for the next $850,000.00.

Defendant states that the excess insurance policy excludes

> any Claim arising out of or in connection with: . . . (c) sexual acts, sexual molestation, sexual harassment, sexual assault, or sexual misconduct of any kind; or (d) acts of deliberate indifference. . . . The Excess Insurance (if any) does not provide coverage in any amount for Claims to which this exclusion applies, including[,] but not limited to[,] claims for negligent hiring, negligent retention and/or negligent supervision.

Thus, the issue before this Court is whether this policy covers the negligence claim that plaintiff would bring under state law. If it does, the Board has waived immunity, and plaintiff may continue the suit; if it does not, the Board has not waived immunity, and summary judgment must be granted in favor of the Board.

Plaintiff asserts that his claim "sounds in negligence because of the negligent failure to supervise." The negligent failure to supervise is explicitly excluded by the language above. In his argument to this

Court, plaintiff does not make an argument for any claim he might bring that would not fall under the exclusionary language above.

The dissent argues at length that sovereign immunity cannot bar a constitutional claim, which is indeed true; however, that is not the issue in this case. As explained above, our consideration of the Board's sovereign immunity applies only to plaintiff's common-law negligence claim.

From plaintiff's complaint and the plain language of the contract, it is clear that the policy excludes any claim plaintiff might bring against the Board, and as such, the Board has not waived immunity and the claim must fail.

II.

[3] Defendant next addresses the issue of whether an adequate state remedy exists. As mentioned above, plaintiff claims that defendant was negligent in failing to provide adequate protection for him from a fellow student, a claim that, under state law, is a common law negligence claim. Defendant argues that, because plaintiff has this adequate remedy under state law, he may not bring a constitutional claim. We agree.

A claim under our state constitution is available only "in the absence of an adequate state remedy." *Corum v. University of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992); *Phillips v. Gray*, 163 N.C. App. 52, 58, 592 S.E.2d 229, 233, *disc. review denied*, 358 N.C. 545, 599 S.E.2d 406 (2004). *See also Alt v. Parker*, 112 N.C. App. 307, 317, 435 S.E.2d 773, 779 (1993) ("one whose state constitutional rights have been offended has a direct action against governmental defendants who allegedly violated those rights, in their official capacities, '[i]n the absence of an adequate state remedy' ") (quoting *Corum*, 330 N.C. at 782, 413 S.E.2d at 289).

Plaintiff acknowledges this principle, but argues that this Court's opinion in *City-Wide Asphalt Paving, Inc. v. Alamance County*, 132 N.C. App. 533, 513 S.E.2d 335 (1999), supports his contention that he may pursue his suit pursuant to the constitution regardless of whether an adequate remedy at law exists:

> We hold that the doctrine of sovereign immunity does not bar plaintiff's equal protection and due process claims. Defendant suggests that plaintiff should have filed suit to enjoin the contract or have it declared void. However, these remedies are equitable in

> nature and do not provide plaintiff with an avenue to pursue *money* damages. Plaintiff's direct action against defendant pursuant to the North Carolina Constitution provides plaintiff's only adequate *legal* remedy. Plaintiff's direct constitutional action against defendant "completes his remedies."

Id. at 539, 513 S.E.2d at 339 (emphasis added) (quoting *Corum*, 330 N.C. at 789, 413 S.E.2d at 294).

However, this language is clearly re-emphasizing the reasoning of *Corum*, in which the Court used the phrase "completes his remedies" in explaining why it was necessary to allow the plaintiff to pursue suit against a defendant in both his official and individual capacities: Suit against the former could produce only equitable relief, and suit against the latter could produce only monetary damages. *Corum*, 330 N.C. at 789, 413 S.E.2d at 294. In *City-Wide*, the Court was again distinguishing between equitable and legal remedies.

Here, plaintiff's negligence claim is not an equitable remedy, and thus not covered by *Corum* or *City-Wide*. The claim would vindicate the same rights as the constitutional argument put forth by plaintiff—namely, his right to attend school without being harmed by classmates. *See*, *e.g.*, *Alt*, 112 N.C. App. at 317-18, 435 S.E.2d at 779. While we agree with plaintiff's contention that such a remedy must, in the end, be fruitless because the state retains immunity to such a claim, we are bound by precedent on this point. *See id.*

The dissent argues that the statement in *Corum* that "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution" essentially means that, where the State has a defense against a state law claim, that claim cannot be considered an "adequate remedy." 330 N.C. at 782, 413 S.E.2d at 289. However, the term "adequate" in *Corum* is not used to mean "potentially successful." Just before the above-quoted statement in *Corum*, the Court quotes this from *Midgett v. Highway Commission*: " 'And where the Constitution points out no remedy and no statute affords an adequate remedy under a particular fact situation, the common law will furnish the appropriate action for adequate redress of such grievance.' " *Id.* (quoting *Midgett v. Highway Commission*, 260 N.C. 241, 249-50, 132 S.E.2d 599, 608 (1963)). Clearly, the Court is using "adequate remedy" to mean "available, existing, applicable remedy." Such a remedy is available here in the form of a common-law negligence claim.

III.

Because defendant's insurance policy does not cover the claims at issue here and thus does not deprive it of immunity, and because plaintiff has an adequate remedy at state law, we reverse the trial court's denial of defendant's summary judgment motion.

Reversed.

Judge WYNN concurs.

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

BRYANT, Judge, concurring in part, dissenting in part.

I agree with the majority's holding that the trial court's denial of defendant's motion for summary judgment as to plaintiff's negligence claim must be reversed. However, because governmental immunity bars consideration of plaintiff's negligence claim and plaintiff does not have an adequate state remedy, I would affirm the trial court's denial of defendant's motion for summary judgment as to plaintiff's constitutional claims.

A claimant may bring a claim under the North Carolina Constitution "in the absence of an adequate state remedy" for the alleged wrong. *Corum v. University of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992), *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992). Defendant claims that a state remedy is "adequate" even if it is barred by the defense of sovereign immunity. I disagree.

The majority decision relies primarily on the holding in *Alt v. Parker*, 112 N.C. App. 307, 435 S.E.2d 773 (1993). In *Alt*, the plaintiff's constitutional due process claim and his claim for false imprisonment, which failed due to insufficiency of evidence, both originated from the same alleged wrongful conduct. *Id.* at 317-18, 435 S.E.2d at 778-79. This Court held that because the plaintiff's false imprisonment claim, if successful, would have compensated him, he had an adequate state remedy and therefore could not bring the constitutional claim. *Id.* The tort action in *Alt* did not fail because the defense of sovereign immunity was raised, but the false imprisonment claim failed because of insufficiency of evidence. *Id.* at 317, 435 S.E.2d at 778-79. In *Alt* this Court held that because the plaintiff's tort claim

would have compensated him if successful, the plaintiff had an "adequate state remedy." *Id.*

In the case *sub judice*, the merits of plaintiff's negligence claim are barred from consideration in our courts because of defendant's sovereign immunity defense. Accordingly, plaintiff does not have an "adequate state remedy" and may assert a constitutional claim. *Corum* at 782, 413 S.E.2d at 289. In reaching this conclusion, I find our Court's discussion in *Sanders v. State Personnel Commission* instructive:

> Defendants argue that if an adequate state remedy exists, then a constitutional claim is barred by sovereign immunity. This Court has, however, previously rejected precisely this contention: "[O]ur Supreme Court in *Corum* never links sovereign immunity and causes of action under the North Carolina Constitution in the manner defendants presume." *McClennahan v. N.C. Sch. of the Arts*, 177 N.C. App. 806, 808, 177 N.C. App. 806, 630 S.E.2d 197, 199 (2006), *disc. review denied*, 361 N.C. 220, 642 S.E.2d 443 (2007). As *McClennahan* holds, the defense of sovereign immunity is distinct from a defense asserting that a specific constitutional cause of action is barred by the existence of other adequate state remedies.

Sanders v. State Pers. Comm'n, 183 N.C. App. 15, 17, 644 S.E.2d 10, 12 (2007). Here, plaintiff asserts a separate and distinct cause of action based on the following sections of the North Carolina State Constitution: Article I, Section 15; Article I, Section 19; and Article IX, Section 1. Article I, Sections 15 and 19 are part of the Declaration of Rights, which are rights intended to protect citizens from those who wield the power of the State. *See Corum* at 783, 413 S.E.2d at 290. Section 15 protects the "right to the privilege of education," and Section 19 protects the right to "life, liberty, or property," as well as the right to "equal protection of the laws." N.C. Const. art. I, § 15; N.C. Const. art. I, § 19. Article IX, Section 1 states that "education shall forever be encouraged." N.C. Const. art. IX, § 1.

In *Corum*, our Supreme Court stated "[t]he very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State." *Corum* at 783, 413 S.E.2d at 290. Given this purpose, a plaintiff must not be barred by the defense of sovereign immunity from asserting a common law claim *and also prevented* from asserting an alternative Constitutional

claim. *See Sanders* at 17, 644 S.E.2d at 12 ("In sum, sovereign immunity is not available as a defense to a claim brought directly under the state constitution."). A claim pursued under state law that does not have the possibility of succeeding on its own merits as a result of government immunity cannot be deemed "adequate." *See Corum* at 785-86, 413 S.E.2d at 291 ("The doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights."). Moreover, "when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail." *Id.* at 786, 413 S.E.2d at 292.

Therefore, I respectfully dissent, as I would hold plaintiff's negligence claim is not an "adequate state remedy" and I would affirm the trial court's denial of defendant's motion for summary judgment as to plaintiff's constitutional claims.

DEXTER LOWERY, PLAINTIFF-APPELLEE v. W. DAVID CAMPBELL D/B/A CAMPBELL INTERIOR SYSTEMS AND CISCO OF FLORENCE AND AUTO-OWNERS INSURANCE COMPANY, DEFENDANT-APPELLANTS

No. COA06-1164

(Filed 4 September 2007)

1. Declaratory Judgments— subject matter jurisdiction— intended third-party beneficiary of workers' compensation coverage contract

The trial court did not err in a declaratory judgment action by denying defendant's N.C.G.S. § 1A-1, Rule 60 motion for relief from judgment arising out of an alleged contractual agreement to provide workers' compensation coverage, based on alleged lack of subject matter jurisdiction, because: (1) in North Carolina, a person may bring an action to enforce a contract to which he is not a party if he demonstrates that the contracting party intended primarily and directly to benefit him or the class of persons to which he belongs; (2) plaintiff was an intended third-party beneficiary of defendant's insurance contract with Campbell; (3) while plaintiff's declaratory judgment action involves workers' compensation insurance, the Industrial Commission already heard plaintiff's claim against his employer and awarded benefits

accordingly; (4) the only matters at issue in the declaratory judgment action were plaintiff's rights and privileges as an intended third-party beneficiary of the alleged contract between his employer, Locklear, and Campbell; and (5) although the Declaratory Judgment Act is not applicable to claims under the Workers' Compensation Act, it is applicable to construction of insurance contracts and in determining the extent of coverage.

2. Judgments— denial of motion to set aside entry of default—good cause

The trial court did not abuse its discretion in a declaratory judgment action by denying defendant's motion to set aside entry of default under N.C.G.S. § 1A-1, Rule 55(d) on the ground that defendant showed good cause, because: (1) when served with plaintiff's declaratory judgment action, defendant forwarded the papers to a South Carolina attorney with no instructions or request to take action; (2) no follow up investigation took place by defendant's insurance adjuster until after plaintiff had obtained the entry of default; and (3) it cannot be concluded that the trial court's denial of defendant's motion was manifestly unsupported by reason.

3. Judgments— default judgment—sufficiency of evidence

The trial court did not abuse its discretion in a declaratory judgment action by granting plaintiff's motion for default judgment even though defendant contends there was insufficient evidence to warrant plaintiff's recovery, because: (1) a number of facts were established by defendant's failure to answer the complaint including that Campbell contracted with Locklear to provide workers' compensation coverage for Locklear's employees, that Campbell contracted with defendant to provide the coverage, and plaintiff was entitled to payment of the Commission's 3 May 2000 opinion and award; and (2) the opinion and award provided a basis to justify the amount of the compensation sought by plaintiff.

Judge STROUD dissenting.

Appeal by defendant from order entered 7 June 2006 by Judge Jack A. Thompson in Robeson County Superior Court. Heard in the Court of Appeals 28 March 2007.

Musselwhite, Musselwhite, Musselwhite & Branch, by W. Edward Musselwhite, Jr., for plaintiff-appellee.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Lee B. Johnson, for defendant-appellant.

CALABRIA, Judge.

Auto-Owners Insurance Company ("defendant") appeals from 7 June 2006 order entered in Robeson County Superior Court denying its Rule 60 motion for relief from judgment. We affirm.

On 13 April 1998, Dexter Lowery ("plaintiff") was injured in a work-related accident in Myrtle Beach, South Carolina, while traveling in a vehicle from a job site. Plaintiff was employed by Donnie Locklear Drywall Services ("Locklear"), a subcontractor for W. David Campbell d/b/a Campbell Interior Systems and Cisco of Florence ("Campbell"), a South Carolina business. Defendant was traveling in another vehicle in front of the vehicle in which plaintiff was a passenger. Plaintiff subsequently filed a workers' compensation claim in North Carolina, Locklear's home state. In August of 2000, defendant, the workers' compensation carrier for Campbell, learned that a potential claim existed against Campbell for injuries plaintiff suffered in the accident. In December of that year, defendant denied plaintiff's claim, citing the expiration of the two-year statute of limitations for workers' compensation claims that North Carolina and South Carolina share.

The North Carolina Industrial Commission ("Industrial Commission") heard plaintiff's claim on 17 January 2001 and the deputy commissioner filed an opinion and award in favor of plaintiff and against Locklear. Neither defendant nor Campbell was a party to that action.

Plaintiff then filed a declaratory judgment action against defendant in Robeson County Superior Court on 9 September 2002. The complaint alleged that Campbell and Locklear had a contractual agreement where Campbell was to provide workers' compensation coverage to Locklear's employees. Defendant was served with the complaint on 19 September 2002 but failed to file an answer or any other pleading.

Plaintiff moved for entry of default and default judgment on 10 December 2002, and entry of default was entered on that date. Defendant then retained North Carolina counsel and moved to set aside the entry of default. The trial court denied defendant's

motion on 13 October 2003. The court heard plaintiff's motion for default judgment on 21 February 2005 and granted the motion on 8 November 2005.

Defendant then filed a Rule 60 motion for relief from judgment on 27 December 2005 and the trial court denied that motion in a 7 June 2006 order. From that order defendant appeals.

[1] On appeal, defendant initially argues the trial court erred in denying defendant's motion for relief from judgment on the ground that the judgment is void for lack of subject matter jurisdiction. Specifically, defendant argues the plaintiff lacked standing to seek a declaratory judgment on the insurance agreement between Campbell and Locklear and that the Industrial Commission has exclusive jurisdiction over this matter. We disagree.

North Carolina's declaratory judgment statute states as follows:

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

N.C. Gen. Stat. § 1-253 (2005). "Any person interested under a deed, will, written contract or other writings constituting a contract . . . may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder." N.C. Gen. Stat. § 1-254 (2005). We have previously recognized that, "in North Carolina, a person may bring an action to enforce a contract to which he is not a party, if he demonstrates that the contracting parties intended primarily and directly to benefit him or the class of persons to which he belongs." *DeMent v. Nationwide Mut. Ins. Co.*, 142 N.C. App. 598, 604, 544 S.E.2d 797, 801 (2001) (citation omitted). We determine that plaintiff was an intended third-party beneficiary of defendant's insurance contract with Campbell and we reject defendant's contention that plaintiff has no standing.

We next consider defendant's argument that the Industrial Commission has exclusive jurisdiction over plaintiff's claim since the claim involves workers' compensation insurance. North Carolina

General Statute § 97-91 (2005) states, "All questions arising under this Article if not settled by agreement of the parties interested therein, with the approval of the Commission, shall be determined by the Commission, except as otherwise herein provided." "By statute the Industrial Commission is vested with jurisdiction over 'all questions arising under' the Workers' Compensation Act." *N.C. Chiropractic Assoc. v. Aetna Casualty & Surety Co.*, 89 N.C. App. 1, 4, 365 S.E.2d 312, 314 (1988) (quoting N.C. Gen. Stat. § 97-91 (1988)).

While plaintiff's declaratory judgment action involves workers' compensation insurance, we reject appellant's contention because at the time plaintiff initiated the declaratory action, the Industrial Commission already heard plaintiff's claim against his employer and awarded benefits accordingly. The only matters at issue in the declaratory action were plaintiff's rights and privileges as an intended third party beneficiary of the alleged contract between his employer, Locklear, and Campbell.

This Court previously has stated that "[a]lthough [the Declaratory Judgment Act] is not applicable to claims under the Workmen's Compensation Act, it is applicable to construction of insurance contracts and in determining the extent of coverage." *Insurance Co. v. Curry*, 28 N.C. App. 286, 289, 221 S.E.2d 75, 78 (1976) (citing *Cox v. Transportation Co.*, 259 N.C. 38, 129 S.E.2d 589 (1963); *Insurance Co. v. Simmons, Inc.*, 258 N.C. 69, 128 S.E.2d 19 (1962)). "The [Workers' Compensation Act] does not take away common law rights that are unrelated to the employer-employee relationship." *N.C. Chiropractic Assoc.*, 89 N.C. App. at 6, 365 S.E.2d at 315 (citation omitted). By initiating the declaratory judgment action, plaintiff merely sought a determination as to his rights as a third-party beneficiary under the alleged contract between Locklear and Campbell. Because this contract is distinct from the employer-employee relationship, the superior court retained subject matter jurisdiction over plaintiff's claim.

The dissent cites *N.C. Ins. Guar. Ass'n v. International Paper Co.* as authority for the conclusion that plaintiff's declaratory action does, in fact, arise under the purview of the Workers' Compensation Act and thus resides within the exclusive jurisdiction of the Industrial Commission. In the cited case, the issue was "whether the trial court had subject matter jurisdiction to interpret the scope of the [North Carolina Insurance Guaranty] Association's statutory responsibilities under the 1992 amendments [to the Workers' Compensation Act]."

N.C. Ins. Guar. Ass'n v. International Paper Co., 152 N.C. App. 224, 226, 569 S.E.2d 285, 286 (2002). However, the concern in that case was the Industrial Commission's ability to interpret its own statute and amendments. This is not the issue in the case *sub judice*, where we are concerned with the scope of the Industrial Commission's jurisdiction as it relates to matters ancillary to previously considered claims.

[2] Defendant next argues the trial court erred in denying defendant's motion to set aside entry of default on the ground that defendant showed good cause to set aside entry of default. North Carolina General Statute § 1A-1, Rule 55(d) (2005) allows a trial court to set aside entry of default for "good cause shown" pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b) (2005). Rule 60(b) allows the trial court to set aside default in certain instances, including where "mistake, inadvertence, surprise, or excusable neglect" is shown or the judgment is void. *Id.* Defendant correctly notes that "default judgments are disfavored by the law." *N.C.N.B. v. McKee*, 63 N.C. App. 58, 61, 303 S.E.2d 842, 844 (1983).

However, "A trial court's decision to grant or deny a motion to set aside an entry of default and default judgment is discretionary. Absent an abuse of that discretion, this Court will not reverse the trial court's ruling." *Basnight Constr. Co. v. Peters & White Constr. Co.*, 169 N.C. App. 619, 621, 610 S.E.2d 469, 470 (2005) (internal citation omitted).

In denying defendant's motion to set aside entry of default, the trial court entered nine findings of fact in support of its decision. Those findings stated that defendant, when served with plaintiff's declaratory judgment action, forwarded the "papers" to a South Carolina attorney with no instructions or request to take action. The court further determined that no follow up investigation took place by defendant's insurance adjuster until after plaintiff had obtained the entry of default. These findings have not been assigned as error and are thus deemed binding on appeal. *In re S.N.H. & L.J.H.*, 177 N.C. App. 82, 83, 627 S.E.2d 510, 512 (2006).

On these facts, the trial court concluded that defendant was "not diligent nor was it attentive to its responsibilities and duties," and thus failed to demonstrate good cause to set aside the entry of default. We have previously determined that reversal for abuse of discretion is limited to instances where the appellant can show the judge's decision is "manifestly unsupported by reason." *Clark v.*

Clark, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980). Based on the findings set out in its 13 October 2003 order, we cannot conclude that the trial court's denial of defendant's motion to set aside the entry of default was manifestly unsupported by reason. Accordingly, this assignment of error is overruled.

[3] Defendant lastly argues the trial court erred in granting plaintiff's motion for default judgment on the grounds that the evidence was insufficient to warrant plaintiff's recovery. We disagree.

A trial court's decision to enter a default judgment, like entry of default, is reviewable for abuse of discretion. *Basnight*, 169 N.C. App. at 621, 610 S.E.2d at 470. As such, we only find abuse of discretion where the trial court's judgment is "manifestly unsupported by reason."

North Carolina General Statute § 1A-1, Rule 8(d) (2005) states as follows:

> Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

Id. Because defendant failed to answer plaintiff's complaint, the allegations stated therein are deemed admitted. However, defendant's argument relies on *Baxter v. Jones*, 14 N.C. App. 296, 188 S.E.2d 622 (1972), which states that while the trial court is bound to accept the factual allegations in a complaint where no answer has been filed, it is under no such duty to accept the pleader's conclusions. Defendant here argues the trial court accepted plaintiff's conclusions regarding insurance coverage under the policy at issue. We find defendant's reliance on *Baxter* to be misplaced.

In the case *sub judice*, a number of facts were established by defendant's failure to answer the complaint. Those facts included that Campbell contracted with Locklear to provide workers' compensation coverage for Locklear's employees and that Campbell contracted with defendant to provide this coverage. It also established that plaintiff was entitled to payment of the Commission's 3 May 2000 opinion and award. The court did not accept the plaintiff's contention as to the amount owed under the opinion and award, but considered other evidence, including the award itself, which was incorporated by reference into the complaint. The award sets forth ten findings of fact

and then enters conclusions on those facts. As such, the opinion and award provided a basis to justify the amount of the compensation sought by plaintiff. The judgment of the trial court is affirmed.

Affirmed.

Judge McCULLOUGH concurs.

Judge STROUD dissents with a separate opinion.

STROUD, Judge dissenting.

I conclude that the case *sub judice* was not properly before the Superior Court, Robeson County, as that court lacked subject matter jurisdiction. The proper forum for this case was the North Carolina Industrial Commission ("Industrial Commission").

The North Carolina Worker's Compensation Act, which is codified in the North Carolina General Statutes, Chapter 97, provides that, "All questions arising under this Article if not settled by agreements of the parties interested therein, with the approval of the [Industrial] Commission, shall be determined by the Commission, except as otherwise herein provided." N.C. Gen. Stat. § 97-91 (2005).

> The [Industrial] Commission is specifically vested by statute with jurisdiction to hear "all questions arising under" the Compensation Act. This jurisdiction under the statute ordinarily includes the right and duty to hear and determine questions of fact and law respecting the existence of insurance coverage and liability of the insurance carrier.

Greene v. Spivey, 236 N.C. 435, 445, 73 S.E.2d 488, 495-96 (1952) (internal citations omitted).

In *N.C. Ins. Guar. Ass'n v. Int'l. Paper Co.*, the North Carolina Insurance Guaranty Association ("Association") brought a declaratory judgment action to determine its statutory responsibilities under the amended Insurance Guaranty Association Act and the Worker's Compensation Act. 152 N.C. App. 224, 226, 569 S.E.2d 285, 285, *petition denied by*, 356 N.C. 438, 572 S.E.2d 786 (2002). This Court affirmed the trial court's decision to dismiss the case for lack of subject matter jurisdiction concluding that "the relief sought by the Association would directly impact upon the Industrial Commission's duty . . . ." *Id.*, 152 N.C. App. at 227, 569 S.E.2d at 287. That duty

includes deciding "questions of fact and law regarding the liability of an insurance carrier." *Id.* (internal citation omitted).

In the case *sub judice* plaintiff was injured in a work-related accident and brought an action for a declaratory judgment "for the court to interpret the rights and privileges [p]laintiff has with regard to recovery of the benefits awarded in I.C. No. 915954 from the [d]efendants and from the insurance coverage described herein." The dispositive issue is determining the liability of an insurance carrier, here, Auto-Owners Insurance Company which falls within the jurisdiction of the Industrial Commission. *N.C. Ins. Guar. Ass'n*, 152 N.C. App. at 227, 569 S.E.2d at 287. This claim for relief falls within the jurisdiction of the Industrial Commission as it is a "question arising under" the purview of the Worker's Compensation Act. *See* N.C. Gen. Stat. § 97-91.

Additionally, I note that Campbell could have been joined as a defendant in the case against Donnie Locklear Drywall Services before the Industrial Commission.

> Any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate, issued by a workers' compensation insurance carrier, or a certificate of compliance issued by the Department of Insurance to a self-insured subcontractor, stating that such subcontractor has complied with G.S. 97-93 hereof, shall be liable, irrespective of whether such subcontractor has regularly in service fewer than three employees in the same business within this State, to the same extent as such subcontractor would be if he were subject to the provisions of this Article for the payment of compensation and other benefits under this Article on account of the injury or death of any employee of such subcontractor due to an accident arising out of and in the course of the performance of the work covered by such subcontract.

N.C. Gen. Stat. § 97-19 (2005).

Campbell, as the principal contractor and owner of the insurance policy, could have been a defendant in the original suit heard by the Industrial Commission. Under N.C. Gen. Stat. § 97-19, Campbell, the principal contractor, is liable for the injuries received by plaintiff and thus is a proper party to any suit to recover for injury. *Id.*

Accordingly, I would reverse the trial court order for lack of subject matter jurisdiction.

I respectfully dissent.

RENNIE L. WILKINS, PLAINTIFF v. PERRY SAFRAN AND THE LAW OFFICES OF PERRY R. SAFRAN, P.A., DEFENDANTS

No. COA06-1528

(Filed 4 September 2007)

1. Appeal and Error— appealability—summary judgment order

Although the Court of Appeals was not bound by the trial court's certification that there was no just reason for delay, interlocutory appeals from a summary judgment order in a legal malpractice case were heard to avoid piece-meal litigation and the risk of inconsistent verdicts.

2. Attorneys— withdrawal of representation—not malpractice

Summary judgment was properly granted for defendants on a claim of legal malpractice where the individual defendant suffered a heart attack, lawyers in defendant firm assisting in plaintiff's litigation resigned, defendants moved to withdraw as counsel more than seven weeks prior to the scheduled trial date, and plaintiff settled after attempting to continue or set aside the withdrawal.

3. Attorneys— withdrawal of representation—not a breach of fiduciary duty

The trial court properly granted defendants' motion for summary judgment on plaintiff's claim for breach of fiduciary duty arising from defendants' withdrawal from representation. Defendants asserted a proper basis for withdrawal and did not breach their fiduciary duty.

4. Attorneys— withdrawal of representation—not constructive fraud

The trial court properly granted summary judgment for defendants on plaintiff's claim for constructive fraud arising from defendant lawyers withdrawing from representation of plaintiff.

Plaintiff presented no evidence tending to show defendants sought or gained any personal benefit by withdrawing from representation of plaintiff.

5. Attorneys— withdrawal of representation—no punitive damages

The trial court properly granted summary judgment for defendants on plaintiff's claim for punitive damages arising from defendant lawyers withdrawing their representation of plaintiffs. Plaintiff's evidence does not raise an inference of any of the three aggravating factors necessary to support a claim for punitive damages: defendants moved to withdraw due to ill health and the resignation of the primary associate attorney working on the case, they asserted a proper basis and utilized proper procedures to withdraw, and they are not liable for compensatory damages.

6. Attorneys— withdrawal of representation—no statutory damages

The trial court erred by denying defendants' motion for summary judgment on plaintiff's claim for statutory damages arising from defendant lawyers withdrawing their representation from plaintiff. N.C.G.S. § 84-13 provides double damages if an attorney commits a fraudulent practice, but no claim arises without a showing of actual or constructive fraud, or a fraudulent practice. The trial court here granted summary judgment on the underlying claims.

Appeal by plaintiff and cross-appeal by defendants from order entered 4 August 2006 by Judge Thomas D. Haigwood in Granville County Superior Court. Heard in the Court of Appeals 20 August 2007.

Hayes Hofler, P.A., by R. Hayes Hofler, for plaintiff-appellant/cross-appellee.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Ronald C. Dilthey and Tobias S. Hampson, for defendants-appellees/cross-appellants.

TYSON, Judge.

Rennie L. Wilkins ("plaintiff") appeals from order entered granting Perry Safran's ("defendant") and The Law Offices of Perry R. Safran's (collectively, "defendants") motions for summary judgment against plaintiff's claims for attorney negligence/malpractice, breach

of fiduciary duty, constructive fraud, and punitive damages. Defendants cross-appeal from that portion of the order denying their motion for summary judgment on plaintiff's claim for statutory damages pursuant to N.C. Gen. Stat. § 84-13. We affirm in part, reverse in part, and remand.

I. Background

Defendant is a duly-licensed attorney and counselor at law, and member of the North Carolina State Bar. The Law Offices of Perry R. Safran, P.A., is chartered by the North Carolina Secretary of State, is an active entity, and is an approved professional association by the North Carolina State Bar. Defendants represented plaintiff for over five years regarding a construction lawsuit filed against plaintiff on 21 April 1998.

In February 2003, defendant suffered a heart attack. On 25 April 2003, defendants submitted a written request asking the court to set the original case for trial on 22 September 2003. Following defendant's heart attack and the resignation of some of the lawyers from defendant's staff, defendants filed a motion to withdraw as plaintiff's counsel on 31 July 2003. Defendants' motion asserted plaintiff had been notified of their motion to withdraw and was actively seeking new counsel. Plaintiff denies he was notified. On 1 August 2003, defendants' motion to withdraw as counsel was granted. Defendants served plaintiff with a copy of the order allowing their withdrawal on 4 August 2003.

After defendants withdrew, plaintiff retained other counsel to represent him in the underlying construction lawsuit. On 4 September 2003, plaintiff submitted motions to continue the 22 September 2003 trial date, or, alternatively, to set aside the order allowing defendants' withdrawal. Both motions were initially denied, but the court ordered the motions could be reconsidered on the day of trial.

Prior to the trial date, plaintiff and his new counsel negotiated a settlement of the construction lawsuit. In the settlement, plaintiff agreed to pay $22,500.00 in exchange for a voluntary dismissal of the suit with prejudice. This agreement did not release defendants "from any claims that [plaintiff] ha[d] or may have against [defendants] or to limit in any way any claims that [plaintiff] may have against [defendants]."

On 28 December 2004, plaintiff commenced a legal malpractice action. A partial summary judgment order was entered on 4 August 2006 dismissing plaintiff's claims for: (1) attorney negligence/

malpractice; (2) breach of fiduciary duty; (3) constructive fraud; and (4) punitive damages. The trial court denied defendants' motion for summary judgment in part on plaintiff's claim for statutory damages under N.C. Gen. Stat. § 84-13. Plaintiff appeals and defendants cross-appeal.

II. Issues

Plaintiff argues the trial court erred by allowing defendants' motions for summary judgment in part and dismissing his claims.

On cross-appeal, defendants argue the trial court erred by denying their motion for summary judgment in part on plaintiff's claim for statutory damages under N.C. Gen. Stat. § 84-13.

III. Interlocutory Appeals

[1] Neither party raised or argued to dismiss either appeal as interlocutory. As a preliminary matter, both appeals are interlocutory. An interlocutory appeal arises when an order is entered by the trial court that does not dispose of the entire controversy between the parties. *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 344, 511 S.E.2d 309, 311 (1999). The general rule is that a party is "not entitled to immediately appeal an interlocutory order." *Id.* There are two exceptions to allow an immediate review of an interlocutory ruling: (1) "where the order represents a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal" or (2) "where delaying the appeal will irreparably impair a substantial right of the party." *Id.* (internal quotation omitted). Here, the trial court certified no just reason exists to delay an appeal of the order. Even though this Court is not bound by the trial court's certification, in our discretion we review these interlocutory appeals because there is no just reason for delay and our review will avoid both piece-meal litigation and the risk of inconsistent verdicts. *See First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998) ("[T]he trial court's determination that 'there is no just reason to delay the appeal,' while accorded great deference, cannot bind the appellate courts because 'ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court.' " (Citations omitted)).

IV. Standard of Review

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

> the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.
>
> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist.
>
> Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.

Draughon v. Harnett County Bd. of Educ., 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (quotations omitted), *aff'd*, 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).

V. Plaintiff's Appeal

Plaintiff argues the trial court erred in allowing defendants' motions for summary judgment in part and dismissing his claims against defendants. We disagree.

A. Attorney Negligence/Malpractice

> **[2]** [I]n a professional malpractice case predicated upon a theory of an attorney's negligence, the plaintiff has the burden of proving by the greater weight of the evidence: (1) that the attorney breached the duties owed to his client . . . and that this negligence (2) proximately caused (3) damage to the plaintiff.

Rorrer v. Cooke, 313 N.C. 338, 355, 329 S.E.2d 355, 366 (1985) (citations omitted).

An attorney:

> is answerable in damages for any loss to his client which proximately results from a want of that degree of knowledge and skill ordinarily possessed by others of his profession similarly situated, or from the omission to use reasonable care and diligence, or from the failure to exercise in good faith his best judgment in attending to the litigation committed in his care.

Hodges v. Carter, 239 N.C. 517, 520, 80 S.E.2d 144, 146 (1954).

> A plaintiff in a legal malpractice action must establish that the loss would not have occurred but for the attorney's conduct. A plaintiff must prove: (1) The original claim was valid; (2) It would have resulted in a judgment in his favor; and (3) The judgment would have been collectible. A plaintiff alleging a legal malpractice action must prove a case within a case, meaning a showing of the viability and likelihood of success of the underlying action.

Formyduval v. Britt, 177 N.C. App. 654, 658, 630 S.E.2d 192, 194 (2006) (internal quotations omitted), *aff'd*, 361 N.C. 215, 639 S.E.2d 443 (2007).

Defendant suffered a heart attack in February 2003. Lawyers assisting defendant in plaintiff's litigation resigned in July 2003. On 31 July 2003, defendants moved to withdraw as counsel on the grounds that the associate attorney in charge of the litigation on behalf of plaintiff was now working at a different law firm and defendant's health did not allow his continued representation of plaintiff. The certificate of service attached to this motion certified plaintiff was served by placing a copy addressed to plaintiff in the United States mail on 31 July 2003. The trial court granted defendants' motion to withdraw as counsel on 1 August 2003 and plaintiff was served the order allowing withdrawal on 4 August 2003.

N.C. State Bar Rules of Professional Conduct, Rule 1.16(a) (2007) states that an attorney "*shall* withdraw from the representation of a client if: . . . (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client[.]" (Emphasis supplied). Plaintiff's expert witness stated that defendants' conduct violated the standard of care with regard to the requirement to give reasonable notice to the client and to allow plaintiff sufficient time to employ other counsel. Under the facts at bar, we disagree.

Defendants filed their motion to withdraw more than seven weeks prior to the scheduled trial date. Defendants' motion complied

with the State Bar Rules of Professional Conduct allowing withdrawal due to defendant's ill health. Defendants' motion to withdraw did not breach the duty owed to plaintiff.

Defendants received a binding court order allowing defendants' motion to withdraw. Plaintiff's new counsel properly requested a continuance and challenged the trial court's order granting defendants' motion to withdraw. *See Williams & Michael, P.A. v. Kennamer*, 71 N.C. App. 215, 217, 321 S.E.2d 514, 516 (1984) ("Where an attorney has given his client no prior notice of an intent to withdraw, the trial judge has no discretion. The Court must grant the party affected a reasonable continuance or deny the attorney's motion for withdrawal."); *Smith v. Bryant*, 264 N.C. 208, 141 S.E.2d 303 (1965) (New trial granted when trial judge did not continue the defendant's case for a reasonable time after attorney refused to represent the defendant.).

Although plaintiff's motions to continue or to set aside defendants' withdrawal were initially denied, the trial court allowed both motions to be reconsidered on the day of trial. Plaintiff and his new counsel settled the claims against plaintiff prior to the scheduled trial date. Summary judgment was properly granted for defendants on plaintiff's claim of attorney negligence/malpractice. This assignment of error is overruled.

B. Breach of Fiduciary Duty

[3] "Breach of fiduciary duty is a species of negligence or professional malpractice." *Heath v. Craighill, Rendleman, Ingle & Blythe, P.A.*, 97 N.C. App. 236, 244, 388 S.E.2d 178, 183 (citing *Childers v. Hayes*, 77 N.C. App. 792, 795, 336 S.E.2d 146, 148 (1985), *disc. rev. denied*, 316 N.C. 375, 342 S.E.2d 892 (1986)), *disc. rev. denied*, 327 N.C. 428, 395 S.E.2d 678 (1990). Because defendants asserted a proper basis and moved to withdraw, defendants' conduct did not breach their fiduciary duty owed to plaintiff. The trial court properly granted defendants' motion for summary judgment on plaintiff's breach of fiduciary duty claim. This assignment of error is overruled.

C. Constructive Fraud

[4] A *prima facie* showing of constructive fraud requires plaintiff to prove "that they and defendants were in a 'relation of trust and confidence . . . [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.' " *Barger v. McCoy*

Hillard & Parks, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) (quoting *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950)). The "relationship of attorney and client creates such a relationship of trust and confidence." *Fox v. Wilson*, 85 N.C. App. 292, 299, 354 S.E.2d 737, 742 (1987) (citations omitted). Plaintiff's evidence must prove defendants sought to benefit themselves or to take advantage of the confidential relationship. *Barger*, 346 N.C. at 666, 488 S.E.2d at 224; *NationsBank v. Parker*, 140 N.C. App. 106, 114, 535 S.E.2d 597, 602 (2000).

Plaintiff presented no evidence tending to show defendants sought or gained any personal benefit by withdrawing from representation of plaintiff. In the absence of such a showing, the trial court properly granted summary judgment for defendants on plaintiff's claim of constructive fraud. This assignment of error is overruled.

D. Punitive Damages

[5] "Punitive damages may be awarded, in an appropriate case . . . to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts." N.C. Gen. Stat. § 1D-1 (2005); *see Rhyne v. K-Mart Corp.*, 358 N.C. 160, 167, 594 S.E.2d 1, 7 (2004) ("Chapter 1D reinforces the common-law purpose behind punitive damages by providing that they are to be awarded to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts." (Quotation omitted)).

"[T]he claimant must prove that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: (1) fraud; (2) malice; or (3) willful or wanton conduct." N.C. Gen. Stat. § 1D-15(a) (2005). The aggravating factors must be "averred with particularity" and proved by clear and convincing evidence. N.C. Gen. Stat. § 1A-1, Rule 9(k) (2005); N.C. Gen. Stat. § 1D-15(b) (2005); *see Burgess v. Busby*, 142 N.C. App. 393, 410, 544 S.E.2d 4, 13 (2001) (Order reversed when aggravating factor was sufficiently alleged in the complaint to support a claim for punitive damages).

Viewed in the light most favorable to plaintiff, defendants' evidence tends to show they moved to withdraw from representation of plaintiff due to ill health and the resignation of the primary associate attorney working on plaintiff's case from the firm. Defendants

asserted a proper basis and utilized proper procedures mandated by the Rules of Professional Conduct and the Rules for Superior Court Practice to move to withdraw. Defendants are not liable for any compensatory damages based on their proper withdrawal. Plaintiff's evidence fails to raise an inference of the existence of any of the three aggravating factors necessary to support a claim for punitive damages. N.C. Gen. Stat. § 1D-15(a). The trial court properly granted summary judgment on plaintiff's claim for punitive damages. This assignment of error is overruled.

VI. Defendants' Appeal

[6] Defendants argue on cross-appeal that the trial court erred by denying their motion for summary judgment in part on the plaintiff's claims for statutory damages under N.C. Gen. Stat. § 84-13. We agree.

N.C. Gen. Stat. § 84-13 (2005) provides, "[i]f any attorney commits any fraudulent practice, he shall be liable in an action to the party injured, and on the verdict passing against him, judgment shall be given for the plaintiff to recover double damages."

In *Jordan v. Crew*, this Court held that if a plaintiff fails to state a viable claim for fraud, constructive fraud, or any "fraudulent practice," no derivative claim for double damages arises under N.C. Gen. Stat. § 84-13. 125 N.C. App. 712, 720, 482 S.E.2d 735, 739, *disc. rev. denied*, 346 N.C. 279, 487 S.E.2d 548 (1997). We have held the trial court properly granted summary judgment for defendants on plaintiff's breach of fiduciary duty and constructive fraud claims. Without a *prima facie* showing of actual or constructive fraud or any "fraudulent practice," no claim for double damages arises under N.C. Gen. Stat. § 84-13. *Id.* The trial court erred in denying defendants' motion for summary judgment on plaintiff's claim for statutory damages under N.C. Gen. Stat. § 84-13. We reverse that portion of the trial court's order and remand for entry of summary judgment for defendants.

VII. Conclusion

The trial court properly granted defendants' motions for summary judgment on plaintiff's claims for: (1) attorney negligence/malpractice; (2) breach of fiduciary duty; (3) constructive fraud; and (4) punitive damages. Viewed in the light most favorable to plaintiff, no genuine issues of material fact exist on those claims. That portion of the trial court's order is affirmed.

Once the underlying claims for breach of fiduciary duty and constructive fraud claims were properly dismissed, plaintiff could not establish the statutory requirements for a claim for double damages pursuant to N.C. Gen. Stat. § 84-13. The trial court erred in denying defendants' motion for summary judgment in part. That portion of the trial court's order is reversed. This case is remanded for entry of summary judgment for defendants on plaintiff's statutory damages claim. *Id.*

Affirmed in Part, Reversed in Part, and Remanded.

Chief Judge MARTIN and Judge McCULLOUGH concur.

BOBBY BRITT, EMPLOYEE, PLAINTIFF v. GATOR WOOD, INC., EMPLOYER, FIREMAN'S FUND INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA06-1398

(Filed 4 September 2007)

1. Workers' Compensation— disability—date established—sufficiency of evidence

The evidence before the Industrial Commission in a workers' compensation case was sufficient to support a finding of total disability as of June 1 where there was medical evidence that established total disability as of 17 June, and testimony from plaintiff permitting the inference that his condition on 1 June was physically the same.

2. Workers' Compensation— disability—economic downturn

The Industrial Commission's award of temporary total disability in a workers' compensation case was upheld where defendants contended that the loss of wage earning capacity was due to an economic downturn. Plaintiff here presented medical evidence showing an impairment of his earning capacity, and the burden shifted to defendants to show that there were suitable jobs that plaintiff could obtain.

3. Workers' Compensation— disability—medical proof

A workers' compensation disability award was remanded for further findings where plaintiff did not present medical evidence

that he was incapable of work in any employment during the relevant period. A Form 60 does not give rise to a presumption of continuing disability. However, the absence of medical proof of disability does not preclude proof of disability under one of the other tests.

4. Workers' Compensation— disability—evidence

A workers' compensation award of temporary partial disability was upheld where plaintiff presented evidence that he obtained employment at lower wages, there was agreement among the doctors that he had permanent restrictions on the type of work he could do, and defendants presented no evidence of how he could have obtained employment at higher earnings (although they challenged the sincerity of his job search and argued about his background).

Appeal by defendants from opinion and award entered 16 June 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 May 2007.

Robert A. Lauver for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Jeffrey A. Doyle and Dana C. Moody, for defendants-appellants.

GEER, Judge.

Defendants Gator Wood, Inc. and Fireman's Fund Insurance Company appeal from an opinion and award of the North Carolina Industrial Commission awarding disability and medical compensation to plaintiff Bobby Britt. Because the Commission's findings of fact are supported by competent evidence with respect to the award of temporary total disability compensation for the period of 1 June 2002 through 16 June 2002 and for temporary partial disability after 6 February 2003, we uphold the awards for those time periods. With respect, however, to the award of temporary total disability compensation for the period of 13 January 2003 through 7 February 2003, we must remand for further factual findings under *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993).

Facts

Plaintiff was hired in April 1999 by defendant-employer as a timber buyer. In this position, plaintiff scouted properties, walked the land to demarcate areas for logging, measured trees, negotiated

prices, and performed title searches. Because defendant-employer had lost a major contract, plaintiff was notified in April 2002 that he would be laid off, with his last day of work being 31 May 2002.

On 1 May 2002, plaintiff sustained an admittedly compensable injury by accident while working on a tract where defendant-employer was conducting logging operations. Plaintiff stepped on a log, lost his footing, and fell in an awkward, twisting manner. He landed hard with his right knee directly striking the log. Despite the injury and even though the knee ached, plaintiff continued to work. He did not seek immediate medical treatment, as he hoped the pain would resolve itself.

After a week had passed, during which the swelling and pain in the injured knee continued, plaintiff saw Dr. Edward F. Hill. Dr. Hill diagnosed plaintiff's condition as a mild knee strain. Over the following weeks, the pain in plaintiff's knee became progressively worse, such that, by 31 May 2002, he was physically incapable of performing the regular duties of his job as a timber buyer. Plaintiff testified: "[T]he pain was just getting increasingly worse. It was harder to walk. Crawling was not an option. The more time on the leg, the more pain and the swelling."

On 5 June 2002, plaintiff returned to Dr. Hill with continued knee pain and was referred to Dr. Scott Hannum, an orthopedist. After seeing plaintiff on 17 June 2002, Dr. Hannum ordered an MRI. The MRI suggested that plaintiff had a torn medial meniscus. On 10 July 2002, Dr. Hannum wrote plaintiff out of work, and a month later, on 13 August 2002, plaintiff underwent recommended knee surgery. Following the surgery, defendants accepted the compensability of the injury in a Form 60, but specified that disability did not begin until the date of the surgery.

Plaintiff continued to have follow-up visits with Dr. Hannum, and on 2 December 2002, Dr. Hannum concluded that plaintiff had reached maximum medical improvement. He assigned a 7% permanent partial disability rating to plaintiff's right knee and released plaintiff to work without restrictions. In his deposition, Dr. Hannum stated that plaintiff could have returned to his previous occupation as a timber buyer had there been a position available, but acknowledged that such work would have given plaintiff a "hard time" and that plaintiff would need to be especially cautious with respect to his knee. According to Dr. Hannum, even after recovery, plaintiff's knee

injury placed him at risk of developing post-traumatic arthritis and of requiring further knee surgery in the future.

Plaintiff obtained opinions from two additional orthopedists—Dr. Gilbert Whitmer and Dr. Kevin Speer—regarding his disability rating. Both Dr. Whitmer and Dr. Speer assigned a 12% permanent partial disability rating to plaintiff's right knee. They recommended that plaintiff's activities be restricted, including no lifting or carrying over 30 pounds and no excessive squatting, kneeling, crawling, and stair or ladder climbing. Dr. Hannum ultimately agreed that the disability ratings and activity restrictions of the other two orthopedists were "reasonable."

Plaintiff remained out of work from 1 June 2002 through 6 February 2003. On 7 February 2003, plaintiff obtained employment in a different line of work and at lower wages than he had previously earned as a timber buyer.

When the parties were unable to reach an agreement regarding the extent of the benefits to which plaintiff was entitled, plaintiff requested a hearing before the Industrial Commission. Deputy Commissioner J. Brad Donovan entered an opinion and award on 6 June 2005 that awarded plaintiff temporary total disability compensation for the period 17 June 2002 through 12 January 2003 and permanent partial disability compensation for an additional 24 weeks.

Plaintiff appealed to the Full Commission, which modified the deputy commissioner's decision in an opinion and award filed on 16 June 2006. The Commission determined that plaintiff was entitled to: (1) temporary total disability beginning on 1 June 2002 and continuing through 7 February 2003; (2) temporary partial disability beginning on 7 February 2003 and continuing for the remainder of 300 weeks from the date of injury; and (3) compensation for "medical expenses incurred or to be incurred as a result of the compensable injury as may be required to provide relief, effect a cure, or lessen the period of disability," including compensation to address any post-traumatic arthritis that plaintiff might develop or any future knee surgery that he might require. Defendants timely appealed to this Court.

Discussion

Our review of a decision of the Industrial Commission "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the con-

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

Defendants do not dispute the award of benefits for the period 17 June 2002 through 12 January 2003. Defendants contend, however, that the Commission erred in awarding (1) temporary total disability benefits for the periods 1 June 2002 through 16 June 2002 and 13 January 2003 through 7 February 2003; and (2) temporary partial disability benefits beginning 7 February 2003.[1]

"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). In order to support a conclusion of compensable disability, the Commission must find:

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). There are four methods by which a plaintiff may prove disability:

> (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 ob-

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1. Defendants report in their brief that they have paid plaintiff temporary total disability benefits from 17 June 2002 through 12 January 2003.

> tained other employment at a wage less than that earned prior to the injury.

Russell, 108 N.C. App. at 765, 425 S.E.2d at 457 (internal citations omitted).

[1] With respect to the period of 1 June 2002 through 16 June 2002, defendants first contend that there was no competent evidence of plaintiff's disability. Defendants do not, however, dispute that plaintiff was totally disabled due to his compensable accident as of 17 June 2002, the date he was first examined by Dr. Hannum. Following the MRI, "the results of which suggested a torn medial meniscus," Dr. Hannum wrote plaintiff out of work due to his knee condition. The evidence from Dr. Hannum meets the requirements of the first method of proof set forth in *Russell*.

As for the two weeks before plaintiff's visit with Dr. Hannum, defendants contend that since plaintiff had not yet been written out of work or assigned any work restrictions, he has not proven that he was disabled. The Commission could, however, reasonably draw the inference that plaintiff's condition on 1 June 2002 was the same as his condition a mere two weeks later on 17 June 2002—the date by which defendants agree plaintiff had become totally disabled.

On 1 June 2002, plaintiff was suffering from the torn medial meniscus resulting from his fall on 1 May 2002, and he testified to his steadily progressing pain. That condition had simply not yet been diagnosed. By 31 May 2002—several weeks after the accident—plaintiff's condition had gotten "increasingly worse" such that "[i]t was harder to walk" and "[t]he more time on the leg, the more pain and the swelling." *See Perkins v. Broughton Hosp.*, 71 N.C. App. 275, 279, 321 S.E.2d 495, 497 (1984) ("The ordinary person knows, without having to consult a medical expert, when it is necessary to lie down and rest because his or her own body is tired, exhausted, or in pain, and the law has no inhibition against testimony to that effect. The credibility and weight of plaintiff's testimony was for the Commission to decide, not us.").

In short, the Commission had before it medical evidence that established, under the first prong of *Russell*, that plaintiff was totally disabled as of 17 June 2002, as well as plaintiff's testimony permitting the inference that plaintiff's condition as of 1 June 2002 was physically the same as on 17 June 2002. This combination of evidence is sufficient to support the Commission's finding of total temporary disability as of 1 June 2002.

[2] Defendants, however, alternatively argue that because plaintiff was laid off on 31 May 2002, "the evidence of record shows that [p]laintiff's loss of wage earning capacity . . . was not the result of his injury by accident but instead was due to an economic downturn." Defendants have focused on the wrong issue. While the immediate cause of the loss of plaintiff's wages as of 1 June 2002 may have been the lay-off, that fact does not preclude a finding of disability. As *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 437, 342 S.E.2d 798, 805 (1986) explained, "an injured employee's earning capacity" is determined "by the employee's own ability to compete in the labor market." Thus, the fact that plaintiff was laid off does not preclude a finding of total disability if, because of plaintiff's injury, he was incapable of obtaining a job in the competitive labor market.

A plaintiff meets the burden of proving that incapacity by offering evidence consistent with one of the methods of proof set forth in *Russell*. Because plaintiff presented medical evidence showing an impairment of his earning capacity under the first prong of *Russell*, the burden shifted to defendants to show that there were suitable jobs that plaintiff was capable of obtaining during the first two weeks in June 2002. *Burwell v. Winn-Dixie Raleigh, Inc.*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994) ("If the claimant presents substantial evidence that he is incapable of earning wages, the employer has the burden of producing evidence to rebut the claimant's evidence. This requires the employer to 'come forward with evidence to show not only that suitable jobs are available, *but also that the plaintiff is capable of getting one*, taking into account both physical and vocational limitations.' " (quoting *Kennedy v. Duke Univ. Med. Ctr.*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990))). As defendants have made no attempt to demonstrate that they met their burden, we uphold the Commission's award of temporary total disability compensation for the period of 1 June 2002 to 16 June 2002.

[3] With respect to the period of 13 January 2003 to 7 February 2003, defendants assert that plaintiff failed to prove total disability because Dr. Hannum released plaintiff to return to work without restrictions in December 2002. In response, plaintiff contends that he was entitled to a presumption of ongoing disability despite having received a doctor's release to work.

A presumption of disability only applies, however, when (1) there has been an executed Form 21 or Form 26, or (2) there has been a prior disability award from the Industrial Commission. *Clark v. Wal-*

Mart, 360 N.C. 41, 44, 619 S.E.2d 491, 493 (2005). Neither of these conditions is satisfied in this case. A Form 60 does not give rise to a presumption of continuing disability. *Id.* at 44-45, 619 S.E.2d at 493-94. As such, plaintiff was not relieved of his burden of proving disability for the period of 13 January 2003 to 7 February 2003 under one of the *Russell* methods.

Plaintiff has not met the requirements of the first method of proof under *Russell* since he presented no medical evidence that he was incapable of work *in any employment* during the period of 13 January 2003 to 7 February 2003. In fact, Dr. Hannum released plaintiff to return to work in December 2002. Thus, the Commission's finding of total disability for the period of 13 January 2003 to 7 February 2003 cannot be premised upon the first *Russell* method.

The absence of medical proof of total disability, however, "does not preclude a finding of disability under one of the other three [*Russell*] tests." *White v. Weyerhaeuser Co.*, 167 N.C. App. 658, 672, 606 S.E.2d 389, 399 (2005). Where, as here, the findings show that "plaintiff, although limited in the work he can perform, is capable of performing some work," and there is evidence that plaintiff may have satisfied *Russell* methods two or three, the Commission must make findings addressing those two methods of proof. *Workman v. Rutherford Elec. Membership Corp.*, 170 N.C. App. 481, 490, 613 S.E.2d 243, 250 (2005). We must, therefore, remand to the Commission to make findings regarding plaintiff's disability, under *Russell* methods two and three, for the period of 13 January 2003 to 7 February 2003. *See id.* at 491, 613 S.E.2d at 250 ("We remand to the Commission to make findings of fact, based on competent evidence, to determine whether plaintiff is totally disabled.").

[4] Finally, defendants assert that plaintiff failed to establish the existence of ongoing disability following his return to work on 7 February 2003 sufficient to entitle him to an award of temporary partial disability benefits. When, however, a worker presents evidence that satisfies the fourth prong of *Russell*—"that he has obtained other employment at a wage less than that earned prior to the injury," 108 N.C. App. at 765, 425 S.E.2d at 457—"[s]uch evidence, while not dispositive of disability, shifts the burden to the employer to establish that the employee could have obtained higher earnings." *Larramore v. Richardson Sports, Ltd. Partners*, 141 N.C. App. 250, 259-60, 540 S.E.2d 768, 773 (2000), *aff'd per curiam*, 353 N.C. 520, 546 S.E.2d 87 (2001).

Here, plaintiff presented evidence that he obtained other employment on 7 February 2003 at lower wages than he had previously earned, as well as evidence showing agreement among all the doctors that he had permanent restrictions on the type of work he could perform. Consequently, the burden shifted to defendants to show that plaintiff could obtain a higher-paying job.

Although defendants challenge the sincerity of plaintiff's job search and make various arguments regarding plaintiff's educational and vocational background, they presented no evidence to the Commission to show that plaintiff could, in fact, have obtained employment at higher earnings. *See Bond v. Foster Masonry, Inc.*, 139 N.C. App. 123, 131, 532 S.E.2d 583, 588 (2000) ("Competent evidence indicates that plaintiff at bar met his burden under [*Russell* method (4)] . . . by showing his earnings through his employment with Direct Transport, Inc. These earnings, likewise, were competent evidence of plaintiff's earning capacity. Defendant presented no evidence that plaintiff could obtain employment earning more than this amount.").

Accordingly, the Commission could properly determine that plaintiff's reduced wages were a manifestation of his disability and, further, that this diminished earning capacity entitled him to temporary partial disability benefits. *See Whitfield v. Lab. Corp. of Am.*, 158 N.C. App. 341, 354, 581 S.E.2d 778, 787 (2003) ("Commission's finding that plaintiff had demonstrated a reduced wage earning capacity under the fourth option . . . was a proper basis for the Commission to award plaintiff partial disability benefits."). The award of temporary partial disability is, therefore, also upheld.

Affirmed in part; remanded in part.

Judges HUNTER and ELMORE concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., PLAINTIFF v. T-N-T CARPORTS, INC., VENANCIO TORRES AND DEBORAH TORRES, DEFENDANTS

No. COA06-1123

(Filed 4 September 2007)

1. Workers' Compensation— premiums—calculation

In an action to determine the calculation of workers' compensation insurance premiums, the trial court did not err by concluding that the work of T-N-T subcontractors and their helpers is "Labor Only" under the contract. The use of trailers and heavy-duty pickup trucks to transport materials to job site locations does not transform T-N-T subcontractors from "Labor Only" employees to "Mobile Equipment with Operators" employees for purposes of calculating the policy premiums.

2. Appeal and Error— preservation of issue—failure to assign error

Defendants' failure to assign error resulted in waiving the right to appellate review of an argument that the trial court should have calculated workers' compensation premiums on a different basis.

Appeal by defendants from judgment entered 16 February 2006 by Judge Robert H. Hobgood in Superior Court, Wake County. Heard in the Court of Appeals 21 March 2007.

Young Moore and Henderson, P.A. by Walter E. Brock, Jr. for plaintiff-appellee.

Eric P. Handler, P.C. by Eric P. Handler for defendant-appellants.

STROUD, Judge.

This is a breach of contract action involving an insurance contract for workers' compensation and employers' liability insurance. Plaintiff North Carolina Farm Bureau Mutual Insurance Company, Inc. insured defendant T-N-T Carports, Inc. ("T-N-T") pursuant to two workers' compensation insurance policies. Plaintiff issued each policy with an initial premium determined by the estimated annual payroll of covered T-N-T employees. This initial premium was subject to an audit from which a final premium would be calculated. De-

fendants Venancio and Deborah Torres personally guaranteed "payment of all premiums."

The dispositive issue before this Court is whether T-N-T subcontractors and their helpers, who transport and assemble steel carports and garages, are properly classified as "Labor Only" employees or "Mobile Equipment with Operators" employees for the purpose of calculating T-N-T's final workers' compensation insurance policy premium. We hold that the trial court did not err by concluding that the work of T-N-T's subcontractors is "Labor Only." Accordingly, we affirm the trial court order entered 16 February 2006 by Judge Robert H. Hobgood in Superior Court, Wake County awarding plaintiff $260,046.50 in additional premium payments under both policies.

I. Background

Defendant T-N-T manufactures unassembled steel carports and garages at its plant in Mount Airy, North Carolina. Between March 2001 and September 2002, defendant T-N-T sold carports and garages to buyers in approximately twenty states. Defendant T-N-T contracted with uninsured subcontractors to transport the unassembled steel materials from Mount Airy to job sites and to assemble the carports and garages on arrival. Defendant T-N-T's subcontractors and the subcontractors' helpers used heavy-duty pickup trucks to transport the unassembled steel and used various hand tools to assemble the carports and garages.

Plaintiff issued two workers' compensation insurance policies to defendant T-N-T. Policy One was in effect from 16 March 2001 to 16 March 2002. Policy Two was in effect from 16 March 2002 to 6 September 2002. Plaintiff issued each policy with an initial premium determined by the estimated annual payroll of covered T-N-T employees. For each policy, this initial premium was subject to audit from which an actual premium would be calculated. The estimated annual payroll of T-N-T subcontractors and their helpers was not included when plaintiff calculated the initial premium for either policy. However, N.C. Gen. Stat. § 97-19 requires North Carolina employers to provide workers' compensation benefits to the employees of uninsured subcontractors. N.C. Gen. Stat. § 97-19 (2005).

Because defendant T-N-T did not require, or provide proof of, workers' compensation insurance coverage from its subcontractors, plaintiff included the annual payroll of defendant T-N-T's subcontrac-

tors and their helpers when calculating the final premiums for both policies. This inclusion caused the final premium to exceed the estimated premium. Plaintiff had calculated the initial estimated premium for Policy One to be $17,005.00, but plaintiff's complaint alleged that the audit revealed that the actual premium for covered T-N-T employees, including T-N-T subcontractors and their helpers, should have been $135,462.00. Plaintiff also calculated the estimated premium for Policy Two to be $11,912.50, but plaintiff's complaint alleged that the audit revealed that the actual premium for covered T-N-T employees should have been $66,138.00. Based on these audits, plaintiff sought additional premiums in the amount of $172,682.50 plus interest.

Defendants do not dispute that the payroll of T-N-T subcontractors and their helpers must be included when calculating the policy premiums. Defendants dispute plaintiff's classification of these employees as "Labor Only" employees for purposes of determining the amount of additional premiums due. Defendants argue that T-N-T subcontractors and their helpers should be classified as "Mobile Equipment with Operators" employees. Defendants refused to pay the additional premiums demanded by plaintiff as a result of the policy audits.

On 9 February 2004, plaintiff filed suit in Superior Court, Wake County alleging breach of contract. In a consent pretrial order, plaintiff and defendants stipulated that

> 10. T-N-T contends, and the Court held in its order granting partial summary judgment entered herein on August 3, 2005,[1] that the Uninsured Subcontractor payments are adjusted under Subcontractor Table 2 of the Basic Manual according to the category for 'Mobile Equipment with Operators (such as but not limited to earth movers, graders, bulldozers or log skitters)', [sic] which applies not less than 33 1/3% of the subcontractor payments to the applicable rate per $100.00. Should that category be deemed to apply, Farm Bureau would in fact apply precisely 33 1/3% of the subcontractor payments to the rate to calculate the final premium.

1. A motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60 for relief from the 3 August 2005 order granting partial summary judgment was heard prior to trial, and on 19 January 2006, the trial court entered an order granting the Rule 60 motion and setting aside the 3 August 2005 order in its entirety. Neither party has assigned error to the trial court's ruling on the Rule 60 motion. Thus, stipulation number 10 stated only T-N-T's contention, not a ruling of the court for purposes of the trial.

> 11. Farm Bureau contends that the Uninsured Subcontractor payments are adjusted under Subcontractor Table 2 of the Basic Manual according to the category for "Labor only," which applies not less than 90% of the subcontractor payments to the applicable rate per $100.00. Should that category be deemed to apply, Farm Bureau would in fact apply precisely 90% to the subcontractor payments to the rate to calculate the final premium.

This matter was heard by bench trial before Superior Court Judge Robert H. Hobgood on 9 January 2006.

Plaintiff tendered Sue Taylor ("Taylor"), director of the North Carolina Rate Bureau Workers' Compensation Department ("Rate Bureau"), as an expert witness at trial. Taylor explained how the Rate Bureau classifies employees and how the Rate Bureau would apply the Basic Manual for Workers Compensation and Employers Liability Insurance ("Basic Manual") to the disputed policies.

The Basic Manual contains insurance rates and classification plans adopted by the North Carolina Rate Bureau and approved by the Commissioner of Insurance. N.C. Gen. Stat. § 58-36-100(k) and (o) (2005). N.C. Gen. Stat. § 58-36-100(k) and (o) provide that all workers' compensation insurance carriers must comply with the Basic Manual. *Id.* The Basic Manual states that "[f]or each subcontractor not providing . . . evidence of workers compensation insurance, additional premium must be charged on the contractor's policy for the uninsured subcontractor's employees according to Subcontractor Table 1 and 2" contained therein. Basic Manual for Workers Compensation and Employers Liability Insurance, Rule 2(H)(2) (2001).

Subcontractor Table 1 notes that

> [i]f the contractor has not furnished evidence of workers compensation insurance and . . . [d]oes not furnish complete payroll records, but documentation of a specific job discloses that a definite amount of the subcontract price represents payroll, . . . [t]hen to calculate the additional premium . . . [u]se the payroll amount indicated by the documentation as the payroll, subject to the minimums in Subcontractor Table 2.

Basic Manual, Subcontractor Table 1. Subcontractor Table 2 provides that "[i]f the job involves . . . [l]abor only, . . . [t]hen the minimum to calculate [the] additional premium is . . . [n]ot less than 90% of the subcontract price." Basic Manual, Subcontractor Table 2 (emphasis added). Subcontractor Table 2 further provides that "[i]f the job

involves . . . [m]obile equipment with operators (such as but not limited to earth movers, graders, bulldozers, or log skidders) . . . [t]hen the minimum to calculate [the] additional premium is . . . [n]ot less than 33 1/3% of the subcontract price." Basic Manual, Subcontractor Table 2 (emphasis added).

Based on the job description of T-N-T subcontractors and their helpers, Taylor testified that the uninsured subcontractors "should be labor only." Taylor further testified that, because the erection and installation of carports and garages required only the use of hand tools and not "mobile equipment . . . such as earth movers, graders, bulldozers, or log skidders," the majority of each subcontract price was attributable to labor. Taylor added that the mere use of motor vehicles to transport equipment and materials to job sites does not remove the subcontractors' job from the "Labor Only" category.

Defendants called a T-N-T subcontractor and subcontractor's helper to testify at trial. These witnesses explained that they used heavy-duty pickup trucks, such as Ford 250 or Chevrolet 3500 pickup trucks, to pull trailers carrying up to ten carports at a time. The trailers are designed specifically for hauling carports and garages.

Judge Hobgood entered judgment on 16 February 2006, finding as follows:

> 19. A typical job contracted by the uninsured contractors involved transporting steel materials manufactured by T-N-T from Mount Airy, North Carolina, to a buyer's location and then erecting the carport or garage at that location. The transportation was done using trailers, which held steel materials at least 21 feet long and carried materials for multiple carports or garages at once, pulled by DOT-registered, heavy-duty pick-up trucks . . . The erection of the carports and garages was done using hand tools provided by the uninsured subcontractors.
>
> 20. Samples of the business auto insurance policy form and general liability insurance policy form used by Farm Bureau each contain a definition of the term "mobile equipment," which definition expressly excludes "motor vehicles" and a definition of the term "motor vehicle" which expressly excludes "mobile equipment."
>
> 21. The workers compensation insurance policies issued to T-N-T by Farm Bureau contain no terms defining "mobile equipment with operators" except the parenthetical phrase "(including

> but not limited to earth movers, graders, bulldozers or log skidders . . .).” Instead, the Basic Manual contains the rules for additional premium calculation for uninsured subcontractors, including Subcontractor Table 2 containing the terms in dispute, and is part of the uniform classification plan and rules that were filed by the North Carolina Rate Bureau with the North Carolina Department of Insurance, approved by the Department of Insurance, and required to be followed by all North Carolina workers compensation insurers.

Based upon these findings, Judge Hobgood concluded:

> 5. The installation of carports and garages by the uninsured subcontractors of T-N-T is not a job that involves “Mobile Equipment with Operators.” Therefore, the job of uninsured subcontractors, who are paid for the installation of carports and garages, most appropriately falls into the category of “Labor only”. Under the category of “Labor only”, 90% of the subcontractor payments are subject to application of the rate for the additional premium due.
>
> 6. For the “Labor only” category, Farm Bureau applies precisely 90% of the subcontract payment to the applicable rate, no more. The parties stipulated that if the 90% rule applies then the additional premium due for the policy period March 16, 2001 to March 16, 2002, is $150,516.00. Therefore, that sum is the additional premium due for that policy period.
>
> 7. The parties have stipulated that if the 90% rule applies, then the additional premium due for the policy period March 16, 2002 to September 6, 2002, is $109,530.50. Therefore, that sum is the additional premium due for that policy period.

Accordingly, Judge Hobgood ordered defendants to pay plaintiff $260,046.50 in additional premiums. Defendants appeal, arguing that Judge Hobgood erred by concluding that the work of T-N-T subcontractors and their employees was “Labor Only.”

II. “Labor Only” vs. “Mobile Equipment with Operators”

[1] Defendants argue that Judge Hobgood erred by concluding that the work of T-N-T subcontractors and their employees was “Labor Only.” In support of their argument, defendants assert that the trial court’s conclusion is illogical because the trial court’s findings reveal that installation of carports and garages is only part of the subcontractors’ job. We disagree.

"The standard of review on appeal from a judgment entered after a non-jury trial is 'whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *Friday v. United Dominion Realty Tr., Inc.*, 155 N.C. App. 671, 674, 575 S.E.2d 532, 534 (2003) (internal citation omitted). In a non-jury trial setting, "the court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975).

Here the trial court found that T-N-T subcontractors and their helpers transport materials on trailers pulled by heavy-duty pickup trucks. The trial court further found that when referring to "Mobile Equipment with Operators," both policies expressly state that mobile equipment is equipment "such as but not limited to earth movers, graders, bulldozers or log skidders." These "mobile equipment" construction vehicles are inherently different from the trailers and heavy-duty pickup trucks used by T-N-T subcontractors and their helpers. Such construction vehicles are designed principally for use off public roads, generally travel on crawler threads, and are maintained to provide mobility to permanently mounted construction equipment. The heavy-duty pickup trucks and trailers used by T-N-T subcontractors and their helpers are designed to travel on public roads and to transport the unassembled steel materials.

We hold that the use of trailers and heavy-duty pickup trucks to transport materials to job site locations does not transform T-N-T subcontractors from "Labor Only" employees to "Mobile Equipment with Operators" employees for purposes of calculating defendant T-N-T's final workers' compensation insurance policy premiums. This holding is consistent with the testimony of North Carolina Rate Bureau, Workers Compensation Department Director Sue Taylor, as discussed above.

For the reasons stated above, the trial court did not err by concluding that the work of T-N-T subcontractors and their helpers is "Labor Only." This assignment of error is overruled.

III. "Vehicle Rule"

[2] Alternatively, defendants argue that the trial court should have calculated the additional premiums based on a "Vehicle Rule" classification, by which 33 1/3% of the subcontract price is used to deter-

mine additional premiums. However, defendants failed to assign error to Judge Hobgood's fourth conclusion of law which was: "The parties stipulated that either the Basic Manual category for 'Mobile Equipment with Operators (such as but not limited to earth movers, graders, bulldozers or log skidders' or the Basic Manual category for 'Labor only' applied to the T-N-T uninsured installers." "[S]tipulations are judicial admissions and are therefore binding in every sense, preventing the party who agreed to the stipulation from introducing evidence to dispute it . . . ." *Thomas v. Poole*, 54 N.C. App. 239, 241, 282 S.E.2d 515, 517 (1981), *cert. denied*, 304 N.C. 733, 287 S.E.2d 902 (1982) (internal citation omitted). Thus because defendants did not assign error to this conclusion, that either the "Mobile Equipment with Operators" or the "Labor Only" categories applied, defendants' rights to review of the conclusion on appeal is deemed waived. N.C.R. App. P., Rule 10(a) (2005).

IV. Conclusion

We hold that the use of trailers and heavy-duty pickup trucks to transport materials to job site locations does not transform T-N-T subcontractors from "Labor Only" employees to "Mobile Equipment with Operators" employees for purposes of calculating defendant T-N-T's final workers' compensation insurance policy premiums. Accordingly, we affirm the trial court order entered 16 February 2006 by Judge Robert H. Hobgood in Superior Court, Wake County awarding plaintiff $260,046.50 in additional premium payments under both policies.

AFFIRMED.

Judges McCULLOUGH and CALABRIA concur.

WISEMAN MORTUARY, INC., Petitioner v. VALERIE J. BURRELL and HAZELENE W. BURRELL, Respondents

No. COA06-926

(Filed 4 September 2007)

1. Divorce— Missouri decree—service of notice

In an action to determine who should have possession of the deceased's body, the trial court did not err by concluding that a Missouri divorce decree was valid. The findings which Hazelene

Burrell contends should have been categorized as conclusions did not involve the exercise of judgment or the application of legal principles; the findings were supported by competent evidence and were conclusive, regardless of contradictory evidence. As to the evidence challenging her receipt of service in the Missouri divorce action, the trial judge in a bench trial has the duty to pass upon the credibility of the witnesses.

2. Trials— dismissal of counterclaims—erroneous order vacated

A portion of an order addressing the dismissal of respondents' claims was vacated where the order stated that respondents had voluntarily dismissed their claims, but the transcript confirmed that they had dismissed only their claims against petitioner.

Appeal by respondent-appellant from judgment entered 3 April 2006 by Judge John W. Dickson in Cumberland County District Court. Heard in the Court of Appeals 10 April 2007.

Mitchell Brewer Richardson, by Ronnie M. Mitchell, for respondent-appellant.

Cheshire, Parker, Schneider, Bryan & Vitale, by Jonathan McGirt, for respondent-appellee.

ELMORE, Judge.

John Edward Burrell (John) died on 24 July 2005 in Durham. His death certificate states that he was married to Hazelene Williams Burrell (Hazelene) at the time of his death. Hazelene arranged for a burial at the Sandhills Vet Cemetery in Spring Lake. She contracted with Wiseman Mortuary, Inc. (Wiseman Mortuary) to provide funeral services, which included embalming, transportation to the funeral home, and a viewing. Hazelene also contracted to purchase a 20-gauge Bronze Tallanwide casket and a Wilbert concrete graveliner. After Hazelene contracted with Wiseman Mortuary, but before John Burrell's funeral, Valerie J. Burrell (Valerie) came forward claiming to be John's legal wife. She asked that John's body be returned to Georgia for burial.

Wiseman Mortuary filed a petition for declaratory judgment and issuance of a summons to determine which of the two respondents, Hazelene or Valerie, should have possession of John's body. Valerie

answered, counterclaimed, and cross-claimed, asserting that she was the surviving spouse and legal widow of John Burrell. Hazelene then answered, requesting that the court dismiss the petition for failure to state a claim upon which relief can be granted. She also moved to dismiss Valerie's cross-claims for the same reason. She continued to assert that she, not Valerie, was John's legal widow.

John and Hazelene were married in South Carolina on 15 January 1954 and had eleven children. According to Hazelene, they lived together in North Carolina until John departed pursuant to military orders. On 12 November 1969, John filed for divorce from Hazelene when he was living in Missouri, but Hazelene claimed that she never signed the receipt acknowledging that she received the summons, despite the presence of her signature on that receipt. She alleged that John did not obtain a valid divorce from her, and that even though "she suspected and became aware that John E. Burell [sic]. . . was consorting with and was involved with other women, [he] continued to represent himself to Hazlene [sic] Burrell as being her husband."

It appears that John next married Pearline Jones, who is not a party to this action, on 27 March 1970. He divorced her on 3 November 1989. On 5 November 1989, John then married Valerie in Atlanta, Georgia. He left Valerie in August, 2000, and moved back to North Carolina, where he resumed cohabitation with Hazelene at her home in Fayetteville. John and Valerie did not divorce before his death.

The trial court issued its final judgment and order on 3 April 2006. It made the following relevant findings of fact:

8. On or about November 12, 1969 John E. Burrell and Hazelene Williams were purportedly divorced in Jackson County, Missouri.

* * *

11. This Court received into evidence . . . the records of the divorce proceedings in Jackson County, Missouri between John E. Burrell and Hazelene Burrell.

12. The divorce decree entered by the Court in Jackson County, Missouri specifically finds that the defendant was, "lawfully summoned by registered mail, registered return receipt."

13. The Missouri record also contains a copy of a receipt marked "deliver to addressee only" bearing the purported signature

of Hazelene Burrell and showing a delivery date of October 11, 1969.

14. The records [of the divorce proceedings] contained in Respondent's Exhibit V-6 do not contradict the findings contained in the Missouri divorce decree.

15. Both Respondents announced in open court that they voluntarily dismissed their claims.

The trial court made nine conclusions of law, including:

2. Respondents' claims, as raised by their pleadings, should be dismissed.

* * *

5. The divorce record from Jackson County, Missouri, contains recitals of jurisdiction and service, and those facts are deemed to import absolute verity unless contradicted by other parts of the record.

6. The record of the divorce of John E. Burrell and Hazelene Burrell from Jackson County . . . does not contain contradicting findings sufficient to overcome the presumption of its validity.

7. The divorce decree entered in Jackson County, Missouri is entitled to full faith and credit in the State of North Carolina.

8. At the time of his death, John E. Burrell was legally married to Valerie James Burrell.

The court then declared Valerie to be John's lawful widow and surviving spouse, dismissed Valerie and Hazelene's claims, and divided the costs equally between the two women. Hazelene appealed the judgment and order.

[1] Hazelene first argues that it was error for the trial court to enforce the Missouri divorce decree because the Missouri court lacked jurisdiction to enter the divorce decree. Hazelene avers that she did not receive proper service, and as a result, the "fundamental standards of due process were not satisfied to obtain jurisdiction over" her because she did not have the minimum contacts with Missouri required by *International Shoe* and *Worldwide Volkswagen*. She also claims that the trial court did not make the findings and conclusions of law required by N.C. Gen. Stat. § 1A-1, Rule 52, arguing

that the trial court instead made findings of fact that were essentially conclusions of law and not ultimate facts.

"The standard by which we review the findings is whether any competent evidence exists in the record to support them." *Hollerbach v. Hollerbach*, 90 N.C. App. 384, 387, 368 S.E.2d 413, 415 (1988). Findings of fact and conclusions of law "allow meaningful review by the appellate courts." *O'Neill v. Southern Nat. Bank*, 40 N.C. App. 227, 231, 252 S.E.2d 231, 234 (1979). "Findings of fact are conclusive if supported by competent evidence, irrespective of evidence to the contrary." *Oliver v. Bynum*, 163 N.C. App. 166, 169, 592 S.E.2d 707, 710 (2004) (citation omitted).

We first address Hazelene's concern that the trial court erroneously "made 'findings' which were effectively conclusions of law." N.C. Gen. Stat. § 1A-1, Rule 52 requires that a court, when trying a matter without a jury, must "find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C. Gen. Stat. § 1A-1, Rule 52 (2005). "A 'conclusion of law' is a statement of the law arising on the specific facts of a case which determines the issues between the parties." *In re Everette*, 133 N.C. App. 84, 85, 514 S.E.2d 523, 525 (1999). " '[I]f [a] finding of fact is essentially a conclusion of law . . . it will be treated as a conclusion of law which is reviewable on appeal.' " *In re R.A.H.*, 182 N.C. App. 52, 60, 641 S.E.2d 404, 409 (2007) (citations omitted) (alteration in original).

> We acknowledge that the classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified a conclusion of law.

Everette, 133 N.C. App. at 85, 514 S.E.2d at 525 (citations and quotations omitted).

Hazelene only argues that findings of fact Nos. 13 and 14 are improperly categorized as findings of fact. However, we cannot agree that these findings should be conclusions of law. We have had an opportunity to review the documents addressed by findings of fact Nos. 13 and 14 and it is apparent that no "exercise of judgment" or "application of legal principles" is necessary to make the statements to which Hazelene objects. The receipt of service is plainly marked "deliver to addressee only," shows a delivery date of 11 October 1969,

and bears a signature that reads, "Hazelene Burrell." These markings do not contradict the Missouri divorce decree.

Hazelene next argues that the district court "failed to apply logical reasoning from the evidentiary facts to make a finding to determine that the Missouri judgment was adequately supported by competent evidence." She reasons that the trial court's decision does not take into account contradictory evidence in the record. However, as stated above, findings of fact are conclusive upon appeal so long as they are supported by competent evidence, regardless of the existence of contradictory evidence.

We have reviewed the exhibits submitted for the trial court's review, and we hold that competent evidence does exist to support the findings of fact objected to by Hazelene, save finding of fact No. 15. Hazelene argues that the Missouri divorce decree is invalid because she did not receive proper notice. A sticking point is the recurrent use of "Mazelene" in place of "Hazelene" on the summons and other court documents. However, our Supreme Court has stated, "It is also well established that a name merely misspelled is nevertheless the same name." *Cogdell v. Telegraph Co.*, 135 N.C. 431, 438, 47 S.E. 490, 493 (1904) (citations and quotations omitted). More recently, this Court reasoned:

> Although service of process should correctly state the name of the parties, a mistake in the names is not always a fatal error, and as a general rule a mistake in the given name of a party who is served will not deprive the court of jurisdiction. 62 Am. Jur. 2d Process § 18 (1972). As stated in *Patterson v. Walton*, 119 N.C. 500, 501, 26 S.E. 43 (1896), "Names are to designate persons, and where the identity is certain a variance in the name is immaterial." Also, error or defects in the pleadings not affecting substantial rights are to be disregarded. *Id.* When original process has been served properly and amendments to it are to make process and pleadings consistent, the court will retain jurisdiction. *Fountain v. County of Pitt*, 171 N.C. 113, 87 S.E. 990 (1916).

Jones v. Whitaker, 59 N.C. App. 223, 225-26, 296 S.E.2d 27, 29 (1982). *Jones* distinguished itself from cases in which the proper party was never served, holding that a party does not suffer prejudice from a misspelled name if that party receives service. *Id.* at 226, 296 S.E.2d at 30. Here, it appears that Hazelene did receive service, as evidenced by her signature upon the receipt.

As to the issue of that signature's authenticity, we have held:

> Where acceptance of service is used, there is a rebuttable presumption that service was proper if the return of process bears the defendant's signature and is dated. In order to overcome this presumption, a defendant must produce clear, unequivocal, and convincing evidence of the alleged defect. If supported by such evidence, the findings of the trial court are binding on this Court, although the conclusions of law may be reviewed *de novo*.

Freeman v. Freeman, 155 N.C. App. 603, 607, 573 S.E.2d 708, 711 (2002) (citations omitted). Hazelene asserts that she successfully rebutted the presumption of proper service by producing clear, unequivocal, and convincing evidence that the signature is not hers. We cannot agree.

In *Freeman*, the wife argued that the signature upon the receipt of service was not hers and had been forged by her husband. *Id.* at 607, 573 S.E.2d at 711-12. She successfully rebutted the presumption by presenting testimony by handwriting experts that the signature was not hers. *Id.* In addition, Mrs. Freeman presented evidence that she and her husband continued to live together as a married couple after the purported divorce. *Id.* at 608, 573 S.E.2d at 712. The husband even listed Mrs. Freeman as his wife on an application for disability benefits. *Id.* After reviewing the evidence, "[t]he trial court specifically found defendant's evidence to be 'clear, unequivocal and convincing' that defendant had not been served with process." *Id.*

Hazelene argues that it was impossible for her to have received the summons because she did not live at the address where it was delivered, although she admits to having lived there fifteen years earlier. Although both Hazelene and her sister, Ethel Campbell, testified that Hazelene had moved away from the address in question by the time the summons was signed, it appears that the judge did not find that testimony credible for the reasons stated below. Although a handwriting expert is not required in every case, one might have been helpful here. Valerie submitted photocopies of Hazelene's signature from other documents for our comparison with the signature on the summons; to the untrained eye, they look passably similar.

Valerie also submitted a general warranty deed dated 30 June 1998 that lists "HAZELENE W. BURRELL, unmarried" as the grantee. A deed of trust from the same date lists the grantor as "HAZELENE

W. BURRELL. AN UNMARRIED WOMAN." These documents suggest that Hazelene held herself out to the public as an unmarried woman. They also diminish Hazelene's credibility. Before submitting these documents into evidence, Valerie's counsel asked Hazelene at least five times, in various iterations, whether Hazelene had ever presented herself as being not married to John Burrell. When faced with the documents that clearly contradicted her previous answers, Hazelene later explained that she had listed herself as unmarried for a particular reason: John Burrell had bad credit and the bank would not have given Hazelene the loan if she had included his name on the application. Hazelene's response diminishes her credibility further because it is apparent that this claim of being unmarried was thought out in advance, and not a clerical error or oversight. It is well-settled that in a bench trial, the trial judge "has the duty to pass upon the credibility of the witnesses who testify. He decides what weight shall be given to the testimony and the reasonable inferences to be drawn therefrom." *General Specialties Co. v. Teer Co.*, 41 N.C. App. 273, 275, 254 S.E.2d 658, 660 (1979).

Accordingly, we hold that the trial court did not err by concluding that the Missouri divorce decree was valid. The trial court's findings of fact are supported by competent evidence, and those findings of fact in turn support the conclusions of law.

[2] Finally, Hazelene objects to finding of fact No. 15, which states, "Both Respondents announced in open court that they voluntarily dismissed their claims." She avers that she did not voluntarily dismiss any claims other than her counterclaims, in contradiction with the trial court's finding and corresponding order dismissing her remaining claims. She contends that she dismissed only her claims against Wiseman Mortuary. The transcript confirms that both Hazelene and Valerie dismissed only their claims against Wiseman Mortuary. Therefore, we vacate that portion of the trial court's order that addresses the dismissal of respondents' claims.

Affirmed in part, vacated in part.

Judges McGEE and STEPHENS concur.

STATE OF NORTH CAROLINA v. HENRY DOWD EDWARDS, JR.

No. COA06-1415

(Filed 4 September 2007)

1. Search and Seizure— probable cause for warrant—evidence erroneously suppressed

A trial court order suppressing the evidence recovered during a search was reversed where the court erred by deciding that a magistrate lacked a substantial basis for concluding that probable cause for a warrant did not exist. Under the totality of the circumstances, the affidavit provided the magistrate with probable cause through a common sense determination based on the officer's extensive experience, his long established relationship with the informant, the information provided, and the specificity of the type of drugs observed.

2. Drugs— ex mero motu dismissal of charges—evidence erroneously suppressed

The trial court erred by dismissing ex mero motu narcotics charges which arose from the search of defendant's home where the court had erroneously suppressed the evidence seized from the home. Even if the evidence had been properly suppressed, it is possible for the State to present other evidence; the granting of a motion to suppress does not mandate the pretrial dismissal of the underlying indictments.

Appeal by the State from order entered 11 April 2006 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 August 2007.

Attorney General Roy Cooper, by Assistant Attorney General William B. Crumpler, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellee.

TYSON, Judge.

The State of North Carolina appeals from order entered granting Henry Dowd Edwards, Jr.'s, ("defendant") motion to suppress evidence seized and dismissing the charges against defendant. We reverse and remand.

I. Background

On 14 July 2005, Charlotte-Mecklenburg Police Officer M.F. Warren ("Officer Warren") signed an affidavit, applied for, and was issued a search warrant to search defendant's home. Officer Warren executed the warrant later that day. During the search of defendant's home, Officer Warren found and seized cocaine, oxycodone, and drug paraphernalia.

Defendant was charged with: (1) trafficking in cocaine by possessing more than twenty-eight grams, but less than 200 grams of cocaine; (2) felony possession of oxycodone; (3) possession of drug paraphernalia; and (4) intentionally maintaining a dwelling for the purpose of keeping or selling cocaine.

On 14 March 2006, defendant filed a motion to suppress the evidence seized from his residence. This motion was calendered before the Mecklenburg County Superior Court on 10 April 2006. Defendant asserted the affidavit failed to establish probable cause for the magistrate to issue the search warrant. On 11 April 2006, the trial court granted defendant's motion to suppress the evidence seized and dismissed the indictments *ex mero motu*. The State appeals.

II. Issues

The State argues the trial court erred by: (1) granting his motion to suppress evidence seized pursuant to the search of his home with a search warrant and (2) dismissing the indictments pretrial.

III. Standard of Review

The trial court's findings of fact regarding a motion to suppress are conclusive and binding on appeal if supported by competent evidence. This Court determines if the trial court's findings of fact support its conclusions of law. *State v. McHone*, 158 N.C. App. 117, 120, 580 S.E.2d 80, 83 (2003), *disc. rev. denied*, 362 N.C. 368, 628 S.E.2d 9 (2006); *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001); *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994). "Our review of a trial court's conclusions of law on a motion to suppress is *de novo*." *State v. Chadwick*, 149 N.C. App. 200, 202, 560 S.E.2d 207, 209 (citing *Brooks*, 337 N.C. at 140-41, 446 S.E.2d at 585), *disc. rev. denied*, 355 N.C. 752, 565 S.E.2d 672 (2002).

Specifically, "the standard for a court reviewing the issuance of a search warrant is 'whether there is substantial evidence in the record

supporting the magistrate's decision to issue the warrant.' " *State v. Ledbetter*, 120 N.C. App. 117, 121, 461 S.E.2d 341, 343 (1995) (quoting *Massachusetts v. Upton*, 466 U.S. 727, 728, 80 L. Ed. 2d 721, 724 (1984)). After reviewing the purposes and goals of the Fourth Amendment, the United States Supreme Court adopted a flexible standard in which "the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." *Illinois v. Gates*, 462 U.S. 213, 238-39, 76 L. Ed. 2d 527, 548 (1983) (quoting *Jones v. United States*, 362 U.S. 257, 271, 4 L. Ed. 2d 697 (1960), *overruled on other grounds by United States v. Salvucci*, 448 U.S. 83, 65 L. Ed. 2d 619 (1980)). When reviewing the magistrate's decision to issue a search warrant, the "magistrate's determination of probable cause should be paid great deference[.]" *Id.* at 236, 76 L. Ed. 2d at 547 (citation omitted).

IV. Probable Cause

[1] Section 20 of Article I of the North Carolina Constitution is similar to the Fourth Amendment to the United States Constitution and states that "probable cause [must] exist[] for issuance of a search warrant." *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260 (1984). N.C. Gen Stat. § 15A-244 (2005) governs the contents of the application for a search warrant:

> Each application for a search warrant must be made in writing upon oath or affirmation. All applications must contain:
>
> (1) The name and title of the applicant; and
>
> (2) A statement that there is probable cause to believe that items subject to seizure under G.S. 15A-242 may be found in or upon a designated or described place, vehicle, or person; and
>
> (3) Allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched; and
>
> (4) A request that the court issue a search warrant directing a search for and the seizure of the items in question.

Defendant asserted before the trial court that Officer Warren's affidavit did not "particularly" allege "facts and circumstances establishing probable cause" for the issuance of the search warrant. *Id.*

The United States Supreme Court has adopted a "totality of the circumstances" approach in determining whether probable cause exists in support of the issuance of a search warrant. *Gates*, 462 U.S. at 230, 76 L. Ed. 2d at 543. "To establish probable cause, an affidavit for a search warrant must set forth such facts that a 'reasonably discreet and prudent person would rely upon[.]' " *State v. King*, 92 N.C. App. 75, 77, 373 S.E.2d. 566, 568 (1988) (quoting *Arrington*, 311 N.C. at 636, 319 S.E.2d at 256).

The issuing magistrate must determine whether probable cause exists in order to support issuance of the search warrant. *State v. McKinnon*, 306 N.C. 288, 293, 293 S.E.2d 118, 122 (1982). "The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a *fair probability* that contraband or evidence of a crime will be found in a particular place." *Gates*, 462 U.S. at 238, 76 L. Ed. 2d at 548 (quotations omitted) (emphasis supplied). Probable cause need not be shown by proof beyond a reasonable doubt, but rather whether it is more probable than not that drugs or other contraband will be found at a specifically described location.

Here, the magistrate determined sufficient and reliable information was shown in Officer Warren's affidavit to establish probable cause and that a search warrant should be issued. Reviewing courts should give "great deference" to the issuing "magistrate's determination." *Id.* at 236, 76 L. Ed. 2d at 547.

Officer Warren's affidavit states that he "received information from a *confidential* and *reliable* informant" who had seen hydrocodone inside defendant's home, without a prescription, within the past forty-eight hours. (Emphasis supplied). The trial court concluded Officer Warren's affidavit showed no basis for believing the information was reliable. We disagree.

Officer Warren asserted in his affidavit he had known the informant for nine years, during which time the informant had provided "confidential and reliable" information in the past that had proven to be true through independent investigations. The fact that the word "investigations" was plural implies Officer Warren had used this particular informant on more than one occasion throughout the past nine years. Officer Warren's ongoing relationship with the informant supports the magistrate's determination that the information provided was reliable.

The affidavit also states that the informant was familiar with this drug and its uses, further supporting the inference that the information was reliable. "An officer may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other *matters within the officer's knowledge*." *Id.* at 242, 76 L. Ed. 2d at 550 (citations omitted) (emphasis supplied).

Officer Warren's twenty-four years of prior experience with the police department, including seven years of street level drug interdiction, shows he has attained extensive knowledge regarding drug investigations and the issuance of search warrants. Even though Officer Warren did not spell out in exact detail the connection between the informant and the previous drug investigations, the magistrate could properly infer the confidential informant had provided reliable information to Officer Warren in previous situations. Following *Gates*, Officer Warren supplied sufficiently reliable information in his affidavit through his own extensive experience and his previous knowledge of the informant's reliability throughout their nine year relationship. *Id.*

Defendant's arguments would require the officer's application and affidavit to technically spell out every detail to specifically show probable cause exists. "[A]ffidavits 'are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity . . . have no proper place in this area.' " *Id.* at 235, 76 L. Ed. 2d at 546 (quoting *United States v. Ventresca*, 380 U.S. 102, 108, 13 L. Ed. 2d 684, 689 (1965)). Officer Warren's affidavit was drafted by an experienced police officer during an investigation of a potential drug offender and was sufficient to establish probable cause for the magistrate.

We find under the "totality of the circumstances," the affidavit provided the magistrate with probable cause through a common sense knowledge determination based on the following: (1) Officer Warren's extensive experience; (2) his long established relationship with the informant; (3) the information provided; and (4) the specificity of the type of drugs observed. *Id.* at 230, 76 L. Ed. 2d at 543. The trial court erred in concluding the magistrate did not have a substantial basis in fact for concluding that probable cause existed to issue the search warrant. The trial court's order suppressing the evidence recovered during the search is reversed.

V. Case Dismissal

[2] The State also argues the trial court erred by dismissing the case when no motion to dismiss the indictments was pending or made before the trial court and the case was still in its pretrial stage. We agree.

Defendant asserts the issuance of a search warrant without probable cause so fragrantly violated his constitutional rights that the trial court's dismissal of the case was required to comply with N.C. Gen. Stat. § 15A-954(a). The State argues the trial court *ex mero motu* dismissed the charges because it determined that without the suppressed evidence, the State did not have sufficient evidence to submit this case to a jury.

The standard of review for deciding whether 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." *State v. Wood*, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005) (quoting *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990)). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995) (quoting *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)). The evidence is to be viewed in the light most favorable to the State and "the State is entitled to every reasonable inference to be drawn therefrom." *State v. Gibson*, 342 N.C. 142, 150, 463 S.E.2d 193, 199 (1995) (citing *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)). "Ultimately, the court must decide whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *State v. Ellis*, 168 N.C. App. 651, 657, 608 S.E.2d 803, 807 (2005) (citing *Powell*, 299 N.C. at 99, 261 S.E.2d at 117).

The granting of a motion to suppress does not mandate a pretrial dismissal of the underlying indictments. The district attorney may elect to dismiss or proceed to trial without the suppressed evidence and attempt to establish a *prima facie* case. If so, a defendant may move to dismiss at the close of the State's evidence and renew his motion at the close of all evidence. N.C. Gen. Stat. § 15-173 (2005). We have held the trial court erred by granting defendant's motion to suppress. The issuance of the search warrant did not violate defendant's Fourth Amendment constitutional rights. The trial court's pretrial order to dismiss defendant's charges is reversed.

VI. Conclusion

Probable cause existed to support the issuance of the search warrant. Defendant's constitutional rights were not violated when the police legally and reasonably searched his home pursuant to a valid search warrant and seized illegal drugs and paraphernalia. The search warrant was properly issued and the evidence seized from the execution of the search should not have been suppressed.

Even if this evidence had been properly suppressed, it is possible for the State to present evidence, apart from the poisonous fruits of an illegal search, to survive defendant's motion to dismiss and allow the jury to find the facts. The trial court erred by granting defendant's motion to suppress evidence seized and in dismissing the charges *ex mero motu*. We reverse the trial court's order and remand for further proceedings.

Reversed and Remanded.

Chief Judge MARTIN and Judge McCULLOUGH concur.

STATE AUTO INSURANCE COMPANY AS SUBROGEE OF C. JAMES LELAND BANTZ AND THE ESTATE OF JAMES LELAND BANTZ BY AND THROUGH HIS ADMINISTRATOR THERESA L. BANTZ, PLAINTIFF v. CHRISTIAN EARL BLIND, DEFENDANT

No. COA06-1530

(Filed 4 September 2007)

Wrongful Death— motorcycle accident—not survivorship action

When a single negligent act of the defendant causes a decedent's injuries and those injuries unquestionably result in the decedent's death, the plaintiff's remedy for the decedent's pain and suffering and medical expenses lies only in a wrongful death statute and must be asserted under that statute. Recovery is distributed in accordance with the intestate succession statute and is not subject to claims against the estate; otherwise, the two-year statute of limitations for wrongful death actions could be circumvented.

Appeal by plaintiff from order entered 11 August 2006 by Judge Zoro J. Guice, Jr. in Superior Court, Polk County. Heard in the Court of Appeals 24 May 2007.

Teague Campbell Dennis & Gorham, L.L.P. by Michael D. Moore for plaintiff-appellant.

Robinson Elliott & Smith by Kevin D. Elliott for defendant-appellee.

STROUD, Judge.

Plaintiff State Auto Insurance Co. appeals the trial court order awarding summary judgment to defendant Christian Earl Blind in a negligence action filed pursuant to North Carolina's survivorship statute, N.C. Gen. Stat. § 28A-18-1 (2005). Section 28A-18-1 provides that claims in favor of or against a decedent at the time of his death "shall survive to and against the personal representative or collector of his estate." N.C. Gen. Stat. § 28A-18-1 (2005). In *Alston v. Britthaven, Inc.*, this Court determined that damages arising from a decedent's pain and suffering and medical expenses that are caused by the negligent act of a defendant may be recovered under section 28A-18-1. *Alston v. Britthaven, Inc.*, 177 N.C. App. 330, 628 S.E.2d 824 (2006), *disc. rev. denied*, 361 N.C. 218, 642 S.E.2d 242 (2007). This Court's holding in *Alston* was dependent upon pleadings and evidence which suggested two possible causes of the decedent's death: one cause of death which would be considered a "wrongful act" or "neglect" under North Carolina's wrongful death statute, N.C. Gen. Stat. § 28A-18-2 (2005), and one natural cause of death. *Id.* at 340, 628 S.E.2d at 831. The dispositive question before this Court is whether plaintiff may sustain a negligence action filed pursuant to section 28A-18-1 when the pleadings allege that a single negligent act of defendant caused decedent James Leland Bantz's injuries and those injuries unquestionably resulted in Bantz's death.

On 25 May 2002, defendant collided with Bantz in a motor vehicle accident at an intersection on North Carolina Highway 28 near Franklin in Macon County, North Carolina. At that time, defendant was making a left turn from the northbound lane of Highway 28 in a 1988 Honda and Bantz was driving a Harley-Davidson motorcycle in the southbound lane of Highway 28. On 18 March 2005, plaintiff filed suit in Superior Court, Polk County alleging the following additional facts:

7. That prior to initiating his turn, defendant observed James Bantz approaching on his motorcycle.

8. That James Bantz applied his brakes but was unable to stop his motorcycle before colliding with the vehicle driven by defendant.

9. That prior to collision, James Bantz's motorcycle left a skid mark of 35 feet, 1 inch.

10. That subsequent to the collision, James Bantz was thrown from his motorcycle, coming to rest approximately 36 feet from the point of impact.

11. That as a result of the collision, James Bantz suffered massive trauma to his face and body.

12. That James Bantz was pronounced dead at the scene by emergency personnel. His body was transported to Angel Medical Center in Franklin, North Carolina where he was pronounced dead on arrival.

13. That James Bantz's death was directly and proximately caused by the collision with defendant's vehicle.

Plaintiff further alleged that defendant operated his vehicle in a negligent manner and that defendant's negligence was the "sole and proximate cause of the collision."

Based on these allegations, plaintiff brought two claims. In its first claim, entitled "Wrongful Death Action," plaintiff sought "compensatory damages for wrongful death" pursuant to N.C. Gen. Stat. § 28A-18-2 (2005). In its second claim, entitled "Survival Action," plaintiff sought "recovery at common law for [Bantz's] pain and suffering, as well as medical expenses incurred." Defendant answered, in part, that plaintiff's wrongful death claim was barred by expiration of the two-year statute of limitations set forth in N.C. Gen. Stat. § 1-53(4) (2005).

Plaintiff voluntarily dismissed its claim for wrongful death with prejudice pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a) (2005). Thereafter, defendant moved for summary judgment, alleging that "[p]laintiff filed a wrongful death action after the two year statute of limitations and . . . has forwarded no evidence that would forecast this matter should move forward under any other theory of recovery." Defendant argued that plaintiff's complaint, on its face, shows that

Bantz did not experience compensable "pain and suffering" or incur "medical expenses" because Bantz, who sustained "massive trauma to his face and body," was pronounced dead by emergency medical personnel at the accident scene. Defendant did not submit affidavits or other documentary evidence in support of its motion for summary judgment but based its motion entirely on the allegations in plaintiff's complaint. Similarly, plaintiff presented no evidence and submitted no affidavits at the summary judgment hearing. Plaintiff argued that it properly pled its survivorship claim separately from its claim for the decedent's wrongful death.

Judge Zoro J. Guice, Jr. heard defendant's motion on 17 July 2006 in Superior Court, Polk County. On 11 August 2006, Judge Guice granted defendant's motion. Plaintiff appealed.

Because defendant based his argument solely on the pleadings and submitted no affidavits or documentary evidence in support of his position, defendant's motion is properly classified as a motion for judgment on the pleadings pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c). *See* N.C. Gen. Stat. § 1A-1, Rule 12(c) (2005) (explaining "[i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment"); *In re Quevedo*, 106 N.C. App. 574, 578, 419 S.E.2d 158, 159, *appeal dismissed*, 332 N.C. 483, 424 S.E.2d 397 (1992) ("[A] motion is treated according to its substance and not its label.").

This Court reviews the trial court's award of judgment on the pleadings *de novo*. *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 334, *disc. rev. denied*, 360 N.C. 78, 623 S.E.2d 263 (2005). To prevail on a motion for judgment on the pleadings, the moving party must show that he is entitled to judgment as a matter of law, even when all allegations set forth in the complaint are taken as true. *De Torre v. Shell Oil Co.*, 84 N.C. App. 501, 504, 353 S.E.2d 269, 271 (1987).

N.C. Gen. Stat. § 28A-18-1(a) provides that "[u]pon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as provided in subsection (b) hereof, shall survive to and against the personal representative or collector of his estate." Claims filed pursuant to N.C. Gen. Stat. § 28A-18-1(a) are generally known as "survivorship actions."

N.C. Gen. Stat. § 28A-18-2(a) provides that

> [w]hen the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their personal representatives or collectors, shall be liable to an action for damages.

"Damages recoverable for death by wrongful act include . . . (1) [e]xpenses for care, treatment and hospitalization incident to the injury resulting in death" and "(2) [c]ompensation for pain and suffering of the decedent." N.C. Gen. Stat. § 28A-18-2(b). Claims filed pursuant to N.C. Gen. Stat. § 28A-18-2(a) are generally known as "wrongful death actions."

"[A]ny common law claim which is now encompassed by the wrongful death statute must be asserted under that statute." *Christenbury v. Hedrick*, 32 N.C. App. 708, 712, 234 S.E.2d 3, 5 (1977). This means that when "the elements of damage which [a] plaintiff seeks to recover" are recoverable under N.C. Gen. Stat. § 28A-18-2(b), a wrongful death action is the only action that the plaintiff may sustain to recover those damages. *Id.* (dismissing the plaintiff's common law negligence action after determining that "the elements of damage which [a] plaintiff seeks to recover" are "encompassed by" N.C. Gen. Stat. § 28A-18-2(b)). These "elements of damage" include the pain and suffering of a decedent and medical expenses incurred by a decedent. *Id.* at 703, 234 S.E.2d at 3; N.C. Gen. Stat. § 28A-18-2(b). Here, plaintiff filed a common law negligence action pursuant to North Carolina's survivorship statute, seeking recovery for Bantz's pain and suffering and medical expenses.

This Court has previously considered whether a plaintiff may plead a survivorship claim as an alternative to a wrongful death claim "where (1) the same injuries are the basis for both the survivorship and wrongful death claims and (2) a jury might find the defendant's negligence did not result in the decedent's death but did result in his injuries prior to death." *Alston*, 177 N.C. App. at 333, 628 S.E.2d at 827-28. In *Alston*, the plaintiff's claims for survivorship and wrongful death arose from alleged nursing home neglect, which caused the decedent to suffer multiple bed sores. *Id.* at 331-32, 628 S.E.2d at 826-27. The plaintiff alleged that septicemia resulting from the bed sores caused the decedent's death and sought recovery for the decedent's pain and suffering and medical expenses under both theories.

Id. at 332, 628 S.E.2d at 827. The defendant answered that Alzheimer's disease caused the decedent's death. *Id.*

This Court held that "wrongful death and survivorship claims may be brought as alternative claims for the same negligent acts." *Alston*, 177 N.C. App. at 339, 628 S.E.2d at 831. In so holding, the Court reasoned that the plaintiff could prevail only on its survivorship claim if the jury found that the defendant's negligence caused the decedent's bed sores but that the decedent ultimately died of another cause (Alzheimer's disease). *Id.* Correspondingly, the plaintiff could prevail on the wrongful death claim if the jury found that the defendant's negligence caused both the decedent's pain and suffering and the decedent's death. *Id.*[1] The Court's holding ensured that the plaintiff was not "prevented from even a single recovery" for the decedent's pain and suffering and medical expenses by permitting the plaintiff to recover in survivorship if his wrongful death claim failed. *Id.* at 340, 628 S.E.2d at 831-32.

However, the Court emphasized in *Alston* that

> <u>It is vital to distinguish [*Alston*] from those where no alternate explanation exists as to the cause of death.</u> In such cases, pursuant to the 1969 statutory changes, the survivorship claims included in the wrongful death statute, which are pain and suffering, medical costs, and punitive damages, may be pursued as part of a wrongful death action.

Id. at 340, 628 S.E.2d at 831 (emphasis added); *see also Christenbury*, 32 N.C. App. at 712, 234 S.E.2d at 5 (explaining that "any common law claim which is now encompassed by the wrongful death statute must be asserted under that statute"). Here, the facts alleged by plaintiff,

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1. In so holding, this Court noted that the plaintiff was not entitled to double recovery for a single injury and stated:

> The submission of separate issues . . . does not alone avert the problem of double recovery. The first issue submitted to the jury should be whether the defendant's negligence or wrongful act caused the decedent's death. If the jury answers this question in the affirmative, it can then determine the amount of damages to which plaintiff is entitled for that death, including, where appropriate, those listed in the wrongful death statute for medical costs, pain and suffering, and punitive damages. The pattern jury instructions for wrongful death address each of these damage issues. If the jury answers the first question in the negative, however, only then should it turn to the question of whether the defendant's negligence or wrongful act caused the decedent's pre-death injuries. If it answers this second question in the affirmative, it can then consider the issue of damages for these injuries, and the trial court should instruct the jury accordingly.

Alston, 177 N.C. App. at 340-41, 628 S.E.2d at 832.

when deemed admitted, establish that Bantz died at the accident scene of fatal injuries sustained during the collision. These injuries are the basis for both plaintiff's survivorship and wrongful death claims; thus, plaintiff seeks to recover damages for its "Survival Action," that are identical to damages plaintiff could have recovered in its "Wrongful Death Action," if plaintiff had filed its complaint in a timely manner.

Applying *Christenbury* and *Alston*, we hold that when a single negligent act of the defendant causes a decedent's injuries and those injuries unquestionably result in the decedent's death, the plaintiff's remedy for the decedent's pain and suffering and medical expenses lies only in a wrongful death claim. Such claim is "encompassed by the wrongful death statute" and "must be asserted under that statute." *Christenbury*, 32 N.C. App. at 712, 234 S.E.2d at 5. To hold otherwise would allow plaintiffs to circumvent the two-year statute of limitations for wrongful death actions set forth in N.C. Gen. Stat. § 1-53(4) (2005) by waiting an additional year before filing the same claim, titled as a "survivorship" claim. *See* N.C. Gen. Stat. § 1-52(16) (2005) (establishing a three-year statute of limitations for personal injury claims "[u]nless otherwise provided by statute") (emphasis added).

We recognize that the entity entitled to recover damages awarded in a survivorship action is different from the individuals entitled to recover damages awarded in a wrongful death action. The judgment entered in a survivorship action is an asset of the decedent's estate and is subject to claims against the estate. N.C. Gen. Stat. § 28A-18-1; *In re Estate of Parrish*, 143 N.C. App. 244, 253, 547 S.E.2d 74, 79, *disc. review denied*, 354 N.C. 69, 553 S.E.2d 201 (2001). However, recovery in a wrongful death action is distributed to the decedent's survivors in accordance with North Carolina's intestate succession statute and is not subject to claims against the decedent's estate. N.C. Gen. Stat. § 28A-18-2; *In re Estate of Parrish*, 143 N.C. App. at 253, 547 S.E.2d at 79. This Court has consistently recognized the distinction described above and applied the language of each statute as written by the North Carolina General Assembly. *See Forsyth County v. Barneycastle*, 18 N.C. App. 513, 197 S.E.2d 576, *cert. denied*, 283 N.C. 752, 198 S.E.2d 722 (1973) (reasoning that "items of damage which might conceivably have been set out in a claim for personal injuries prior to death are now includable [sic] in an action for damages for death by wrongful act" and that a creditor of the decedent's estate could not collect its debt from funds recovered in the wrongful death

action). Accordingly, this distinction does not affect our analysis in the case *sub judice*.

For the reasons stated above, the trial court did not err by granting defendant's "Motion for Summary Judgment." Accordingly, the order entered 11 August 2006 in Superior Court, Polk County by Judge Zoro J. Guice, Jr. is affirmed.

AFFIRMED.

Judges McCULLOUGH and BRYANT concur.

CHARLES R. ADAMS, EMPLOYEE, PLAINTIFF v. FRIT CAR, INC., EMPLOYER, SELF-INSURED, DEFENDANT

No. COA06-1267

(Filed 4 September 2007)

1. Workers' Compensation— disability—physical restrictions caused by knee injury

The Industrial Commission did not err in a workers' compensation case by finding that plaintiff worker had failed to establish disability due to his physical restrictions caused by his knee injury, because: (1) plaintiff essentially asks the Court of Appeals to reweigh the evidence on appeal, which is outside its standard of review; and (2) the full Commission's findings of fact are supported by competent evidence, and its conclusions that plaintiff failed to establish disability and that he was terminated for his own misconduct are also supported by its findings.

2. Workers' Compensation— anxiety and depression—causally related to knee injury

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff workers' anxiety and depression are not causally related to his knee injury, because: (1) the full Commission made an unchallenged finding that plaintiff had been getting treatment for anxiety disorder and depression for approximately eight months prior to his injury by accident, and his doctor never causally related her treatment of plaintiff to the September 2000 injury; and (2) the full Commis-

sion found that during his counseling sessions, plaintiff reported that his anxiety and depression were related to the loss of his job and self esteem which was due to his own misconduct.

3. Workers' Compensation— future medical treatment—knee injury

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff is entitled to future medical treatment for his knee injury, because: (1) in light of the depositions of two doctors, the full Commission had sufficient evidence to support its findings of fact and to conclude that there was a substantial likelihood that plaintiff will need additional treatment for his knee in the future regardless of what that treatment might entail; and (2) the Court of Appeals cannot reweigh the evidence.

Appeal by plaintiff and cross-appeal by defendant from Opinion and Award of the North Carolina Industrial Commission entered 22 May 2006. Heard in the Court of Appeals 22 May 2007.

Brumbaugh, Mu & King, P.A., by Nicole D. Wray, for plaintiff-appellant/cross-appellee.

Brooks, Stevens & Pope, P.A., by Matthew P. Blake, Ginny P. Lanier, and James A. Barnes, IV, for defendant-appellee/cross-appellant.

WYNN, Judge.

In general, our review of findings supporting an Opinion and Award of the North Carolina Industrial Commission is limited to determining whether any evidence supports the findings of fact.[1] Here, the plaintiff and the defendant essentially ask us to re-weigh the evidence and determine that the Full Commission erred in its findings and conclusions. Because the standard of review for worker's compensation cases prohibits the re-weighing of evidence on appeal, we affirm the Opinion and Award.

On 13 September 2000, Plaintiff Charles Adams was working as an employee for Defendant Frit Car, Inc., when he suffered an injury to his right knee. Mr. Adams underwent arthroscopic knee surgery in

1. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999).

December 2000 and did not return to work at Frit Car until February 2001, by which time his doctor had concluded Mr. Adams had reached maximum medical improvement and assigned a ten percent permanent partial disability rating to his knee. However, upon his return to work, Mr. Adams was informed that his employers had discovered numerous problems with his performance prior to his injury, including the failure over an extended period of time to file several safety reports and other documents that were a part of his responsibilities. Frit Car terminated Mr. Adams for this poor job performance, which they contend was unrelated to his knee injury.

Mr. Adams continued to have pain in his knee after he was terminated by Frit Car, and he underwent additional surgery in November 2001, as well as physical therapy through 2002. Mr. Adams further suffered from anxiety and depression, for which he received counseling and therapy for a number of years, but which he contends was controlled by medication prior to his accident, yet more severe afterwards. Mr. Adams remains unemployed since he was terminated by Frit Car in February 2001, despite being cleared by his doctor for sedentary work. Frit Car accepted his initial worker's compensation claim as compensable and paid temporary total disability benefits through 27 March 2002.

An Opinion and Award was filed by a Deputy Commissioner of the Industrial Commission on 17 June 2003, which ordered Frit Car to pay all medical expenses incurred by Mr. Adams as a result of his September 2000 knee injury, but denied his claim for temporary total disability from 15 February 2001 onward and denied his claim for loss of earning capacity. Mr. Adams and Frit Car were also ordered to pay their own respective costs.

Both sides appealed to the Full Commission, which entered an Opinion and Award on 22 May 2006, affirming in part and modifying in part, due to additional evidence received, the Opinion and Award of the Deputy Commissioner. The Full Commission denied Mr. Adams's claim for additional temporary total disability, as it found that Frit Car had already paid for the period he was out of work, namely, up to February 2001 and then from 19 November 2001 until 27 March 2002. The Full Commission also ordered that, if not already paid, Frit Car should pay Mr. Adams permanent partial disability compensation for a period of one hundred weeks for the fifty percent permanent partial disability to his leg. Frit Car was ordered to pay "all of [Mr. Adams's] reasonably required medical treatment resulting from his knee injury of September 13, 2000, including past and future med-

ical treatment, for so long as such treatment is reasonably required to effect a cure, provide relief and/or lessen his disability . . . ." Mr. Adams's attorney was awarded a fee of twenty-five percent of the compensation awarded to Mr. Adams, and Frit Car was ordered to pay costs.

Both Mr. Adams and Frit Car now appeal. Mr. Adams argues that the Full Commission erred when it found that (I) he had failed to establish disability due to his physical restrictions caused by his knee injury, and (II) his anxiety and depression are not causally related to his knee injury; and Frit Car contends that the Full Commission erred when it (III) concluded that Mr. Adams is entitled to future medical treatment for his knee injury.

At the outset, we note that our review of an Opinion and Award of the Full Commission of the North Carolina Industrial Commission is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). In particular, this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999).

Furthermore, if there is any evidence at all, taken in the light most favorable to the non-moving party, the finding of fact stands, even if there is substantial evidence supporting the opposing position, *id.*, and findings may be set aside on appeal only "where there is a complete lack of competent evidence to support them." *Rhodes v. Price Bros., Inc.*, 175 N.C. App. 219, 221, 622 S.E.2d 710, 712 (2005) (quotation omitted). However, we review the Commission's conclusions of law *de novo*. *Griggs v. Eastern Omni Constructors*, 158 N.C. App. 480, 483, 581 S.E.2d 138, 141 (2003).

I.

[1] First, Mr. Adams argues that the Full Commission erred by finding that he had failed to establish disability due to his physical restrictions caused by his knee injury. We disagree.

Under North Carolina General Statute § 97-32, "[i]f an injured employee refuses employment procured for him suitable to his capacity, he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified." N.C. Gen. Stat. § 97-32 (2005). This Court has previously found that such refusal can be either actual or constructive, as through termination of employment due to misconduct or other fault on the part of the employee. *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 233-34, 472 S.E.2d 397, 401 (1996).

Nevertheless, even if the employee is terminated due to misconduct or other fault, the employee will not be automatically barred from receiving disability benefits; instead,

> the test is whether the employee's loss of, or diminution in, wages is attributable to the wrongful act resulting in loss of employment, in which case benefits will be barred, or whether such loss or diminution in earning capacity is due to the employee's work-related disability, in which case the employee will be entitled to benefits for such disability.

Id. at 234, 472 S.E.2d at 401. Thus, we have established a two-pronged approach to such situations:

> [T]he employer must first show that the employee was terminated for misconduct or fault, unrelated to the compensable injury, for which a nondisabled employee would ordinarily have been terminated. If the employer makes such a showing, the employee's misconduct will be deemed to constitute a constructive refusal to perform the work provided and consequent forfeiture of benefits for lost earnings, unless the employee is then able to show that his or her inability to find or hold other employment of any kind, or other employment at a wage comparable to that earned prior to the injury, is due to the work-related disability.

Id.

In its Opinion and Award, the Full Commission made the following finding, challenged by Mr. Adams on appeal:

> 22. Defendant terminated Plaintiff on February 19, 2001, due to his misconduct or fault unrelated to his workers' compensation claim and for which a non-disabled employee would have been terminated. Except for the period from November 19, 2001

> through March 27, 2002, Plaintiff failed to establish that his physical restrictions resulting from his injury prevented him from earning his pre-injury wages in any other employment after Defendant terminated him on February 19, 2001.

The Full Commission also included findings, unchallenged by Mr. Adams and therefore binding on this Court, that Mr. Adams had been cleared for sedentary work by more than one doctor and that he had ongoing problems with alcohol abuse, which "might impact his ability to look for work because of hangovers and blackouts," as well as anxiety, depression, and use of prescription medications. Significantly, Mr. Adams has not challenged the finding which stated that Mr. Adams "admitted that he did not do his job, but blamed it on his ongoing battle with alcohol abuse. Defendant terminated Plaintiff's employment on February 19, 2001, due to his misconduct or fault."

All of these findings were supported by medical testimony and other evidence in the record. Mr. Adams essentially asks us to reweigh the evidence on appeal, which is outside our standard of review. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. We find that the Full Commission's findings of fact are supported by competent evidence, and their conclusions that Mr. Adams failed to establish disability and that he was terminated for his own misconduct are likewise supported by their findings. These assignments of error are accordingly overruled.

II.

[2] Next, Mr. Adams contends that the Full Commission erred by failing to find that his anxiety and depression are causally related to his knee injury. We disagree.

According to the following finding made by the Full Commission, unchallenged by Mr. Adams on appeal:

> 17. Plaintiff has been treated for anxiety disorder and depression since at least the 1990's, but has not been restricted from working as a result of these conditions. Dr. Tara Knott had treated Plaintiff for his anxiety disorder and depression for approximately eight months prior to his injury by accident and continues to treat him. In her deposition testimony, Dr. Knott never causally related her treatment of Plaintiff to the September 2000 injury. She did indicate that Plaintiff alleged that his anxiety and depression were related to the injury, but she never indicated that it was related.

Furthermore, the Full Commission found that during his counseling sessions, Mr. Adams "reported that his anxiety and depression were related to the loss of his job and self esteem," which was due to his own misconduct.

These findings, binding on appeal, support the Full Commission's conclusion that Mr. Adams failed to show that his anxiety disorder and depression are causally related to his compensable injury. This assignment of error is overruled.

III.

[3] Finally, Frit Car argues that the Full Commission erred when it concluded that Mr. Adams is entitled to future medical treatment for his knee injury. We disagree.

After an employee has established a compensable injury under the Workers' Compensation Act, he may seek compensation for additional medical treatment when such treatment "lessens the period of disability, effects a cure or gives relief." *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 541-42, 485 S.E.2d 867, 869 (1997). However, such treatment must be "directly related to the original compensable injury," with the burden on the employer to produce evidence showing the treatment is not directly related to the compensable injury. *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 130, 468 S.E.2d 283, 286, *disc. review denied*, 343 N.C. 513, 472 S.E.2d 18 (1996). Moreover, the Commission must determine that "there is a substantial risk of the necessity of future medical compensation" to order such payment. N.C. Gen. Stat. § 97-25.1 (2005).

Here, the Full Commission made a number of specific findings as to two doctors' testimony that Mr. Adams would likely need additional medical treatment for his knee in the future, and that such treatment was causally related to the 2000 knee injury. Nevertheless, the Full Commission did not find that a total knee replacement would definitely be necessary, or that there is even a "substantial risk" of a need for such surgery. Rather, the Full Commission found that "[a]s a result of his knee injury, [Mr. Adams] will require future medical treatment *including a possible total knee replacement*." (Emphasis added).

In light of the depositions from Drs. Esposito and Miller, the Full Commission had sufficient evidence to support their findings of fact and to conclude that there is a substantial likelihood that Mr. Adams will need additional treatment for his knee in the future, regardless of

what that treatment might entail. We refuse to reweigh the evidence before us and therefore find that the Full Commission made the requisite findings as to "substantial risk of the necessity of future medical compensation." These assignments of error are overruled.

Affirmed.

Judges HUNTER and CALABRIA concur.

STATE OF NORTH CAROLINA v. EDDIE CAPLE

No. COA04-860-2

(Filed 4 September 2007)

Sentencing— aggravating factor—*Blakely* error—prejudice

The trial court committed *Blakely* error in a robbery with a firearm case by finding as a nonstatutory aggravating factor that defendant's actions endangered multiple persons and victims continue to have emotional distress, and the case is remanded for resentencing because: (1) the facts for the aggravating factor were neither presented to the jury nor proved beyond a reasonable doubt; and (2) harmless error review revealed that the evidence was not so overwhelming or uncontroverted that any rational factfinder would have found this aggravating factor beyond a reasonable doubt.

Judge STEELMAN dissenting.

Appeal by defendant from judgment entered 7 January 2004 by Judge B. Craig Ellis in Superior Court, Robeson County. Heard in the Court of Appeals 15 February 2005, and opinion filed 2 August 2005, finding sentencing error and remanding for resentencing. Remanded to this Court by order of the North Carolina Supreme Court for reconsideration in light of *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006).

Attorney General Roy Cooper, by Special Deputy Attorney General Victoria L. Voight, for the State.

Paul F. Herzog for defendant-appellant.

WYNN, Judge.

This case is before us on remand from the North Carolina Supreme Court to reexamine Defendant Eddie Caple's sentencing in light of *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, 127 S. Ct. 2281, 167 L. Ed. 2d 1114 (2007). During Defendant's sentencing hearing, the trial court found as an aggravating factor that "Defendant's actions endangered multiple persons and victims continue to have emotional distress." Because we find that the evidence was not so overwhelming or uncontroverted that any rational factfinder would have found this aggravating factor beyond a reasonable doubt, we remand for resentencing.

At trial, the State offered evidence that tended to show that at approximately 10:00 a.m. on 30 December 2002, Defendant forced an employee at Maxton Town Hall to reenter the customer service area where citizens paid their bills and to give him the money in a drawer behind the counter. Defendant used a gun during the commission of this robbery, firing a shot which lodged in the wall near the door of the men's bathroom, and took approximately $255 from the office. Four Town Hall employees were immediately affected by the events of the robbery.

One of these employees, Leslie Nicole Jones, testified that at the time of the investigation into the robbery, she knew the identity of Defendant but did not tell police because she was scared for herself and her four children. Ms. Jones also stated that she was so traumatized by the robbery that she was unable to return to her job with the Town of Maxton and that she continued to be afraid of Defendant, although he had not made any threats against her. There was also testimony that Ms. Jones had been fired from her job at Town Hall because of poor job performance.

Another employee, Annette Huguley, who was on the second floor of Town Hall at the time of the robbery and thus not directly involved, testified that she has been fearful that it would happen again and that, despite new security cameras and other precautions, employees continue to be afraid. Ms. Huguley said that at least one employee directly affected by the robbery now refuses to work downstairs by herself, and that she has recommended that all the employees get counseling because of the way in which the robbery has impacted them.

After a jury found Defendant guilty of robbery with a firearm, the trial court found a non-statutory aggravating factor that "Defendant's

actions endangered multiple persons and victims continue to have emotional distress." The trial court further found that the aggravating factor outweighed the two mitigating factors and sentenced Defendant in the aggravated range of ninety-five to one hundred twenty-three months' imprisonment. Defendant appealed, arguing that the trial court committed a *Blakely* error by sentencing him in the aggravated range, in violation of his Sixth Amendment right to a jury trial. We agree.

In *Blakely v. Washington*, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt[]" in order to safeguard a defendant's Sixth Amendment right to trial by jury. 542 U.S. 296, 301, 159 L. Ed. 2d 403, 412 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000)), *reh'g denied*, 542 U.S. 961, 159 L. Ed. 2d 851 (2004). More recently, in *Washington v. Recuenco*, the Supreme Court further held that failure to submit a sentencing factor to the jury was not structural error but was subject to harmless error review. 126 S. Ct. 2546, 2553, 165 L. Ed. 2d 466, 477 (2006).

Our Supreme Court applied *Blakely* and *Recuenco* in *State v. Blackwell*, conducting a two-step analysis to determine first if the trial court had committed a *Blakely* error by finding an aggravated factor rather than submitting it to the jury, and if so, whether such error was harmless beyond a reasonable doubt. 361 N.C. at 49-50, 638 S.E.2d at 458. Harmless error review in this context requires "determin[ing] from the record whether the evidence against the defendant was so 'overwhelming' and 'uncontroverted' that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *Id.* at 49, 638 S.E.2d at 458 (quoting *Neder v. United States*, 527 U.S. 1, 9, 144 L. Ed. 2d 35, 47 (1999)).

North Carolina law further states that a violation of a defendant's constitutional rights is "prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt[,]" with the burden on the State to demonstrate such harmlessness. N.C. Gen. Stat. § 15A-1443(b) (2005). Nevertheless,

> [A] defendant may not avoid a conclusion that evidence of an aggravating factor is "uncontroverted" by merely raising an objection at trial. *See*, *e.g.*, *Neder*, 527 U.S. at 19, 144 L. Ed. 2d at 47. Instead, the defendant must "bring forth facts contesting the

> omitted element," and must have "raised evidence sufficient to support a contrary finding." *Id.*

Blackwell, 361 N.C. at 50, 638 S.E.2d at 458.

In the instant case, it is undisputed that the facts for the aggravated factor that "Defendant's actions endangered multiple persons and victims continue to have emotional distress[]" were neither presented to the jury nor proved beyond a reasonable doubt. We, therefore, conclude that the trial court did commit a *Blakely* error and turn now to the question of whether such error was harmless beyond a reasonable doubt.

Although the State offered testimony that the Town Hall employees, particularly Ms. Jones, were traumatized by the robbery and had ongoing emotional problems relating to the crime, there was also testimony that, in the case of Ms. Jones, she had left her job not because of emotional distress but because she was fired due to poor job performance. Given this conflicting evidence, we find that the aggravating factor found by the trial court, particularly that portion concerning the victims' continuing "emotional distress," was not shown by the State through "overwhelming" or "uncontroverted" evidence such that any rational factfinder would have found it beyond a reasonable doubt. As such, we conclude that the trial court's *Blakely* error was not harmless and remand for resentencing.

Remanded.

Judge STROUD concurs.

Judge STEELMAN dissents in a separate opinion.

STEELMAN, Judge dissenting.

While I agree with the majority's recitation of *Blackwell's* two part test, I would hold that the State has shown "overwhelming" and "uncontroverted" evidence that "Defendant's actions endangered multiple persons and victims continue to have emotional distress." For the reasons set out below, I respectfully dissent.

There is no dispute that the trial judge committed a *Blakely* error by finding a non-statutory aggravating factor without submitting it to the jury. My disagreement is with the majority's application of the second *Blackwell* prong, which requires that the error be harmless

beyond a reasonable doubt. To be harmless beyond a reasonable doubt "the evidence against the defendant [must be] so 'overwhelming' and 'uncontroverted' that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *State v. Blackwell*, 361 N.C. 41, 50, 638 S.E.2d 452 (2006).

In the instant case, the State provided uncontroverted evidence from the trial and sentencing hearing that multiple people were in the Town Hall at the time of the robbery. The State has also offered evidence showing that defendant fired one shot into the air as he was leaving the building, which could have injured any of the people in the area. Defendant does not contest these facts. Therefore, as in *Blackwell*, the State's evidence constitutes uncontroverted and overwhelming evidence that defendant did endanger multiple persons.

The State presented testimony from two witnesses that the victims continue to suffer emotional distress. Leslie Jones testified, "I am still scared. I am still nervous. It's not going to be able to end . . . There's not going to be an end so I'm nervous." Annette Huguley testified that "the effect that the robbery had on [her] on that particular day and today has been very fearful." Ms. Huguley then stated, "It had put a lot of fear in me, myself, I can say. It feared me then and it still fears me now." In response to the State's question regarding the impact of the robbery on the other workers, Ms. Huguley said, "Nicole Jones left . . . Ms. Johnson will not stay down there by herself, and it has caused everybody to always look at our customers totally different now when they come in because we don't know if they're coming to pay a bill or to rob us . . . we just look at it totally different now." This testimony demonstrates that Ms. Huguley, Ms. Jones and Ms. Johnson all continue to suffer emotional distress.

The trial court found a non-statutory aggravating factor that "Defendant's actions endangered multiple persons and victims continue to have emotional distress." There is uncontroverted and overwhelming evidence that defendant endangered multiple persons. The majority does not dispute this. However, the majority contends that there is not uncontroverted and overwhelming evidence that the victims continue to suffer emotional distress. Specifically, it notes that defendant elicited testimony that Ms. Jones left her job not because of emotional distress but due to poor job performance.

I would hold that even excluding the testimony pertaining to Ms. Jones, there is still sufficient uncontroverted and overwhelming evi-

dence that Ms. Johnson and Ms. Huguley continue to experience emotional distress. Therefore, "taken together, the State's evidence, [D]efendant's failure to object, and [D]efendant's failure to present any arguments or evidence contesting the sole aggravating factor constitute uncontroverted and overwhelming evidence," *Blackwell*, 361 N.C. at 51, 638 S.E.2d at 459, that Ms. Johnson and Ms. Huguley continue to experience emotional distress. Thus, even if Ms. Jones was fired because of her poor job performance, rather than continuing emotional distress, there is sufficient evidence to demonstrate that "victims continue to have emotional distress" and that the trial judge's *Blakely* error was harmless beyond a reasonable doubt.

STATE OF NORTH CAROLINA v. THOMAS SELLERS[1]

No. COA07-170

(Filed 4 September 2007)

Probation and Parole— revocation—admission of violation—through counsel

There is no requirement that the court personally examine defendants about their admissions of probation violations. Here, the trial court did not err by revoking defendant's probation where he received notice of the alleged violations, a hearing was held, defendant admitted through counsel two of the violations contained in the violation report, the court heard from the probation officer, and defendant then addressed the court.

Appeal by defendant from judgment entered 14 September 2006 by Judge Beverly T. Beal in Superior Court, Mecklenburg County. Heard in the Court of Appeals 27 August 2007.

Attorney General Roy Cooper, by Assistant Attorney General Charlene Bell Richardson, for the State.

Robin E. Strickland for defendant-appellant.

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1. We note that in the 14 September 2006 judgment revoking his probation, which he appeals to this Court, Defendant is identified as "Thomas Sellers." However, in the original, 11 January 2006 judgment imposed against him and suspending his sentence, he is identified as "Thomas Thurlow Sellers, Jr."

WYNN, Judge.

In North Carolina, a probation revocation hearing is not a formal trial and, as such, due process does not require that the trial court personally examine a defendant regarding his admission that he violated his probation.[2] Here, Defendant Thomas Sellers contends that activation of his prison sentence was in error because he did not waive a violation hearing nor did he personally admit he had violated the conditions of his probation. Because we find that a hearing was held and that Defendant's admission through counsel that he had violated his probation conditions was sufficient to meet due process, we affirm the activation of his sentence.

On 11 January 2006, Defendant pled guilty to common law robbery and was sentenced to a term of fourteen to seventeen months' imprisonment. The trial court suspended Defendant's sentence and placed him on supervised probation for thirty-six months.

On 15 May 2006, a probation violation report was filed, alleging that Defendant (1) had tested positive for marijuana, and (2) was in arrears on his court and supervision fees. On 21 June 2006, the trial court modified Defendant's probation and required him to participate in a "structured day program" for six to twelve months.

Nevertheless, on 24 August 2006, another probation violation report was filed, asserting that Defendant had: (1) tested positive for marijuana on five different occasions; (2) violated his curfew on two occasions; (3) violated the rules of the structured day program by threatening to harm a staff member and by making sexually inappropriate remarks; and (4) failed to attend the GED program.

The trial court held a probation violation hearing in Mecklenburg County Superior Court on 13 and 14 September 2006. Defendant, through counsel, admitted to the first and second violations alleged in the report but denied the third and fourth allegations. The trial court also heard from Defendant's probation officer regarding the alleged violations. Defendant then addressed the court, admitted that he uses drugs, and apologized for "whatever I did in Structured Day Program." The trial court found that Defendant willfully violated the terms of his probation, revoked Defendant's probation and activated his suspended sentence.

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2. *See State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 479 (1967) ("Proceedings to revoke probation are often regarded as informal or summary.").

Defendant now appeals, arguing that the trial court erred by finding that he waived the probation violation hearing and admitted to violating his probation. Defendant contends that the trial court relied on the assertions of his counsel and failed to make an adequate personal inquiry regarding his waiver and admissions. Defendant argues that these decisions were personal decisions, akin to pleading guilty, that cannot be made without his consent, and that he was prejudiced by deprivation of his due process and statutory rights. We disagree.

"A proceeding to revoke probation is not a criminal prosecution, and we have no statute in this State requiring a formal trial in such a proceeding. Proceedings to revoke probation are often regarded as informal or summary." *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 479 (1967). The "minimum requirements of due process in a final probation revocation hearing" require:

(1) a written notice of the conditions allegedly violated;

(2) a court hearing on the violation(s) including:

> (a) a disclosure of the evidence against him, or,
>
> (b) a waiver of the presentation of the State's evidence by an in-court admission of the willful or without lawful excuse violation as contained in the written notice (or report) of violation,
>
> (c) an opportunity to be heard in person and to present witnesses and evidence,
>
> (d) the right to cross-examine adverse witnesses;

(3) a written judgment by the judge which shall contain

> (a) findings of fact as to the evidence relied on,
>
> (b) reasons for revoking probation.

State v. Williamson, 61 N.C. App. 531, 533-34, 301 S.E.2d 423, 425 (1983) (citations omitted).

Here, Defendant received notice of his alleged probation violations, and a hearing was held. Defendant admitted to the first two violations contained in the probation violation report. Unlike when a defendant pleads guilty, there is no requirement that the trial court

personally examine a defendant regarding his admission that he violated his probation. *Cf.* N.C. Gen. Stat. § 15A-1022 (2005). Therefore, we conclude there was no violation of Defendant's right to due process or any statutory violation. This assignment of error is accordingly overruled.

Defendant's remaining assignments of error have not been brought forth in his brief, and they are thus deemed abandoned. N.C. R. App. P. 28(b)(6).

Affirmed.

Judges BRYANT and ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

Filed 4 September 2007

ALL STATE REST. EQUIP. CO. v. SYMPOSIUM WESTSIDE, LLC No. 06-1119	Guilford (05CVS12291)	Affirmed
BRADSHAW v. WAL-MART STORES, INC. No. 06-1437	Indus. Comm. (I.C. 273768)	Affirmed
COUNTY MOTOR CO. v. SWIGGETT No. 06-1596	Alamance (05CVS1598)	Affirmed
DUNBARTON POINTE AT GREYSTONE VILLAGE CONDO. OWNERS ASS'N v. PARLIMENT POINTE HOMEOWNERS ASS'N No. 06-330	Wake (05CVD7102)	Reversed and remanded
GARRISON v. HOLT No. 06-1085	Pitt (05SP116)	Affirmed
IN RE B.L.J. No. 07-59	Brunswick (05J121A)	Affirmed
IN RE C.S.M. No. 07-148	Randolph (03JB146)	No error
IN RE M.M. No. 07-323	Iredell (04JT165)	Affirmed
IN RE M.M., L.M., Q.M., R.G. No. 07-513	Mecklenburg (06JT915-18)	Affirmed
IN RE S.E.C. & S.I.C. No. 07-480	Alexander (05J65-66)	Affirmed
IN RE W.D.M., K.M., Z.S., & D.A.M. No. 06-1537	Henderson (99J15-16) (03J132) (03J157)	Affirmed
JACKSON v. MISSION ST. JOSEPH HEALTH SYS. No. 06-1548	Indus. Comm. (I.C. 105204) (I.C. 441504)	Affirmed
JONES v. POPPER No. 05-1210	Macon (02CVS167)	Reversed in part, affirmed in part and remanded with instructions
McMILLAN v. SWIFT No. 07-238	Wake (05CVS9881)	Dismissed

MORTON v. LEE No. 06-1509	Brunswick (04CVS451)	Reversed and remanded in part; vacated in part
POLSTON v. SIX STAR ECON. DEV./GOLDEN CORRAL No. 06-1500	Indus. Comm. (I.C. 465538)	Affirmed
STATE v. ABRAHAM No. 07-56	Mecklenburg (01CRS114987) (01CRS114989)	Affirmed
STATE v. ANGRAM No. 07-143	Henderson (06CRS247) (05CRS52027)	No prejudicial error
STATE v. BANDON No. 07-252	Caldwell (04CRS5340)	No error
STATE v. BARNES No. 07-333	Wilson (05CRS57409)	No error
STATE v. BATEMAN No. 07-37	Henderson (04CRS56445)	No error
STATE v. BETHEA No. 06-1341	Cumberland (04CRS60478)	No error
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Appealability—interlocutory order—denial of motion for summary judgment—Although defendants appeal from and assign error to Judge Titus' order denying defendant Christina Cerwin's motion for summary judgment, this appeal is dismissed, because: (1) the denial of a motion for summary judgment is interlocutory and not immediately appealable unless it affects a substantial right; and (2) defendants failed to articulate or argue any substantial right affected by the denial of defendant's motion and by the trial court's permitting the matter to proceed to the jury. **Cail v. Cerwin, 176.**

Appealability—judgment notwithstanding verdict—substantial right—Defendant's appeal from an interlocutory order entered 21 July 2006 granting judgment notwithstanding the verdict and ordering a new trial on the remaining issues of causation and damages is immediately appealable because it affects a substantial right when: (1) defendant has already gone through one trial on the issue of liability and damages and is now being forced to undertake a second trial on the same issues; and (2) the possibility of being forced to undergo two full trials on the merits and to incur the expense of litigating twice works an injury to defendant if not corrected before appeal from a final judgment. **Jones v. Durham Anesthesia Assocs., P.A., 504.**

APPEAL AND ERROR—Continued

Appealability—mootness—attorney fees—Defendants' appeal from a judgment determining that defendants improperly removed plaintiff from his position as a member and chairman of the Airport Authority is dimissed as moot because plaintiff's term of office in the Airport Authority has expired and the issue of attorney fees is thereafter determinable under the court's continuing equitable jurisdiction and is most appropriately determined in the first instance by the district court. **McClure v. County of Jackson, 462.**

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Appealability—summary judgment order—Although the Court of Appeals was not bound by the trial court's certification that there was no just reason for delay, interlocutory appeals from a summary judgment order in a legal malpractice case were heard to avoid piece-meal litigation and the risk of inconsistent verdicts. **Wilkins v. Safran, 668.**

Appealability—untimely notice of appeal—Defendant's attempt to appeal from the 12 January 2006 contempt order by filing a notice of appeal on 27 June 2006 is dismissed, because: (1) N.C. R. App. P. 3(c)(1) allows a party thirty days after entry of judgment to file and serve a notice of appeal; and (2) the notice of appeal in the instant case was filed more than five months after the entry of the 12 January 2006 contempt order which was a final rather than an interlocutory order. On those same grounds, plaintiff's attempt to appeal from the 12 January 2006 contempt order and 13 January 2006 child custody order by filing a notice of appeal on 20 June 2006 is dismissed. **Row v. Row (Deese), 450.**

Assignments of error—citation to transcript rather than record—merits addressed—The merits of defendant's appeal were addressed even though he violated Appellate Rule 28(b)(6) by citing the transcript rather than the record for the assignments of error. Defendant's mistake does not prevent a full understanding of the issues at hand or obstruct the process of the appeal. **State v. Burke, 115.**

Assignments of error—no supporting legal basis—dismissal—An assignment of error was dismissed where it included no legal basis opposing the admission of certain evidence. There was no manifest injustice to support invocation of Rule 2 because the result would not change if the rule was applied. **State v. Patterson, 67.**

Correction of judgment after appeal—authority of trial court—The trial court was without jurisdiction to change the original judgment, even to correct a clerical error, while the matter was pending on appeal. A motion for appropriate relief was granted and the amended judgments were vacated and remanded for correction of the clerical error. **State v. Ridgeway, 423.**

APPEAL AND ERROR—Continued

Cross-appeal—notice filed with superior court clerk—The homeowners association's cross-appeal was dismissed for lack of jurisdiction where its notice of cross-appeal was filed with the Clerk of the Court of Appeals, not with the Clerk of Superior Court of Wake County. **Reidy v. Whitehart Ass'n, 76.**

Multiple grounds for dismissal by trial court—one not challenged—all considered—Dismissals for violations of N.C.G.S. § 1A-1, Rule 4(a) are entered pursuant to Rule 41(b); because plaintiffs challenged the dismissal of their case pursuant to Rules 11 and 41, the merits of their case were heard even though they made no argument regarding their dismissal under Rule 4, which the trial judge had stated was a sufficient and independent ground to dismiss. **Stocum v. Oakley, 56.**

Multiple orders—appeal not preserved—Defendants' argument was dismissed where they did not follow the proper procedure to have the merits of their argument considered. They did not appeal from a trial court order dismissing their appeal following their failure to perfect or petition for certiorari, but instead purported to appeal from an earlier order striking defenses. They also did not present an argument in their brief addressing their assignment of error to the denial of a motion to set aside the order striking their offenses. **N.C. Indus. Capital, LLC v. Clayton, 356.**

Preservation of issues—absence of legal authority—An argument in plaintiffs' brief with no citation to legal authority was taken as abandoned. **Reidy v. Whitehart Ass'n, 76.**

Preservation of issues—appeal from summary judgment—failure to comply with appellate rule 10—motion to dismiss—The trial court did not err in a breach of contract case by denying plaintiffs' motion to dismiss defendant's appeal even though plaintiffs contend that defendant's first and second assignments of error are overly broad and vague in violation of N.C. R. App. P. 10(c)(1) because, in reviewing a trial court's grant of summary judgment, the purpose of the Rule 10 requirements is no longer applicable since exceptions and assignments of error add nothing. **Kniep v. Templeton, 622.**

Preservation of issues—arguments in brief exceeding issues raised by assignments of error—motion to dismiss—The trial court did not err in a breach of contract case by denying plaintiffs' motion to dismiss defendant's appeal even though plaintiffs contend the arguments in appellant's brief exceed the issues raised by defendant's assignments of error, because although a plain reading of the third assignment of error demonstrated that defendant preserved an argument regarding the procedural timing of the summary judgment order but failed to preserve a substantive argument regarding the basis for the trial court's order, defendant's second assignment of error preserved his substantive argument as to the trial court's decision to enter summary judgment in plaintiffs' favor. **Kniep v. Templeton, 622.**

Preservation of issues—assigning error to both summary judgment and default judgment not necessary—motion to dismiss—The trial court did not err in a breach of contract case by denying plaintiffs' motion to dismiss defendant's appeal even though plaintiffs contend that defendant's third assignment of error only addresses the trial court's entry of summary judgment and fails to address the entry of default judgment, because it was not necessary to assign error to both. **Kniep v. Templeton, 622.**

APPEAL AND ERROR—Continued

Preservation of issues—assignment of error—supporting authority required—An assignment of error was deemed abandoned where defendant did not cite authority to support his argument. **State v. Ridgeway, 423.**

Preservation of issues—challenge at trial on different basis—A contention about a detective's testimony was not preserved for appeal where the testimony was not challenged at trial on this basis. **State v. Brockett, 18.**

Preservation of issues—failure to argue—Assignments of error listed in the record but not argued in defendant's brief are deemed abandoned under N.C. R. App. P. 28(b)(6). **State v. Styles, 271.**

Preservation of issues—failure to argue—Although defendant appealed the judgment entered in 05 CRS 51915 in a first-degree sexual offense case, he failed to argue that assignment of error in his brief and it is therefore deemed abandoned under N.C. R. App. P. 28(b)(6). **State v. Hill, 216.**

Preservation of issues—failure to argue—Although defendant contends the trial court erred by denying his motion to dismiss the charge of possession of cocaine based on alleged insufficiency of the evidence, this assignment of error is dismissed because: (1) defendant's motions to dismiss were based specifically on his contention that the State failed to prove that the crime allegedly occurred in North Carolina; and (2) the Court of Appeals will not consider arguments based upon matters not presented to or adjudicated by the trial court. **State v. Freeman, 408.**

Preservation of issues—failure to argue—Although plaintiff mother contends the trial court erred in a child custody case by concluding that intervenor paternal grandparents' N.C.G.S. § 1A-1, Rule 60(b) motion was untimely, this assignment of error is dismissed under N.C. R. App. P. 10(b)(1) because: (1) the record contains no indication that plaintiff argued the timeliness of intervenors' motion before the trial court; and (2) plaintiff did not contend in her written opposition to a motion for relief from judgment that the Rule 60(b) motion was untimely, and the trial court made no finding or ruling with respect to the issue of timeliness. **Williams v. Walker, 393.**

Preservation of issues—failure to assign error—Defendants' failure to assign error resulted in waiving the right to appellate review of an argument that the trial court should have calculated workers' compensation premiums on a different basis. **N.C. Farm Bureau Mut. Ins. Co. v. T-N-T Carports, Inc., 686.**

Preservation of issues—failure to cite authority—contention abandoned—Defendant did not cite authority on appeal and abandoned his contention that his written statement should not have been admitted because officers provided the means and opportunity for him to make the statement before he was advised of his rights. **State v. Ridgeway, 423.**

Preservation of issues—failure to cite to specific paragraph of judgment—vagueness—not confined to single legal issue—motion to dismiss—The trial court did not err in a breach of contract case by denying plaintiffs' motion to dismiss defendant's appeal even though plaintiffs contend defendant's fourth assignment of error violated the North Carolina Rules of Appellate Procedure because the assignment of error sufficiently directed the Court's attention to the particular error as required by N.C. R. App. P. 10(c)(1). **Kniep v. Templeton, 622.**

APPEAL AND ERROR—Continued

Preservation of issues—failure to object—Although defendant husband contends the trial court erred in an alimony case by failing to require plaintiff wife to produce bank records, this assignment of error is dismissed because defendant failed to make a timely request, objection, or motion at trial asking the court to enforce production of the bank records. **Phillips v. Phillips, 238.**

Preservation of issues—failure to object—An issue was not preserved for appellate review where there was no objection on that basis at trial. **State v. Wiggins, 376.**

Preservation of issues—failure to object—plain error analysis inapplicable—Although defendant contends his Eighth Amendment right against cruel and unusual punishment was violated in a possession of cocaine case based on the fact that his sentence was grossly disproportionate to the severity of the crime, this assignment of error is dismissed, because: (1) defendant did not object, and constitutional arguments will not be considered for the first time on appeal; and (2) although defendant assigns plain error to this issue, plain error analysis applies only to instructions to the jury and evidentiary matters. **State v. Freeman, 408.**

Preservation of issues—failure to raise issue in written motion for appropriate relief—Although defendant contends that the prosecution discouraged a witness from testifying in a double armed robbery case and thereby violated defendant's constitutional right to offer testimony of a witness in his defense, defendant failed to preserve this argument for appellate review because defendant did not raise a Sixth Amendment argument in his written motion for appropriate relief; defendant could have made an amendment to his motion prior to the hearing under N.C.G.S. § 15A-1415(g) or he could have made such an amendment during the hearing if he had done so in writing, but he failed to do either; and defendant's argument concerning the alleged Sixth Amendment violation could not be considered a new motion for appropriate relief made under Article 89 since it was not in writing and it was not made within ten days after entry of judgment. **State v. Moore, 257.**

Peservation of issues—invited error—Defendants waived the issue as to whether the trial court applied the wrong standard when it denied their motion to dismiss plaintiff's complaint at the close of evidence where defendants expressly consented to the standard applied by the court and thus invited the alleged error of which they complain. **Pitt Cty. v. Deja Vue, Inc., 545.**

Preservation of issues—motion for appropriate relief—failure to raise issue at trial—Although defendant contends in a motion for appropriate relief that his due process rights were violated when the State failed to correct alleged false and misleading testimony from a witness that he had been offered no deals in exchange for his testimony, this assignment of error is dismissed because defendant failed to make this constitutional argument at any point at the trial level, either during the presentation of evidence, during the hearing on a codefendant's's motion to dismiss, or during the hearing on his motion for appropriate relief. **State v. Moore, 257.**

Preservation of issues—motion to dismiss assignment of error—vagueness—The State's motion to dismiss defendant's assignment of error in an assault inflicting serious bodily injury case based on an alleged violation of N.C.

APPEAL AND ERROR—Continued

R. App. P. 10(c)(1) is denied because: (1) defendant references specific statutes and the applicable transcript and record page numbers; and (2) defendant's assignment of error plainly and concisely stated a specific trial court error. **State v. Lindsay, 314.**

Preservation of issues—not the basis for objection at trial—A contention regarding alteration or supplementation of the transcript of a taped conversation was not the basis for the objection at trial and was not preserved for appeal. A general objection to the witness's testimony did not include these changes or additions. **State v. Brockett, 18.**

Record—not timely filed in Court of Appeals—An appeal from a district court order dismissing plaintiff's complaint was properly dismissed for failure to timely file a settled record with the Court of Appeals. **Cadle Co. v. Buyna, 148.**

Violations of appellate rules—no dismissal—Defendant's appeal was not dismissed for violations of the Rules of Appellate Procedure; assuming that defendant violated the Rules, those violations were not sufficiently egregious to warrant dismissal. **Cotter v. Cotter, 511.**

ASSOCIATIONS

Validity—incorporation after sale of first lot—The Planned Community Act applies to this case despite plaintiff's contention that the homeowners association was incorporated after the conveyance of the first lot in violation of N.C. Gen. Stat. § 47F-3-101 (2005). That was not one of the provisions made applicable to communities created before the effective date of the Act. **Reidy v. Whitehart Ass'n, 76.**

ATTORNEYS

Exceeding authority in settling case—Rule 60 motion for relief—not excusable neglect—The trial court did not abuse its discretion in denying defendants' motion for relief under N.C.G.S. 1A-1, Rule 60(b)(1) for excusable neglect after their attorney exceeded his authority in negotiating a settlement. **Purcell Int'l Textile Grp., Inc. v. Algemene AFW N.V., 135.**

Exceeding authority in settling case—Rule 60 motion for relief—not extraordinary circumstance—The trial court did not abuse its discretion by denying defendants' motion for relief under N.C.G.S. § 1A-1, Rule 60(b)(6) for extraordinary circumstances where defendants' attorney exceeded his authority in reaching a settlement. The attorney acted with apparent authority as defendants' agent. **Purcell Int'l Textile Grp., Inc. v. Algemene AFW N.V., 135.**

Fees—commercial lease—basis for calculation—The trial court did not err in its calculation of attorney fees in an action involving a commercial lease where the court used the amount of damages as determined by the jury to calculate those fees. **N.C. Indus. Capital, LLC v. Clayton, 356.**

Fees—commercial lease—no fees in ejectment action—The trial court did not abuse its discretion by not awarding attorney fees in an underlying summary ejectment action arising from a commercial lease where plaintiff argued that the ejectment claim was reasonably related to the breach of contract action for

ATTORNEYS—Continued

which the court awarded fees. While it has been held that the court may award fees when a reasonable relationship between the proceedings is proved, the court is not required to award fees and the burden is on the claimant to present evidence that the other proceedings are reasonably related. **N.C. Indus. Capital, LLC v. Clayton, 356.**

Legal malpractice—representation for equitable distribution—failure to show alleged negligence proximately caused damage—The trial court did not err in a legal malpractice case arising out of representation during an equitable distribution proceeding by entering summary judgment in favor of defendants. **Young v. Gum, 642.**

Withdrawal of representation—not a breach of fiduciary duty—The trial court properly granted defendants' motion for summary judgment on plaintiff's claim for breach of fiduciary duty arising from defendants' withdrawal from representation. Defendants asserted a proper basis for withdrawal and did not breach their fiduciary duty. **Wilkins v. Safran, 668.**

Withdrawal of representation—not constructive fraud—The trial court properly granted summary judgment for defendants on plaintiff's claim for constructive fraud arising from defendant lawyers withdrawing from representation of plaintiff. Plaintiff presented no evidence tending to show defendants sought or gained any personal benefit by withdrawing from representation of plaintiff. **Wilkins v. Safran, 668.**

Withdrawal of representation—not malpractice—Summary judgment was properly granted for defendants on a claim of legal malpractice where the individual defendant suffered a heart attack, lawyers in defendant firm assisting in plaintiff's litigation resigned, defendants moved to withdraw as counsel more than seven weeks prior to the scheduled trial date, and plaintiff settled after attempting to continue or set aside the withdrawal. **Wilkins v. Safran, 668.**

Withdrawal of representation—punitive damages—The trial court properly granted summary judgment for defendants on plaintiff's claim for punitive damages arising from defendant lawyers withdrawing their representation of plaintiffs. Plaintiff's evidence does not raise an inference of any of the three aggravating factors necessary to support a claim for punitive damages: defendants moved to withdraw due to ill health and the resignation of the primary associate attorney working on the case, they asserted a proper basis and utilized proper procedures to withdraw, and they are not liable for compensatory damages. **Wilkins v. Safran, 668.**

Withdrawal of representation—statutory damages—The trial court erred by denying defendants' motion for summary judgment on plaintiff's claim for statutory damages arising from defendant lawyers withdrawing their representation from plaintiff. N.C.G.S. § 84-13 provides double damages if an attorney commits a fraudulent practice, but no claim arises without a showing of actual or constructive fraud, or a fraudulent practice. **Wilkins v. Safran, 668.**

CHILD ABUSE AND NEGLECT

Alternate theories—not mutually inconsistent—The State did not argue mutually inconsistent theories in a felony child abuse prosecution where defend-

CHILD ABUSE AND NEGLECT—Continued

ants were tried together, the evidence showed that they had sole custody of the child when he suffered his injury, both had the opportunity to commit the crime, and the State's position throughout was that both defendants had a hand in injuring the child. Furthermore, the State did not use objectively false evidence or make misrepresentations to the jury. **State v. Parker, 437.**

Chapter 50 custody—findings of fact—sufficiency of evidence—The trial court did not err in a child abuse and neglect case by decreeing that its order resolved any pending claim for custody where the trial court made sufficient findings of fact and conclusions of law under N.C.G.S. § 7B-911. **In re T.H.T., 337.**

Disposition—Chapter 50 custody—best interests of child—The trial court did not err in a child abuse and neglect case by concluding that awarding custody of the minor child to her father was in the minor child's best interest where the child was severely injured while in her mother's care, the mother failed to obtain medical care for her, and the father called the police and took the child to a hospital after picking her up from her mother. **In re T.H.T., 337.**

Findings of fact—clear and convincing evidence—The trial court's conclusions that a child was abused and neglected by respondent mother were supported by findings of fact that were uncontested or supported by clear and convincing evidence where those findings established: (1) the child was seen at a hospital for various injuries, including a skull fracture; (2) a pediatrician concluded that the skull fracture was a depression fracture caused by nonaccidental means; (3) respondent mother's explanations were not consistent with the injuries observed; (4) the injuries occurred during a period of time while the child was in the physical custody of respondent mother; (5) the injuries were severe and obvious; and (6) respondent mother failed to obtain medical attention for the child. **In re T.H.T., 337.**

Sufficiency of evidence—defendants as perpetrators—In a prosecution for felony child abuse, there was sufficient evidence that defendants inflicted the injuries where the uncontradicted evidence was that the injuries could not have occurred accidentally and that the injuries occurred when the child was under the sole care and supervision of defendants. Additionally, there was evidence that defendants had each altered the accounts they gave to doctors and investigators. **State v. Parker, 437.**

Time delay—failure to hold hearing after delay—failure to show prejudice—The trial court did not err in a child abuse and neglect case by failing to enter its adjudication and disposition within the thirty-day requirement and by failing to hold a subsequent hearing to determine and explain the reason for the delay as required by N.C.G.S. § 7B-807, because: (1) although there was a two-month delay, respondent mother was not prejudiced when her visitation rights were not affected nor was her right to appeal the order; and (2) although the trial court failed to conduct a hearing when the order was not entered within thirty days, the goal of a speedy resolution of cases involving juvenile custody would not be furthered by reversal where no prejudice was shown. **In re T.H.T., 337.**

CHILD SUPPORT, CUSTODY, AND VISITATION

Child support guidelines—deviation—The trial court did not err or abuse its discretion in a modification of child support and custody case by its application

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

and deviation from the child support guidelines, because: (1) the trial court relied on plaintiff's financial affidavit to determine his monthly expense for his children; and (2) based on the evidence before the trial court, the slight deviation was not manifestly unsupported by reason. **Row v. Row (Deese), 450.**

Child support guidelines—Equal Protection—Procedural Due Process—The child support guidelines are not violative of the Equal Protection Clause of the United States Constitution or of Procedural Due Process. **Row v. Row (Deese), 450.**

Child support guidelines—Substantive Due Process—The trial court did not err in a modification of child support and custody case by concluding the child support guidelines are not violative of Substantive Due Process rights, because: (1) the State has a compelling state interest in regulating child support obligations to ensure that parents support their children so that children will not become wards of the State; and (2) the guidelines establish a rebuttable presumption, and thus the State has narrowly drawn the act to express only the legitimate state interests. **Row v. Row (Deese), 450.**

Child support guidelines—Supremacy Clause—The trial court did not err in a modification of child support and custody case by concluding the child support guidelines are not violative of the Supremacy Clause of the U.S. Constitution based on an alleged failure to comply with the congressional standard under 45 C.F.R. § 302.56 which requires the State to consider and analyze case data on the cost of raising children when performing its four-year review of the guidelines. **Row v. Row (Deese), 450.**

Custody—jurisdiction—The trial court erred in a child custody case by finding and concluding in a 6 October 2005 order that it was without jurisdiction to enter its 15 July 2003 order, because: (1) although the Court of Appeals could not determine whether the original Illinois order was made consistently with the Parental Kidnapping Prevention Act (PKPA), the Illinois court relinquished jurisdiction in its 14 July 2003 order to the North Carolina court, and the North Carolina court properly assumed exclusive jurisdiction over custody matters involving the parties' minor child; (2) an unchallenged finding of fact stated the minor child has resided with plaintiff in North Carolina since 12 July 2002, and thus North Carolina was the minor child's home state under both PKPA and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA); and (3) although the Illinois court subsequently held a hearing during which it learned of intervenors' guardianship, the Illinois court's attempt to recapture jurisdiction was ineffectual when it had already relinquished jurisdiction on 14 July 2003. **Williams v. Walker, 393.**

Custody—motion to intervene—standing—The trial court did not abuse its discretion in a child custody case by granting intervenor paternal grandparents' N.C.G.S. § 1A-1, Rule 60(b) motion even though plaintiff mother contends they lacked standing, because: (1) plaintiff failed to assign error to the trial court's order granting the motion to intervene, and the record contains no objection by plaintiff to the motion; and (2) an intervening party has standing to seek relief from a judgment under Rule 60(b). **Williams v. Walker, 393.**

Modification of support—findings of fact—calculation of expenses—The trial court did not err in a modification of child support and custody case by

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

allegedly failing to consider the evidence presented when making its findings of fact including consideration of expenses for the children totaling $2,650.85 per month, because: (1) the affidavits were competent evidence on which the trial court was allowed to rely in determining the costs of raising the parties' children; (2) the trial court did not err in its calculation of medical insurance when the evidence showed that defendant provided necessary medical coverage through her job for the children since the military did not cover all of her daughter's medical expenses; and (3) if plaintiff wanted the trial court to consider the amount of $2,472 which plaintiff stated was the amount of the tuition for the two months the children are in Hawaii for the summer, he should have increased his monthly expenses for tuition accordingly. **Row v. Row (Deese), 450.**

CIVIL PROCEDURE

Default judgment—summary judgment—simultaneous entry—The trial court did not err in a breach of contract case by simultaneously entering both default judgment and summary judgment. **Kniep v. Templeton, 622.**

Summary judgment—same legal issues for first and second motion for summary judgment—The trial court's order of 3 March 2005 is vacated to the extent that it overrules another judge's 27 February 2004 order with respect to plaintiffs' first, second, third, fourth, and sixth claims for relief and defendant Christina Cerwin's counterclaim. **Cail v. Cerwin, 176.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Arbitration award—preclusive effect to be determined by arbitrator, not court—In the context of the Federal Arbitration Act, the issues of res judicata and collateral based upon a prior arbitration proceeding estoppel must be decided initially by the arbitrator and not the trial court. **WMS, Inc. v. Alltel Corp., 86.**

COMPROMISE AND SETTLEMENT

Agreement entered over telephone—confession of judgment not executed—Legal agreements are not required to be in writing, and an unauthorized settlement agreement concluded over the telephone by defendants' attorney and plaintiff was valid. **Purcell Int'l Textile Grp., Inc. v. Algemene AFW N.V., 135.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Redaction of statement—release from prison—The trial court did not commit plain error by failing to redact defendant's statement where he mentioned his release from prison because it was not error to introduce defendant's prior felony conviction or to give a limiting instruction regarding the conviction, and defendant thus cannot show the failure to redact defendant's statement was so prejudicial that it had a probable impact on the jury's verdict. **State v. Wood, 227.**

Spontaneous statement—admissible—The trial court correctly admitted a spontaneous incriminating statement defendant made to officers while en route to have dental impressions made where the unchallenged findings were that no

CONFESSIONS AND INCRIMINATING STATEMENTS—Continued

questions were posed, no threats or promises induced the statement, and defendant seemed to understand what he was doing. **State v. Ridgeway, 423.**

CONSTITUTIONAL LAW

Contract clause—homeowners association—retroactive application of enforcement statute—The Contract Clause of the United States Constitution was not violated by retroactive application of a statute allowing fines and suspension of services for violating the regulations and covenants of a homeowners association. The statute merely provides an additional remedy for the enforcement of the declaration and does not disturb a vested right, impair a binding contract or create a new obligation. **Reidy v. Whitehart Ass'n, 76.**

County ordinance—regulation of sexually oriented businesses—content-neutral—intermediate scrutiny—A county ordinance and amended ordinance regulating sexually oriented businesses was content-neutral, and thus subject to intermediate constitutional scrutiny, even though defendants contend individual commissioners did not personally review the research materials considered by county legal staff during drafting of the ordinance. **Pitt Cty. v. Deja Vue, Inc., 545.**

County ordinance—regulation of sexually oriented businesses—Equal Protection—A county ordinance regulating sexually oriented businesses did not violate the Equal Protection clauses of the United States and North Carolina Constitutions even though defendant Hudson argues the amended ordinance prevents him from living within 1,320 feet of a sexually oriented business that he operates. **Pitt Cty. v. Deja Vue, Inc., 545.**

County ordinance—regulation of sexually oriented businesses—finding of fact—In determining that a county ordinance regulating sexually oriented businesses was not content-based and thus not subject to strict constitutional scrutiny, competent evidence supported the trial court's finding that the county relied upon a variety of evidence regarding the secondary effects of sexually oriented business even though plaintiff did not show that members of the board of commissioners actually viewed the documentary evidence tendered by plaintiff. **Pitt Cty. v. Deja Vue, Inc., 545.**

County ordinance—regulation of sexually oriented businesses—free speech—reasonable alternative avenues of communication—An amended county ordinance regulating sexually oriented businesses left open reasonable alternative avenues of communication for defendant businesses even though defendants emphasize that a county map identifying locations in which sexually oriented businesses were prohibited or permitted was not prepared until after the amended ordinance was enacted, and the cost of relocating is prohibitive. **Pitt Cty. v. Deja Vue, Inc., 545.**

County ordinance—regulation of sexually oriented businesses—not ex post facto law—An amended county ordinance regulating sexually oriented businesses was not an unconstitutional ex post facto law even though it provided that all enforcement action would be based upon the effective date of the original ordinance. **Pitt Cty. v. Deja Vue, Inc., 545.**

Double jeopardy—possession of firearm by felon—felonious breaking and entering—Defendant's conviction for possession of a firearm by a felon was

CONSTITUTIONAL LAW—Continued

not a violation of his right to be free from double jeopardy even though defendant contends it is a greater offense of the predicate felony of felonious breaking and entering. **State v. Wood, 227.**

Double jeopardy—possession of firearm by felon—substantive offense— Defendant's conviction for possession of a firearm by a felon was not a violation of his right to be free from double jeopardy even though defendant contends it is a recidivist offense and not a substantive crime, because: (1) while N.C.G.S. § 14-415.1 has characteristics of a recidivist statute, a plain reading of the statute shows it creates a new substantive offense; and (2) defendant did not violate a consequence of his original conviction, but rather committed a new substantive offense. **State v. Wood, 227.**

Double jeopardy—separate sentencing for kidnapping and other felonies—The trial court did not violate defendant's constitutional rights by imposing consecutive sentences for first-degree kidnapping and robbery with a dangerous weapon even though defendant contends the robbery charge was an element of the kidnapping charge. **State v. Moffitt, 308.**

Effective assistance of counsel—dismissal of claim without prejudice— Defendant's claim that he received ineffective assistance of counsel is dismissed without prejudice to defendant's right to raise this claim in a post-conviction motion for appropriate relief because there was insufficient information in the record regarding trial counsel's strategy. **State v. Loftis, 190.**

Effective assistance of counsel—failure to show prejudice—Defendant was not denied his right to the effective assistance of counsel even though his trial counsel failed to stipulate to defendant's prior conviction, to request a limiting instruction, and to object to mention of defendant's release from jail. **State v. Wood, 227.**

Enforcement of homeowners association covenants—no evidence of discrimination—A homeowners association did not discriminate against plaintiffs by refusing to allow a building modification where plaintiffs admitted erecting their staircase and door without the architectural committee's approval, and in fact did so in the face of disapproval. Moreover, there does not appear to be any evidence of discrimination. **Reidy v. Whitehart Ass'n, 76.**

Procedural due process—enforcement of homeowners association covenants—Plaintiffs' procedural due process rights were not violated by the procedure provided by a homeowners association. Even if the creation of the statutory framework by the legislature is sufficient state action, the statutes provided notice and the opportunity to be heard, and the association in this case provided both. **Reidy v. Whitehart Ass'n, 76.**

Right to and liberty interest in education free from harm—adequate remedy at law—The trial court erred by denying defendant board of education's motion for summary judgment on plaintiff's constitutional claim alleging a denial of plaintiff's right to and liberty interest in education free from harm arising from defendant's alleged negligence in failing to provide adequate protection for plaintiff from a fellow student based on the fact that an adequate state remedy existed because such a remedy is available here in the form of a common law negligence claim even though defendant board of education has sovereign immunity for such claim. **Craig v. New Hanover Cty. Bd. of Educ., 651.**

CONSTITUTIONAL LAW—Continued

Right to confrontation—statements to deputy—There was no Sixth Amendment *Crawford* error in a drug trafficking case where a deputy's testimony included statements made by an informant. The statements were not offered for their truth, but to explain how the investigation unfolded. **State v. Wiggins, 376.**

Right to confrontation—statements to witness—nontestimonial—The admission of statements made by a murder victim to the witness did not violate defendant's right to confront the witnesses against him. The statements were nontestimonial; they were made during the course of a private conversation, outside the presence of any police officer and before a crime was committed, and without any indication of thought of a future trial. **State v. Williams, 318.**

Right to counsel—resumption of questioning after request—Defendant's right to counsel was protected when officers resumed questioning defendant after he inquired about an attorney. The unchallenged findings support the conclusion that defendant never unequivocally requested an attorney during his early custodial interrogation and that none of his state or federal constitutional rights had been violated. **State v. Ridgeway, 423.**

Right to remain silent—comment defendant did not want to make statement after Miranda rights—The trial court did not commit plain error in a drug trafficking case by allowing an officer to testify that after she read defendant his Miranda rights, defendant did not want to make any statements, because even assuming arguendo that the admission of this testimony was error in the present case, it did not amount to plain error. **State v. Loftis, 190.**

Substantive due process—Planned Community Act—Retroactive application of the Planned Community Act did not violate plaintiffs' substantive due process rights. The individual statutes that form the Act are rationally related to the legitimate purpose of providing a statutory framework for dealing with modern real estate developments, particularly planned communities. **Reidy v. Whitehart Ass'n, 76.**

CONTEMPT

Indirect criminal contempt—burden of proof—The trial court did not improperly place the burden on defendant to prove that he was not in contempt of court rather than requiring the State to prove beyond a reasonable doubt that defendant was in contempt because the only issue before the trial court was a question of law involving whether defendant's admitted behavior constituted indirect criminal contempt; and the trial court properly required proof beyond a reasonable doubt of defendant's contempt of court, and its order states the facts were found beyond a reasonable doubt. **State v. Simon, 247.**

Indirect criminal contempt—sufficiency of evidence—The trial court did not err by holding defendant in indirect criminal contempt of court for entering an area of the courthouse marked "Judges Offices" to deliver a motion to the trial court administrator when he had been ordered by two different superior court judges not to enter such area. **State v. Simon, 247.**

Indirect criminal contempt—violation of formal written order not required—The trial court did not err by holding defendant in indirect criminal contempt of court even though defendant contends he did not violate a formal

CONTEMPT—Continued

written order when he visited the office of the trial court administrator in violation of the trial court's directive to stay out of the judges' office area because N.C.G.S. § 5A-11(a)(3) does not limit criminal contempt to violation of a formal written order that has been entered and filed with the clerk of court. **State v. Simon, 247.**

COSTS

Attorney fees—denied as costs—breach of lease—The trial court did not err by failing to award attorneys' fees as costs under N.C.G.S. § 6-20 in an action involving an ejectment under a commercial lease. **N.C. Indus. Capital, LLC v. Clayton, 356.**

Attorney fees—jurisdiction—The trial court did not have jurisdiction to enter an award of attorney fees after defendants had filed notice of appeal from the judgment of 14 February 2006, and the entry of an award of attorney fees is remanded to the trial court. **McClure v. County of Jackson, 462.**

No statutory basis—pertinent portion of summary judgment order vacated—The trial court erred in part by taxing defendant Christina Cerwin with certain costs, because: (1) there was no statutory basis for awarding $6,684 for expenses incurred in defending against the foreclosure proceeding filed by defendant; (2) the $500 civil penalty awarded under N.C.G.S. § 45-36.3 to the Cails and Deal based on defendant's failure to cancel the Deal deed was improper when the pertinent portion of Judge Cashwell's summary judgment order was vacated and Judge Titus ruled that defendants' alleged violation of N.C.G.S. § 45-36.3 was an issue for the jury; and (3) N.C.G.S. § 45-36.3 cannot support the court's award of $25,200 to plaintiffs when the pertinent portion of Judge Cashwell's summary judgment order was vacated. **Cail v. Cerwin, 176.**

COUNTIES

Pleading section and caption of ordinance—Plaintiff county's complaint sufficiently pleaded both the section number and caption of the pertinent amended ordinance in accordance with N.C.G.S. § 160A-179 in an action seeking declaratory and injunctive relief concerning the interpretation and enforcement of an ordinance regulating sexually oriented businesses. **Pitt Cty. v. Deja Vue, Inc., 545.**

CRIMINAL LAW

Acting in concert—victim shooting himself—The trial court's correct instruction on acting in concert in a first-degree murder and felony murder prosecution instruction cured the improper argument by the State that defendant would be guilty under an acting in concert theory even if the victim pulled the trigger. **State v. Williams, 318.**

Comments of prospective juror—not unduly prejudicial—The comments of a prospective juror in a narcotics prosecution were not so prejudicial as to require a new trial where defendant Cartwright contended that the comments implied that Cartwright "partied" with a person on probation. None of the statements linked Cartwright to the use or sale of unlawful drugs, and the fact that the

CRIMINAL LAW—Continued

prospective juror had a probation officer was not enough to infer that Cartwright was involved with illegal drugs. **State v. Wiggins, 376.**

Deadlocked jury—additional instruction on acting in concert—no error—The trial court did not express an opinion on defendant's guilt by giving an additional instruction on acting in concert after the failure of the jury to come to an unanimous decision (there had been an earlier inquiry from the jury). The court acted appropriately under the totality of the circumstances in giving the additional instruction. **State v. Williams, 318.**

Deadlocked jury—inquiry and instruction—verdict not coerced—The trial court did not impermissibly coerce a verdict by giving an additional instruction ex mero motu after the jury deadlocked. The instruction given was not in error, and the court's inquiry into the numerical division was not an inquiry into whether the majority favored conviction. **State v. Williams, 318.**

Equitable estoppel—not applicable—Equitable estoppel was not extended into a criminal case in which defendants argued that the State should be barred from presenting inconsistent theories of guilt. **State v. Parker, 437.**

Establishing crime occurred in North Carolina—circumstantial evidence—The trial court did not err by denying defendant's motion to dismiss the charge of possession of cocaine based on an alleged failure to establish the crime occurred in the State of North Carolina. **State v. Freeman, 408.**

Instruction—interested witnesses—The trial court did not abuse its discretion in a possession of cocaine case by denying defendant's request for a jury instruction on interested witnesses, because: (1) the requested instruction was not in writing; and (2) although defendant correctly states that an officer was responsible for the destruction of much of the physical evidence prior to trial, defendant has not offered any explanation as to how the officer could be considered interested. **State v. Freeman, 408.**

Instructions—invited error—There was no plain error by charging the jury on out-of-court statements where the instruction was requested and drafted by defendant. Any error was invited. **State v. Wiggins, 376.**

Instructions—reasonable doubt—no plain error—There was no plain error in the trial court's jury instruction on reasonable doubt in a prosecution for altering an official document. The language to which defendant takes issue is substantially the same as that which the N.C. Supreme Court has upheld. Moreover, defendant did not prove that any error affected the instruction as a whole or prejudiced his case. **State v. Burke, 115.**

Mistrial denied—cross-examination ended and then continued—The trial court did not abuse his discretion by denying a mistrial after the court ended a cross-examination for badgering a witness, heard arguments out of the presence of the jury on the motion for a mistrial, and denied the motion but allowed the cross-examination to continue. The propriety of counsel's examination was not an issue for the jury to determine, and it is clear that the judge made a reasoned decision. **State v. Parker, 437.**

Motion to sever—possession of firearm by felon—felonious possession of stolen property—The trial court did not abuse its discretion by denying defend-

CRIMINAL LAW—Continued

ant's motion to sever the charge of possession of a firearm by a felon from the charge of possession of stolen property because: (1) defendant waived his right to severance based on his failure to renew his motion to sever at the close of all evidence as required by N.C.G.S. § 15A-927(a)(2); and (2) defendant's theft and subsequent possession of the firearm as a result of his breaking and entering are so closely related in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the other. **State v. Wood, 227.**

Prosecutor's argument—defendant's failure to plead guilty—harmless error—overwhelming evidence of guilt—A prosecutor's improper comment referencing defendant's failure to plead guilty was harmless error in a domestic violence case involving assault with a deadly weapon with intent to kill, and defendant was not entitled to a new trial. **State v. Byrd, 597.**

Prosecutor's argument—defendants not testifying—comment only on circumstantial evidence—The trial court did not err by not intervening ex mero motu in a prosecution for felony child abuse where the prosecutor argued that only three people knew what happened on the morning of the injury and that the parents had not testified. Taken in context, the prosecutor was arguing that the jury was left to consider only circumstantial evidence and did not suggest that defendants must be guilty because they did not testify. **State v. Parker, 437.**

Unanimity of verdict—not raised by consistency of verdict and evidence—The question of whether a guilty verdict was consistent with the evidence did not raise the constitutional question of whether the verdict was unanimous. **State v. Parker, 437.**

Withdrawal of guilty plea—fair and just reason not shown—The trial court did not err by denying defendant's motion to withdraw his guilty plea, made before sentencing, where defendant did not carry his burden of showing a fair and just reason for the withdrawal. **State v. Hatley, 93.**

Withdrawal of guilty plea—greater than agreed to sentence—The trial court did not err by giving defendant a sentence greater than that set in a plea agreement where the agreement explicitly stated that the district attorney was not bound to the less stringent sentence if defendant did not comply with the terms. There was no ambiguity, defendant did not abide by the terms of his agreement, and N.C.G.S. § 15A-1024 thus did not apply. **State v. Hatley, 93.**

Withdrawal of plea agreement denied—failure to cooperate—terms of agreement—The trial court did not err by denying defendant's motion to withdraw his guilty plea where defendant asserted that the State breached the plea agreement by not making a sentencing recommendation, and the State asserted that defendant breached the contract by not cooperating. A defendant who breaches a plea agreement is not entitled to go to trial if the agreement provides otherwise. **State v. Hatley, 93.**

DECLARATORY JUDGMENTS

Subject matter jurisdiction—intended third-party beneficiary of workers' compensation coverage contract—The trial court did not err in a declaratory judgment action by denying defendant's N.C.G.S. § 1A-1, Rule 60 motion for relief from judgment arising out of an alleged contractual agreement to provide

DECLARATORY JUDGMENTS—Continued

workers' compensation coverage based on alleged lack of subject matter jurisdiction because the only matters at issue in the declaratory judgment action were plaintiff's rights and privileges as an intended third-party beneficiary of the alleged contract between his employer, Locklear, and Campbell, and although the Declaratory Judgment Act is not applicable to claims under the Workers' Compensation Act, it is applicable to construction of insurance contracts and in determining the extent of coverage. **Lowery v. Campbell, 659.**

DEEDS

Contract clause—homeowners association—retroactive application of enforcement statute—The Contract Clause of the United States Constitution was not violated by retroactive application of a statute allowing fines and suspension of services for violating the regulations and covenants of a homeowners association. The statute merely provides an additional remedy for the enforcement of the declaration and does not disturb a vested right, impair a binding contract or create a new obligation. **Reidy v. Whitehart Ass'n, 76.**

Enforcement of homeowners association covenants—no evidence of discrimination—A homeowners association did not discriminate against plaintiffs by refusing to allow a building modification where plaintiffs admitted erecting their staircase and door without the architectural committee's approval, and in fact did so in the face of disapproval. Moreover, there does not appear to be any evidence of discrimination. **Reidy v. Whitehart Ass'n, 76.**

Restrictive covenants—development of lot in flood plain—soccer field—A soccer field was the "extension" of a subdivision within the meaning of restrictive covenants where the lot in question was in a flood plain and was not suitable for the development of homes. **Terres Bend Homeowners Ass'n v. Overcash, 45.**

Restrictive covenants—easements—access to extend subdivision—Easements included in a plat and easements which were not included were both permitted by a restrictive covenant which allowed access to a particular lot for the extension of a subdivision. **Terres Bend Homeowners Ass'n v. Overcash, 45.**

Restrictive covenants—exception—running with land—Unambiguous language in restrictive covenants provided that an exception for a particular lot ran with the land rather than being personal to the developer. **Terres Bend Homeowners Ass'n v. Overcash, 45.**

Restrictive covenants—read together—exception—An exception in restrictive covenants allowing access across a lot to extend the subdivision despite the general prohibition on using lots for streets was also an exception to another covenant that lots could be used only for residential purposes. **Terres Bend Homeowners Ass'n v. Overcash, 45.**

Restrictive covenants—successor in title and successor developer—Defendant Overcash was a successor of the developer of a lot despite the interjection of another owner in the chain of title. **Terres Bend Homeowners Ass'n v. Overcash, 45.**

Substantive due process—Planned Community Act—Retroactive application of the Planned Community Act did not violate plaintiffs' substantive due

DEEDS—Continued

process rights. The individual statutes that form the Act are rationally related to the legitimate purpose of providing a statutory framework for dealing with modern real estate developments, particularly planned communities. **Reidy v. Whitehart Ass'n, 76.**

Validity of homeowners association—incorporation after sale of first lot—The Planned Community Act applies to this case despite plaintiff's contention that the homeowners association was incorporated after the conveyance of the first lot in violation of N.C. Gen. Stat. § 47F-3-101 (2005). That was not one of the provisions made applicable to communities created before the effective date of the Act. **Reidy v. Whitehart Ass'n, 76.**

DISCOVERY

Improper denial of admissions—sanctions—attorney fees—The trial court did not abuse its discretion by taxing defendant Christina Cerwin with costs of $25,200 under N.C.G.S. § 1A-1, Rule 37(c), because: (1) defendants failed to request that the trial court make findings with respect to the four exceptions under Rule 37(c); (2) Judge Cashwell listed the specific requests for admissions that defendants improperly denied, and noted that plaintiffs ultimately proved those matters; and (3) Judge Cashwell provided an itemized list of attorney fees attributable to the failure to admit, and concluded that attorney fees were reasonable. **Cail v. Cerwin, 176.**

DIVORCE

Alimony—consideration of all relevant factors—The trial court erred in an alimony case by failing to consider all relevant factors in determining the amount, duration, and manner of payment of alimony as required by N.C.G.S. § 50-16.3A(b), and the award of alimony is vacated and remanded for additional findings on all income, including medical benefits and any other benefits that function as income, because the trial court made no findings with respect to plaintiff's medical benefits or potential income from her IRA, although evidence of the sources of income was presented at the hearing. **Phillips v. Phillips, 238.**

Alimony—dependent spouse—The trial court did not err in an alimony case by its determination under N.C.G.S. § 50-16.1A(2) that plaintiff was a dependent spouse because: (1) the trial court's findings include a description of the real property owned by each of the parties as well as their personal savings, thus satisfying the requirement to consider the parties' estates; (2) the findings indicate the standard of living established during the marriage and plaintiff's need for more space in order to maintain the standard of living of the spouse seeking alimony in the manner to which that spouse became accustomed during the last several years prior to separation; and (3) while it is true that plaintiff owned a condominium in fee simple, plaintiff's ownership cannot be weighed without consideration of the past use and intended future use of the condominium. **Phillips v. Phillips, 238.**

Alimony—modification—conclusions of law—findings of fact—The trial court did not abuse its discretion in the amount it reduced defendant's alimony obligation because: (1) defendant did not assign error to any of the trial court's conclusions of law, and therefore waived his right to challenge the conclusions;

DIVORCE—Continued

and (2) the findings of fact are deemed to be supported by competent evidence when the transcript was incomplete. **Dodson v. Dodson, 265.**

Alimony—notice of hearing—The trial court did not err in an alimony case by allegedly holding the trial without notice even though defendant contends he thought the hearing on 1 May 2006 would be a status conference only because on 23 March 2006 defendant signed a memorandum of judgment/order which stated any potential alimony issue is set for hearing on 1 May 2006. **Phillips v. Phillips, 238.**

Alimony—stipulation—technical error—Although the trial court made a technical error in an alimony case by finding that the parties stipulated that there would be no evidence pertaining to marital misconduct or fault, the error does not require reversal, because: (1) although defendant contends plaintiff admitted marital misconduct and fault by failing to respond to defendant's counterclaim, N.C.G.S. § 50-10(a) provides that the material facts in every complaint asking for a divorce shall be deemed to be denied whether the same shall be actually denied by pleading; and (2) while defendant is correct that the parties did not stipulate on the record that there would be no evidence of marital fault, neither party presented evidence of marital misconduct or fault. **Phillips v. Phillips, 238.**

Equitable distribution—antenuptial agreement—interpretation—The trial court did not err in an equitable distribution case by interpreting the language of an antenuptial agreement so that a notice requirement applied to one paragraph only. **Cooke v. Cooke, 101.**

Equitable distribution—post-separation mortgage payments—The trial court did not err in an equitable distribution action by determining that reimbursement of post-separation mortgage payments was equitable. The payments were not divisible property and the court was not required to consider the statutory factors concerning whether the payments were equitable. **Cooke v. Cooke, 101.**

Equitable distribution—post-separation mortgage payments—nondivisible property—The trial court erred in an equitable distribution action by characterizing post-separation mortgage payments as a distribution of divisible property. However, a remand was not necessary because the trial court had the authority to reimburse defendant for those payments. **Cooke v. Cooke, 101.**

Equitable distribution—post-separation mortgage payments—reimbursements—The trial court was within its discretion in an equitable distribution case in requiring that defendant be reimbursed for post-separation mortgage payments made while plaintiff was in exclusive possession of the marital home. **Cooke v. Cooke, 101.**

Foreign order—enforcement—The trial court did not err by granting summary judgment for plaintiff in an action to domesticate an Israeli divorce and child support order. Plaintiff's complaint made sufficiently clear that she was seeking recognition of payments provided in that order, specifically citing the North Carolina Foreign Money Judgments Recognition Act (NCMJRA); the order qualifies as a foreign judgment under that act; and defendant did not assert any ground for nonrecognition. Plaintiff must follow the statutory steps contained in the Uniform Enforcement of Foreign Judgments Act (UEFJA) at the appropriate time to enforce the judgment. **Cotter v. Cotter, 511.**

DIVORCE—Continued

Missouri decree—service of notice—In an action to determine who should have possession of the deceased's body, the trial court did not err by concluding that a Missouri divorce decree was valid. **Wiseman Mortuary, Inc. v. Burrell, 693.**

DOMESTIC VIOLENCE

Instructions—enhancement provisions in Chapter 50B—knowing violation—ignorance of law—The trial court did not err a domestic violence case involving assault with a deadly weapon with intent to kill by its instructions to the jury as they related to the enhancement provisions in Chapter 50B based on a violation of a valid domestic violence protective order, because: (1) defendant conceded that he was aware of the temporary restraining order (TRO), but that he made a mistake of law as to the legal impact of the TRO; and (2) it is well-settled that ignorance of the law or a mistake of law is no defense to criminal prosecution. **State v. Byrd, 597.**

DRUGS

Constructive possession—control of motel room—There was sufficient evidence that defendant Wiggins constructively possessed an opium derivative even though he contended that he did not have exclusive control of a motel room in which the opium derivative was found. **State v. Wiggins, 376.**

Ex mero motu dismissal of charges—evidence erroneously suppressed—The trial court erred by dismissing ex mero motu narcotics charges which arose from the search of defendant's home where the court had erroneously suppressed the evidence seized from the home. Even if the evidence had been properly suppressed, it is possible for the State to present other evidence; the granting of a motion to suppress does not mandate the pretrial dismissal of the underlying indictments. **State v. Edwards, 701.**

Possession of cocaine—instruction—State's burden of proof—The trial court did not commit plain error in a possession of cocaine case in instructing the jury on the State's burden of proof by instructing the jury to find defendant not guilty if it did not find defendant knowingly possessed cocaine and had reasonable doubt because the jury instructions taken as a whole adequately advised the jury that the State has the burden of proving its evidence beyond a reasonable doubt. **State v. Freeman, 408.**

Possession with intent to sell—sufficiency of evidence—There was sufficient evidence to deny defendant's motion to dismiss a charge of possession of cocaine with intent to sell. **State v. Wiggins, 376.**

Trafficking—motions to dismiss—sufficiency of evidence—constructive possession—The trial court did not err by denying defendant's motions to dismiss drug trafficking charges because the State sufficiently provided incriminating circumstances to establish that defendant had constructive possession of methamphetamine and precursor chemicals including that (1) defendant was found inside a locked shed with the methamphetamine and precursor chemicals, a jar of unknown liquid containing methamphetamine was on a heater that was still warm to the touch, and a letter was found in the shed that was addressed to defendant containing confidential tax information; and (2) defendant was the

DRUGS—Continued

only person seen entering and leaving the shed that evening, and there was no evidence that anyone else's belongings were inside the shed. **State v. Loftis, 190.**

Trafficking by possession—conspiracy—mutual implied understanding—The evidence in a prosecution for conspiracy to traffic in cocaine by possession was sufficient, taken collectively, to permit an inference of a mutual implied understanding. **State v. Wiggins, 376.**

Trafficking by possession—proximity—A passenger in a truck in which cocaine was found was not simply in close proximity; there were other incriminating circumstances permitting the inference that he had knowledge of the cocaine under the hood. **State v. Wiggins, 376.**

Trafficking by possession—sufficiency of evidence—There was sufficient evidence to deny a motion to dismiss a prosecution for trafficking in cocaine by possession where defendant argued that there was no evidence that he actually or constructively possessed the cocaine, but cocaine and digital scales were recovered from his vehicle, and paraphernalia from his hotel room. **State v. Wiggins, 376.**

EMINENT DOMAIN

Condominium common area—unity of ownership—The common area and individually owned townhouse lots in a condoninium development constituted a "single, unified tract" for purposes of awarding damages for the condemnation of a portion of the common area. **Department of Transp. v. Fernwood Hill Townhome Homeowners' Ass'n, 633.**

Condominium owners—necessary parties—The superior court correctly determined that individual owners within a condominium association were necessary parties to a condemnation suit. **Department of Transp. v. Fernwood Hill Townhome Homeowners' Ass'n, 633.**

Hearing—matters raised by pleadings only—The plain language of N.C.G.S. § 40A-47 (condemnation) requires that the trial court resolve only issues raised by the pleadings, not all matters at issue between the parties as the defendants here contended. **City of Winston-Salem v. Slate, 33.**

Refusal to conduct evidentiary hearing—issues—The trial court erred by refusing to conduct an evidentiary hearing in an eminent domain action where defendants' answers were sufficient to raise an issue as to the land affected by the taking. **City of Winston-Salem v. Slate, 33.**

Refusal to conduct evidentiary hearing—prejudice—An error in not holding an evidentiary hearing in an eminent domain action was not harmless where there was a possibility that defendants could show a unity of ownership and unity of use as to certain tracts. **City of Winston-Salem v. Slate, 33.**

ENVIRONMENTAL LAW

Solid waste management—illegal disposal of sheetrock—incorrect regulation—The trial court did not err in a case involving violation of solid waste management statutes by concluding defendant agency erroneously relied upon

ENVIRONMENTAL LAW—Continued

15A N.C.A.C. 13B.201(a) in proceeding against plaintiff for the illegal disposal of scrap sheetrock on property owned by another without a permit. **Luna v. N.C. Dep't of Env't & Natural Res., 291.**

ESTOPPEL

Validity of homeowners association—delay in contesting—earlier recognition—Plaintiffs were estopped from contesting the validity of a homeowners association where they purchased their lot subject to the declaration of covenants; they did not contest the validity of the association for nearly five years, until the architectural committee denied their design approval request; and there was evidence in the record that plaintiffs recognized the validity of the association by paying dues. **Reidy v. Whitehart Ass'n, 76.**

EVIDENCE

Defendant in jail during trial—admission not plain error—There was no plain error in allowing testimony to the fact that defendant had been incarcerated on the charges in this case. **State v. Ridgeway, 423.**

Defendant's telephone conversation—discussion of witnesses—profanity—not prejudicial—The trial court did not err in a first-degree murder prosecution by admitting into evidence a taped telephone conversation between defendant and his brother in which defendant used profanity, discussed witnesses who would testify against him, and discussed his brother's sexual encounters. Defendant's statements about witnesses showed awareness of guilt, and he did not specifically object at trial to other portions of the testimony. The trial court held a voir dire, listened to the recording, heard arguments from counsel, and made a reasoned decision. **State v. Brockett, 18.**

Federal plea bargain—not relevant—The trial court did not abuse its discretion in a first-degree murder prosecution by not allowing a witness to be cross-examined about his federal plea bargain. There was no showing that the witness received anything in exchange for his testimony against defendant. **State v. Williams, 318.**

Gang terminology—meaning of specific terms—variable context—The trial court did not err by allowing a detective to testify about the meaning of certain gang terminology where defendant asserted that the terms have various meanings depending on the context. It is clear that the testimony was necessary for an understanding of the conversation in issue, defendant did not object to the specific testimony offered, and he cross-examined the detective on his interpretation of only one word. Moreover, the judge instructed the jury that it was the sole judge of credibility. **State v. Brockett, 18.**

Hearsay—forensic chemist testimony—testing and conclusions passed review—The trial court did not commit plain error in a possession of cocaine case by allowing a forensic chemist to testify regarding a review of her conclusions even though defendant contends it constituted inadmissible hearsay, because: (1) assuming, without deciding, that the testimony that her testing and conclusions passed review constituted inadmissible hearsay, the admission did not constitute fundamental error so that justice could not be done; (2) the chemist did not describe the contents of the review but simply stated her report

EVIDENCE—Continued

passed; and (3) both the chemist and an officer testified without objection that the pills were cocaine. **State v. Freeman, 408.**

Hollow point bullets—not probative of issues—not prejudicial—The admission of testimony about hollow point bullets found in defendant's gun was erroneous but not prejudicial in a prosecution for cocaine trafficking and carrying a concealed weapon. The State provided evidence of each element of the offense that was not challenged. **State v. Gayton, 122.**

Identification of stolen property—properly admitted—Testimony identifying a recovered camera as one that had been stolen was properly admitted in a prosecution for possession of stolen property. The testimony was relevant, the witness stated that she was personally familiar with the camera, and she testified that she recognized it as the one stolen. **State v. Patterson, 67.**

Involvement of another person—defendant's address at time of arrest—The trial court did not err in a drug trafficking case by excluding evidence of law enforcement's suspicions of the involvement of another person and evidence of defendant's address at the time of his arrest. **State v. Loftis, 190.**

Items found at scene—supportive of reasonable inference—The trial court did not err by admitting a knife and a condom found at the scene of a sexual assault and murder where defendant stated that he had initially intended to use the condom when he assaulted the victim and intended to use the knife to kill the victim's mother when she got home. **State v. Ridgeway, 423.**

Judicial notice—records of prior case—The trial court did not err by considering unverified documents in the court file from a prior action between these two parties in support of a motion to dismiss. Trial courts may take judicial notice of their own records. **Stocum v. Oakley, 56.**

Lease—damages—business records exception—The trial court did not err in an action arising from a commercial lease by admitting testimony from the person responsible for the management of the premises about the extent of damages incurred by plaintiff. The witness was referring to documents from plaintiff's file and it is clear that the documents were admissible under the business records exception to the hearsay rule. **N.C. Indus. Capital, LLC v. Clayton, 356.**

Malicious conduct by prisoner—physical and emotional state of defendant's wife on night of incident—The trial court did not err in a malicious conduct by a prisoner case by admitting direct testimony of an officer as to the physical and emotional state of defendant's wife on the night of the incident where defendant was first in custody and was later arrested for domestic violence against his wife. **State v. Gutierrez, 297.**

Meaning of gang terms—detective's lay expertise—The trial court did not err in a gang-related first-degree murder prosecution by allowing a detective to testify about the meaning of slang terms used by defendant and his brother during a taped telephone conversation after refusing to qualify him as an expert. The judge stated that he believed the detective had the training and skills to aid the jury in interpreting the language. **State v. Brockett, 18.**

Officer testimony—crack cocaine—lay opinion—The trial court did not abuse its discretion or commit plain error in a possession of cocaine case by

EVIDENCE—Continued

allowing an officer to testify that the substance seized was crack cocaine even though defendant contends the testimony constituted inadmissible lay opinion where the officer testified based on his extensive training and experience in the field of narcotics. **State v. Freeman, 408.**

Other break-ins—chain of events—Evidence about other reported break-ins was properly admitted in a prosecution for possession of stolen property . The evidence explained the chain of events in the police investigation and was not hearsay. **State v. Patterson, 67.**

Photographs of gang tattoos—not revealed in discovery—The trial court did not abuse its discretion by declining to exclude as a discovery sanction photographs of tattoos indicating defendant's possible gang membership, for the stated reason that defendant was aware of his own tattoos. Given the overwhelming evidence of defendant's guilt, the court was within its rights to hold that the photographs need not be excluded. **State v. Gayton, 122.**

Possession of stolen property—other break-ins—not prejudicial—The probative value of testimony about other break-ins in a prosecution for possession of stolen property was not out-weighed by the prejudicial value. There was no testimony directly accusing defendant of the other crimes, and the court gave an instruction limiting the testimony to what the detective did, not what he heard. **State v. Patterson, 67.**

Possession of stolen property—relevancy—proper foundation—Testimony identifying a recovered camcorder as having been stolen was properly admitted in a prosecution for possession of stolen property. The witness's testimony was relevant and was preceded by a proper foundation. **State v. Patterson, 67.**

Prior crimes or bad acts—decision to admit—not an abuse of discretion—The trial judge did not abuse his discretion by admitting evidence of prior bad acts in a gang-related murder prosecution where he held a voir dire hearing, considered the arguments of counsel, and then determined that the probative value of the evidence outweighed any prejudicial effect it may have had. His decision was not arbitrary or unsupported by reason. **State v. Brockett, 18.**

Prior crimes or bad acts—fake names—fictitious identification card—guilty knowledge—chain of circumstances—The trial court did not commit plain error in a possession of cocaine case by allowing an officer's testimony that defendant provided fake names and possessed a fictitious identification card. **State v. Freeman, 408.**

Prior crimes or bad acts—prior conviction—failure to give limiting instruction—The trial court did not abuse its discretion in a felonious possession of stolen property and possession of a firearm by a felon case by admitting defendant's prior conviction of felony breaking and entering into evidence, nor did it commit plain error by failing to give a limiting instruction regarding the prior conviction, because: (1) the Felony Firearms Act under N.C.G.S. § 14-415.1(b) provides that records of prior convictions of any offense shall be admissible in evidence for the purpose of proving a violation of this section; (2) there was no indication that defendant agreed to stipulate to his prior felony conviction, and the State had no choice but to introduce evidence of defendant's conviction in order to prove its case as to the charge of possession of a firearm by a

EVIDENCE—Continued

felon; and (3) the lack of any instructions to the jury regarding the use of defendant's prior conviction could not have been so prejudicial that it had a probable impact on the jury's verdict. **State v. Wood, 227.**

Prior crimes or bad acts—use of same firearm—relevant to identity—Evidence of prior bad acts (robberies) was relevant to identity and was properly admitted in a prosecution for gang-related first-degree murder and related crimes. There was expert testimony that the TEC-9 firearm used in the killing was the weapon used in the robberies. **State v. Brockett, 18.**

Standard of care—testimony not judicial admission—judgment notwithstanding verdict improper—Testimony by an anesthesiologist, an employee of the defendant in a wrongful death case, indicating that she did not comply with the applicable standard of care when she was not present at the beginning of decedent's surgery, was not a judicial admission but was an evidential admission that did not support the trial court's allowance of plaintiff's motion for judgment notwithstanding the verdict for defendant and a new trial. **Jones v. Durham Anesthesia Assocs., P.A., 504.**

Statements to deputy—not hearsay—Testimony by a deputy in a drug trafficking prosecution that included statements by an informant was not offered for its truth and was not hearsay. **State v. Wiggins, 376.**

Statements to witness—present sense impressions—The trial court did not err by admitting as presence sense impressions testimony about the witness's telephone conversations with a murder victim. Moreover, there was other testimony to substantially the same subject matter without objection. **State v. Williams, 318.**

Sufficiency of evidence—property claimed by defendant—There was sufficient evidence to support charges of possessing stolen property and possessing housebreaking tools where there was evidence that stolen items were recovered which defendant claimed were his, and tools found with the stolen items were consistent with tools typically used to break and enter locked properties. **State v. Patterson, 67.**

Testimony about gangs—unrelated to charges—not prejudicial—The admission of testimony about gangs was erroneous but not prejudicial in a prosecution for cocaine trafficking and carrying a concealed weapon. The information had nothing to do with the charges, but there was overwhelming undisputed evidence of defendant's guilt. **State v. Gayton, 122.**

Testimony by deputy—statements by an informant—not unduly prejudicial—The probative value of testimony by a deputy that included statements by an informant was not outweighed by its prejudicial effect and there was no abuse of discretion in its admission. Also, there was no abuse of discretion in the denial of a motion for a mistrial on this basis. **State v. Wiggins, 376.**

Transcript of prior plea—admissibility—The trial court did not err in a prosecution for a gang-related murder by admitting the transcript of defendant's plea to three prior armed robberies. The transcript established defendant's admission to having previously used the murder weapon, a limiting instruction was given, the actual judgment or conviction record was not admitted, and the State was required to sanitize the plea to remove references to any charge or crime other than that to which he was pleading guilty. **State v. Brockett, 18.**

FIREARMS AND OTHER WEAPONS

Felony firearm statute—motion for summary judgment—The trial court did not err by failing to interpret N.C.G.S. § 14-415.1 to allow plaintiff the right to bear firearms, because: (1) there is no dispute between the parties as to the fact that defendant is a convicted felon; (2) N.C.G.S. § 14-415.1 clearly states plaintiff may not possess a firearm for any reason; and (3) the proscription in the statute shows that it is intended to apply to anyone ever convicted of a felony offense in North Carolina without exception. **Britt v. State, 610.**

Felony firearm statute—right to bear arms—rational relation—ex post facto—bill of attainder—due process—equal protection—The statute making the possession of a firearm by convicted felon unlawful, N.C.G.S. § 14-415.1, is rationally related to a legitimate state interest, does not violate the ex post facto clause, does not constitute a prohibited bill of attainder, does not violate a defendant's right to equal protection and due process, and does not violate the Second Amendment right to bear arms. **Britt v. State, 610.**

HOMICIDE

Felony murder—multiple underlying felonies—one arrested—There was no plain error where the trial court arrested judgment on one of five felonies supporting felony murder. Where the trial court's jury instructions did not specify which of the multiple felonies were to be considered as the underlying felony for purposes of the felony murder conviction, it was within the trial court's discretion to select which felony conviction would serve as the underlying felony. **State v. Ridgeway, 423.**

Felony murder—victim shooting himself—State's argument—error cured by instructions—Any error in an argument by the State that it did not matter under the felony murder rule whether the victim or the defendant pulled the trigger was cured by the court's instructions. **State v. Williams, 318.**

Shooting during armed robbery—evidence of causation by defendant—sufficiency—There was sufficient evidence that defendant was the perpetrator of a first-degree murder committed in the course of an armed robbery where defendant argued that the evidence showed that the victim was shot by his own weapon, but it was reasonable for the jury to infer from the evidence that an act by defendant caused the death. **State v. Williams, 318.**

HOSPITALS AND OTHER MEDICAL FACILITIES

Hospice—certificate of need—branch office—The opening of a branch office by an established hospice within its current service area is not the construction of a new institutional health service for which a certificate of need (CON) is required (as Chapter 131E existed in July 2005). However, Liberty was required to obtain a CON for its proposed Greensboro hospice office because that office is not located within the current service area of its Fayetteville office and is a new institutional health service. **Hospice at Greensboro, Inc. v. N.C. Dep't of Health & Human Servs., 1.**

Hospice—licensed and operational—certificate of need oversight—An agency correctly concluded that a contested case was not moot where the mootness claim was based on the erroneous premise that a new hospice office was no longer subject to certificate of need oversight because the office was licensed

HOSPITALS AND OTHER MEDICAL FACILITIES—Continued

and fully operational. **Hospice & Palliative Care Charlotte Region v. N.C. Dep't of Health & Human Servs., 109.**

Hospice—no review letter—exemption—appeal to Court of Appeals—The issuance of a "no review" letter by the N.C. Department of Health and Human Services Certificate of Need section is the issuance of an "exemption" for purposes of N.C.G.S. § 131E-188(a), so that there may be an immediate appeal to the Court of Appeals rather than to superior court. **Hospice at Greensboro, Inc. v. N.C. Dep't of Health & Human Servs., 1.**

Hospice—no review letter—prejudice to existing competing provider—The issuance of a "no review" letter, which results in the establishment of a new institutional health service (in this case a hospice) without a prior determination of need, substantially prejudiced a licensed, pre-existing competing health service provider as a matter of law. **Hospice at Greensboro, Inc. v. N.C. Dep't of Health & Human Servs., 1.**

Hospice—opening office in another county—certificate of need required—A Johnson County hospice was required to obtain a certificate of need before opening a hospice office in Mecklenburg County even though it had obtained a "no review" letter. **Hospice & Palliative Care Charlotte Region v. N.C. Dep't of Health & Human Servs., 109.**

IMMUNITY

Board of education—common law negligence—sovereign immunity not waived—In a common law negligence action based upon failure to supervise brought on behalf of a middle school student who was sexually assaulted by another student, defendant board of education did not waive its sovereign immunity up to $150,000 by its purchase of indemnification coverage in that amount through the North Carolina School Boards Trust (NCSBT) because a school board's participation in NCSBT does not qualify as a purchase of liability insurance as defined by N.C.G.S. § 115C-42. Furthermore, an excess liability policy purchased by the board of education did not provide coverage of $850,000 for the amount of the claim exceeding $150,000 because the excess policy specifically excluded coverage for claims of negligent failure to supervise. **Craig v. New Hanover Cty. Bd. of Educ., 651.**

Sovereign—community college—reimbursement of payments for workers' compensation benefits—The trial court erred by denying defendant community college's motion to dismiss on the ground of sovereign immunity a declaratory judgment action by the Insurance Guaranty Association for reimbursement of payments for workers' compensation benefits under the net worth provisions of the Guaranty Act in N.C.G.S. § 58-48-50(a1). **N.C. Ins. Guar. Ass'n v. Board of Trs. of Guilford Technical Cmty. College, 518.**

INSURANCE

Insurer's unjustifiable refusal to defend—liability for reasonable settlement and defense costs—An insurer who unjustifiably refused to provide a defense to an insured is liable for the settlement entered into by the insured and the costs of defense in the amount of $805,957 where the insured submitted evi-

INSURANCE—Continued

dence to the trial court regarding the reasonableness of the settlement and its defense costs, and the insurer presented no counter evidence and made no argument on appeal that the settlement or defense costs were unreasonable. **Pulte Home Corp. v. American S. Ins. Co., 162.**

Subcontractor's general liability policy—additional insured endorsement—coverage for general contractor's negligence—An additional insured endorsement adding a general contractor to a subcontractor's commercial general liability policy "as an insured but only with respect to liability arising out of [the subcontractor's] operations" covered the general contractor for its independent negligence if a causal nexus exists between the general contractor's liability and the subcontractor's operations; it did not cover the general contractor only for vicarious liability based on the negligence of the subcontractor. **Pulte Home Corp. v. American S. Ins. Co., 162.**

Subcontractor's general liability policy—additional insured endorsement—coverage for general contractor's negligence—A general contractor's alleged negligence in failing to provide safety devices or fall protection for a worker who fell while installing trusses in a house for a framing subcontractor arose out of the subcontractor's operations and was thus covered by an additional insured endorsement in the subcontractor's commercial general liability policy since the general contractor's alleged liability was a natural and reasonable incident or consequence of the subcontractor's operations. Therefore, the commercial general liability insurer had a duty to defend the general contractor in a suit to recover for the worker's injuries. **Pulte Home Corp. v. American S. Ins. Co., 162.**

Subcontractor's general liability policy—additional insured endorsement—suit against general contractor—delay in notice to insurer—Defendant insurer was not justified in refusing to defend plaintiff general contractor under the additional insured endorsement in a subcontractor's commercial general liability policy on the ground that plaintiff failed to give defendant notice of the suit against it "as soon as practicable" as required by the policy where plaintiff showed that it acted in good faith during a six-month delay in notifying defendant insurer because the delay was a function of its internal polices for processing claims, and defendant conceded that it was not materially prejudiced by the delay. **Pulte Home Corp. v. American S. Ins. Co., 162.**

JUDGES

Recusal—motion required to be in writing—The trial judge did not err by refusing to recuse himself as the sentencing judge even though he had previously sentenced defendant in the same case because: (1) N.C.G.S. § 15A-1223 requires that a written motion must be filed no less than five days before the time the case is called for trial unless good cause is shown for failure to file within that time; (2) defendant's request to the trial judge to recuse himself was made only orally, and nothing in the record meets the definition of good cause sufficient to excuse defendant's failure to comply with the statute; and (3) the trial judge's refreshing his memory as to defendant's case did not suggest he had any bias or prejudice against defendant when his comments were neutral and did not reflect any opinion. **State v. Moffitt, 308.**

JUDGMENTS

Default judgment—failure to answer requests for admissions—summary judgment—The trial court did not err in a breach of contract case by entering summary judgment against defendant based on defendant's failure to answer requests for admissions when default had already been entered prior to the deadline of defendant's responses, because: (1) the entry of default did not preclude defendant from responding to plaintiffs' requests for admissions since defendant was free to contest the sufficiency of plaintiffs' complaint to state a claim for recovery; and (2) by not responding to the requests, defendant admitted the matters requested and from these admissions defendant established the elements of plaintiffs' breach of contract claim. **Kniep v. Templeton, 622.**

Default judgment—sufficiency of evidence—The trial court did not abuse its discretion in a declaratory judgment action by granting plaintiff's motion for default judgment even though defendant contends there was insufficient evidence to warrant plaintiff's recovery, because: (1) a number of facts were established by defendant's failure to answer the complaint; and (2) the opinion and award provided a basis to justify the amount of the compensation sought by plaintiff. **Lowery v. Campbell, 659.**

Denial of motion to set aside entry of default—good cause—The trial court did not abuse its discretion in a declaratory judgment action by denying defendant's motion to set aside entry of default under N.C.G.S. § 1A-1, Rule 55(d) on the ground that defendant showed good cause, because: (1) when served with plaintiff's declaratory judgment action, defendant forwarded the papers to a South Carolina attorney with no instructions or request to take action; (2) no follow up investigation took place by defendant's insurance adjuster until after plaintiff had obtained the entry of default; and (3) it cannot be concluded that the trial court's denial of defendant's motion was manifestly unsupported by reason. **Lowery v. Campbell, 659.**

Findings and conclusions—not required for de novo review—It was not necessary for the trial judge to make findings of fact and conclusions of law in denying plaintiff's motion for judgment notwithstanding the verdict and for a new trial. Review is de novo; findings of fact and conclusions will not aid the review and are not required. **N.C. Indus. Capital, LLC v. Clayton, 356.**

JURISDICTION

Summary judgment—same legal issues for first and second motion for summary judgment—The trial court's order of 3 March 2005 is vacated to the extent that it overrules another judge's 27 February 2004 order with respect to plaintiffs' first, second, third, fourth, and sixth claims for relief and defendant Christina Cerwin's counterclaim. **Cail v. Cerwin, 176.**

JURY

Selection—pretrial publicity—The trial court properly denied defendant's motion to change venue or for a special venire based on pretrial publicity in a prosecution for murder, rape and sexual offenses against his girlfriend's daughter. Defendant did not demonstrate such widespread and pervasive prejudice in the community that he could not receive a fair trial before the jurors who were selected. **State v. Ridgeway, 423.**

KIDNAPPING

Amendment of indictment—purpose of confinement, restraint, or removal—substantial alteration—The trial court's amendment of a kidnapping indictment that removed an allegation that the victim was seriously injured and changed the alleged purpose of defendant's confinement, restraint or removal of the victim from "facilitating the commission of a felony" to "facilitating inflicting serious injury" constituted a substantial alteration of the charge against defendant and prejudiced defendant's ability to prepare for trial. **State v. Morris, 481.**

LACHES

Action on the closing of a road—summary judgment—The trial court did not err by granting summary judgment for defendants on their claim of laches in an action arising from the closing of a road in a subdivision where the undisputed facts showed a delay of 9 years in bringing the claim, $100,000 spent to repair the street one year before the claim was brought, and the purchase and sale of properties in the subdivision. These facts satisfy all of the conditions for laches. **Farley v. Holler, 130.**

LANDLORD AND TENANT

Commercial lease—damages—question for jury—The trial court did not err in an action involving a commercial lease by denying defendant's motions for a directed verdict and judgment n.o.v. in an action to determine damages. The evidence and documentation provided more than a scintilla of evidence to support the assertion that plaintiff's claims were exaggerated. **N.C. Indus. Capital, LLC v. Clayton, 356.**

Commercial lease—ejectment and breach of contract—res judicata—Defendant Clayton's dismissal with prejudice in an ejectment action did not operate as res judicata or collateral estoppel on his liability in a breach of contract case. The summary ejectment statute specifically allows a lessor to bring an action to regain possession of the premises separate from an action for damages; the disposition of the underlying case would have no res judicata or collateral estoppel effect on plaintiff's subsequent suit for recovery of damages. **N.C. Indus. Capital, LLC v. Clayton, 356.**

Disputed lease amounts—payment to clerk—prejudgment interest—Defendant's payment of certain disputed lease amounts did not stop the running of interest, and the trial court did not err by awarding prejudgment interest, where the payments were required by the Clerk to stay execution of a summary ejectment and were not tenders of payment to plaintiff. **N.C. Indus. Capital, LLC v. Clayton, 356.**

Payments to clerk—applicability of lease late fee provisions—The trial court did not err by deciding that plaintiff was not entitled to late fees where there was a dispute under a commercial lease, defendant made payments to the Clerk of Court, and plaintiff argued that the payments from the Clerk were not timely under the terms of the lease. The lease terms regarding late fees were not applicable because the Clerk's order satisfied the statutory requirements for an "undertaking" on defendant's part. N.C.G.S. § 42-34(b). **N.C. Indus. Capital, LLC v. Clayton, 356.**

LIBEL AND SLANDER

Slander per se—affirmative defense of truth—The trial court did not err in a defamation case stemming from plaintiff's drug test on 11 December 2001 by entering summary judgment in favor of defendant on the claim of slander per se because defendant definitively proved the affirmative defense of truth to slander per se when the statements were all true even if plaintiff subsequently showed that they were based on a false underlying premise. **Losing v. Food Lion, L.L.C., 278.**

MEDICAL MALPRACTICE

Common law negligence—specialized knowledge or skill—Plaintiff's complaint did not state a claim for common law negligence against defendant doctor which did not require a Rule 9(j) certification because plaintiff's contention that preventing plaintiff from participating in a bowling outing did not require specialized knowledge or skill is without merit since determining whether a patient who is known to be at risk of falling should participate in such an activity is precisely the kind of professional judgment to which N.C.G.S. § 90-21.11 applies. **Smith v. Serro, 524.**

Rule 9(j) certification—reasonable expectation expert would qualify—A de novo review revealed that the trial court did not err in a medical malpractice case by holding that plaintiff failed to comply with N.C.G.S. § 1A-1, Rule 9(j) because plaintiff could not have reasonably expected the pertinent doctor to qualify as an expert under N.C.G.S. §8C-1, Rule 702 when his specialty was not the same as defendant doctor, nor is it a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint. **Smith v. Serro, 524.**

MORTGAGES AND DEEDS OF TRUST

Check not accepted—foreclosure—not allowed—The evidence supported the trial court's finding that there was no default on a mortgage where respondent testified that petitioner had refused a check because the numeric and written amounts differed, that she had attempted to pay the amounts owed, and that petitioner was not communicative. **In re Foreclosure of Bigelow, 142.**

Foreclosure—not allowed—mortgage holder's conduct—The trial court did not impermissibly rely on an equitable defense in refusing to allow a foreclosure where the apparent lack of communication between petitioner's different departments or personnel supported the factual determination that respondents were not in default. **In re Foreclosure of Bigelow, 142.**

PLEADINGS

Motion to amend answer—no ruling—There was no error in an eminent domain action where defendants argued that the trial court erred by declining to rule on their motion to amend their answer. The trial court properly concluded that defendants had failed to file their motion in a timely fashion; moreover, the court's orders do not preclude defendants from having their motion heard on another date. **City of Winston-Salem v. Slate, 33.**

Motion to dismiss—verification of complaint—The trial court did not err in a declaratory and injunctive relief case concerning the interpretation and

PLEADINGS—Continued

enforcement of a county ordinance regulating sexually oriented businesses by denying defendant's motion to dismiss plaintiff's complaint based on it not being verified by an officer, or managing or local agent of the county. **Pitt Cty. v. Deja Vue, Inc., 545.**

Rule 11 sanctions—action refiled after voluntary dismissal consideration of prior action—A voluntary dismissal may not be taken in bad faith, and will not deprive the trial court of jurisdiction to consider collateral issues such as sanctions under Rule 11. However, a motion for Rule 11 sanctions must be filed within a reasonable time, and defendants' motion to dismiss as a Rule 11 sanction was filed within a reasonable time where defendants filed one motion before plaintiffs took a voluntary dismissal of their action, and defendants filed a second motion upon plaintiffs' refiling of their complaint. **Stocum v. Oakley, 56.**

Rule 11 sanctions—dismissal—In light of the trial court's findings, it could not be said that the trial court abused its discretion in determining that dismissal was appropriate as a Rule 11 sanction where the court considered less severe sanctions and there was competent evidence to support the court's findings. **Stocum v. Oakley, 56.**

Rule 11 sanctions—effect of voluntary dismissal—Plaintiffs' arguments that a Rule 41(a) voluntary dismissal wipes the slate clean of sanctionable conduct was rejected where the trial court found that the Rules of Civil Procedure were violated for the purpose of delay and to gain an unfair advantage. **Stocum v. Oakley, 56.**

Rule 11 sanctions—estoppel—Plaintiffs did not cite authority discussing the use of estoppel in a Rule 11 motion; in fact, Rule 11 sanctions must be imposed when a trial court finds grounds for sanctions. **Stocum v. Oakley, 56.**

Rule 11 sanctions—prejudice not required—In a case in involving Rule 11 sanctions, plaintiffs cited no authority requiring prejudice before sanctions could be granted; in fact, some degree of sanction is mandatory upon finding a Rule 11 violation. Moreover, the trial court in this case had competent evidence from which it made its finding. **Stocum v. Oakley, 56.**

POSSESSION OF STOLEN PROPERTY

Sufficiency of evidence—property claimed by defendant—There was sufficient evidence to support charges of possessing stolen property and possessing housebreaking tools where there was evidence that stolen items were recovered which defendant claimed were his, and tools found with the stolen items were consistent with tools typically used to break and enter locked properties. **State v. Patterson, 67.**

PREMISES LIABILITY

Duty of care—warning of hidden dangers—The Industrial Commission did not fail to apply a premises liability legal standard in an action seeking to recover damages for personal injuries under the Tort Claims Act based upon defendant State Zoo's alleged negligence in monitoring a ficus tree. **Cherney v. N.C. Zoological Park, 203.**

PRISONS AND PRISONERS

Malicious conduct by prisoner—intentionally spat on officer—The trial court did not abuse its discretion in a malicious conduct by a prisoner case by admitting over defendant's objection the police officers' testimony that defendant intentionally spat on an officer. **State v. Gutierrez, 297.**

PRIVACY

Invasion of privacy—expiration of statute of limitations—The trial court did not err in an invasion of privacy case stemming from plaintiff's drug test on 11 December 2001 by entering summary judgment in favor of defendant on the claim of invasion of privacy because the claim was barred by the statute of limitations. **Losing v. Food Lion, L.L.C., 278.**

PROBATION AND PAROLE

Probation revocation—admission of violation—through counsel—There is no requirement that the court personally examine defendants about their admissions of probation violations. Here, the trial court did not err by revoking defendant's probation where he received notice of the alleged violations, a hearing was held, defendant admitted through counsel two of the violations contained in the violation report, the court heard from the probation officer, and defendant then addressed the court. **State v. Sellers, 726.**

Probation revocation—reasonable effort to conduct hearing prior to expiration of probation—The trial court had jurisdiction to revoke defendant's probation and activate the suspended sentence for assault with a deadly weapon inflicting serious injury after the term of defendant's probation expired, and the case is remanded to make sufficient material findings, because, although the trial court's statutorily required findings of fact were incomplete since merely issuing a warrant for arrest is not a reasonable effort to conduct a hearing prior to the expiration of defendant's probation, there was sufficient additional evidence in the record to support a reasonable effort finding. **State v. Daniels, 535.**

PUBLIC RECORDS

Alteration of child support order—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss for insufficient evidence a charge of altering an official record (a child support record). **State v. Burke, 115.**

RAPE

Aassault to gratify desire—evidence sufficient—There was sufficient evidence that defendant assaulted his victim for the purpose of arousing or gratifying sexual desire. **State v. Ridgeway, 423.**

Sexual offenses—murder—single transaction—There is sufficient evidence to support sex offense convictions even if it is not clear that the victim was alive when the sex offenses were committed when the crimes were part of a continuous chain of events. Here, there was sufficient evidence to support a conclusion that defendant's physical abuse, rape, and sexual offenses against his girlfriend's daughter occurred as part of a single transaction, and his motion to dismiss for insufficient evidence was properly denied. **State v. Ridgeway, 423.**

RAPE—Continued

Statutory and forcible theories—consolidated judgments—arrest of judgment on one count—Judgment was arrested on one count of first-degree rape and one count of first-degree sexual offense where the jury found defendant guilty of rape on theories of statutory and forcible rape and found defendant guilty of sexual offense on theories of statutory and forcible sexual offense, even though the trial court consolidated the convictions for statutory and forcible rape in a single judgment and consolidated the convictions for statutory and forcible sexual offense in a single judgment, because separate convictions for those offenses, even when consolidated in a single judgment, have potentially severe adverse collateral consequences. **State v. Ridgeway, 423.**

SCHOOLS AND EDUCATION

Board of education—common law negligence—sovereign immunity not waived—In a common law negligence action based upon failure to supervise brought on behalf of a middle school student who was sexually assaulted by another student, defendant board of education did not waive its sovereign immunity up to $150,000 by its purchase of indemnification coverage in that amount through the North Carolina School Boards Trust (NCSBT) because a school board's participation in NCSBT does not qualify as a purchase of liability insurance as defined by N.C.G.S. § 115C-42. Furthermore, an excess liability policy purchased by the board of education did not provide coverage of $850,000 for the amount of the claim exceeding $150,000 because the excess policy specifically excluded coverage for claims of negligent failure to supervise. **Craig v. New Hanover Cty. Bd. of Educ., 651.**

Probationary teacher—contract not renewed—no right to evidentiary hearing before board—There is no implicit right to notice and a hearing before the board of education on the issue of nonrenewal for a probationary teacher in N.C.G.S. § 115C-325, which authorizes direct judicial review in superior court of a nonrenewal decision. **Moore v. Charlotte-Mecklenburg Bd. of Educ., 566.**

Probationary teacher—contract not renewed—no right to hearing before board—A probationary teacher whose contract was not renewed was not granted a right to a hearing before the board of education by N.C.G.S. § 115C-45, which deals with appeals to a local board of education from a final administrative decision. **Moore v. Charlotte-Mecklenburg Bd. of Educ., 566.**

Probationary teacher—contract not renewed—record sufficient—The record was sufficient under the whole record test to support the school board's decision not to renew a probationary teacher's contract as non-arbitrary. Nothing in controlling case law suggests that an evidentiary hearing is necessary. **Moore v. Charlotte-Mecklenburg Bd. of Educ., 566.**

Probationary teacher—contract not renewed—superintendent's decision—A letter recommending that a probationary teacher's contract not be renewed that was signed by someone other than the superintendent was sufficient where the language of the letter resolved any doubt that the superintendent made the recommendation. **Moore v. Charlotte-Mecklenburg Bd. of Educ., 566.**

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Right to and liberty interest in education free from harm—adequate remedy at law—The trial court erred by denying defendant board of education's motion for summary judgment on plaintiff's constitutional claim alleging a denial of plaintiff's right to and liberty interest in education free from harm arising from defendant's alleged negligence in failing to provide adequate protection for plaintiff from a fellow student based on the fact that an adequate state remedy existed because such a remedy is available here in the form of a common law negligence claim even though defendant board of education has sovereign immunity for such claim. **Craig v. New Hanover Cty. Bd. of Educ., 651.**

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Investigatory stop—vehicle owned by driver with suspended license—reasonable suspicion—An officer had reasonable suspicion to make an investigatory stop of a vehicle when he knew that defendant was the owner of the vehicle and that defendant's license had been suspended. In the absence of evidence to the contrary, it was reasonable to infer that defendant was driving the vehicle, and the judge did not err by denying defendant's motion to suppress in the resulting prosecution for driving while impaired. **State v. Hess, 530.**

Probable cause for warrant—evidence erroneously suppressed—A trial court order suppressing the evidence recovered during a search was reversed where the court erred by deciding that a magistrate lacked a substantial basis for concluding that probable cause for a warrant did not exist. Under the totality of the circumstances, the affidavit provided the magistrate with probable cause through a common sense determination based on the officer's extensive experience, his long established relationship with the informant, the information provided, and the specificity of the type of drugs observed. **State v. Edwards, 701.**

Stop of vehicle—traffic violation—motion to suppress evidence—probable cause—The trial court did not err in a possession controlled substances and drug paraphernalia case by denying defendant's motion to suppress the stop of his vehicle and the evidence procured as a result of the subsequent search of the vehicle, because: (1) although the trial court's mention of an investigatory stop was erroneous since the officer's stop of defendant was based upon a readily observed traffic violation, the officer was required to have probable cause instead of reasonable suspicion to stop defendant; and (2) the officer had probable cause to stop defendant's vehicle based on defendant's violation of N.C.G.S. § 20-154(a) when he changed lanes without signaling. **State v. Styles, 271.**

Traffic checkpoint—required trial court findings—The trial court is not required to make extensive inquiries into the purpose behind every traffic checkpoint, no evidence was brought forward in this case to suggest that the stated purpose behind this checkpoint (sobriety) was a mask for another, unconstitutional purpose, and an order excluding evidence from the sobriety checkpoint was reversed. However, the case was remanded for further findings as to the manner in which this individual stop was conducted. **State v. Burroughs, 496.**

SENTENCING

***Blakely* error—harmless beyond reasonable doubt**—The trial court's *Blakely* error during a sentencing hearing finding as an aggravating factor that defendant committed the rape offense while on pretrial release on another charge was harmless beyond a reasonable doubt because defendant has never disputed at trial or on appeal that he was on pretrial release when he committed the present crimes, and the validity of the charges for which he was on pretrial release is irrelevant. **State v. Watts, 539.**

***Blakely* error—harmless beyond reasonable doubt—joined with more than one other person to commit offense—armed with deadly weapon**—The trial court's *Blakely* error in a second-degree murder case in failing to submit to the jury the aggravating factors that defendant joined with more than one other person in committing the murder and was not charged with a conspiracy and that defendant was armed with a deadly weapon at the time of the offense was harmless beyond a reasonable doubt. **State v. Harris, 285.**

***Blakely* error—prejudice**—The trial court committed *Blakely* error in a robbery with a firearm case by finding as a nonstatutory aggravating factor that defendant's actions endangered multiple persons and victims continue to have emotional distress, and the case is remanded for resentencing because: (1) the facts for the aggravating factor were neither presented to the jury nor proved beyond a reasonable doubt; and (2) harmless error review revealed that the evidence was not so overwhelming or uncontroverted that any rational factfinder would have found this aggravating factor beyond a reasonable doubt. **State v. Caple, 721.**

Enhancement—domestic violence—violation of valid protective order—motion to dismiss—The trial court did not err in a domestic violence case involving assault with a deadly weapon with intent to kill by denying defendant's motion to dismiss the enhancement of violation of a valid protective order under N.C.G.S. § 50B-4.1, because: (1) N.C.G.S. § 50B-2(a) allows a person to seek the same kind of relief provided by Chapter 50B by filing a civil action under Chapter 50 and a motion in the cause alleging acts of domestic violence; (2) the wife victim filed a civil action under Chapter 50 for divorce from bed and board, and she was thereafter permitted under N.C.G.S. § 50B-2 to file a motion in the cause in her Chapter 50 action alleging acts of domestic violence to avail herself of the protections found in Chapter 50B; (3) the temporary restraining order (TRO) granted in the Chapter 50 action was issued under Chapter 50B; and (4) the ex parte TRO was a protective order within the meaning of Chapter 50B since the hearing requirement found in N.C.G.S. § 50B-1(c) was satisfied when defendant received notice that a TRO had been entered against him. **State v. Byrd, 597.**

Prior record level—calculation—elements of prior convictions—stipulation—The trial court erred in calculating defendant's prior record level where defendant was sentenced for several sexual offenses against a child, including first-degree sexual offense; none of defendant's prior convictions included all of the elements of first-degree sexual offense; and the judge erred by adding an additional point pursuant to N.C.G.S. § 15A-1340(b)(6), which raised his prior record level. Defendant's stipulation to that prior record level is ineffective because comparison of the elements of criminal offenses does not require the resolution of disputed facts. **State v. Prush, 472.**

SENTENCING—Continued

Prior record level—calculation—harmless error analysis—The trial court did not commit prejudicial error in an assault inflicting serious bodily injury case by calculating under N.C.G.S. § 15A-1340.14 defendant's prior record level for sentencing when it assessed points for being on probation, for convictions occurring in the same week of superior court, and for an out-of-state robbery conviction, because: (1) even if the trial court miscalculated the points involved, the improperly assessed points would not affect defendant's record level; and (2) a sentence within the presumptive range is accepted as valid unless the record shows the trial court considered improper evidence. **State v. Lindsay, 314.**

Resentencing—consolidation of charges differently—The trial court did not err in a double first-degree kidnapping, double robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and felony breaking or entering case by imposing two separate sentences on charges that had previously been consolidated in an earlier sentence, because: (1) while N.C.G.S. § 15A-1335 prohibits trial courts from imposing stiffer sentences upon remand than originally imposed, nothing prohibits the trial court from changing the way in which it consolidated convictions during a sentencing hearing prior to remand; and (2) in the first sentencing defendant got a total of 179 to 233 months' imprisonment whereas during resentencing he got a total of 131 to 176 months' imprisonment. **State v. Moffitt, 308.**

SEXUAL OFFENSES

First-degree sexual offenses—indictments—amendment—substantial alteration—The trial court in a prosecution for sexual offenses against a child under the age of 13 years erred by permitting the State, at the close of the evidence, to amend indictments which alleged parts of the offenses of first-degree statutory sexual offenses under N.C.G.S. § 14-27.4 and first-degree sexual offenses under N.C.G.S. § 14-27.7A. **State v. Hill, 216.**

First-degree sexual offenses—two acts of fellatio—sufficiency of evidence—The State presented sufficient evidence to support defendant's conviction on two counts of first-degree sexual offense against a child where the child testified at trial that defendant performed two acts of fellatio on him, although the child also gave inconsistent testimony as to whether a second act of fellatio occurred; and corroborating evidence from a detective and a forensic interviewer was presented that the child had stated that defendant performed fellatio on him once in defendant's garage and once behind a shed. **State v. Prush, 472.**

Statutory and forcible theories—consolidated judgments—arrest of judgment on one count—Judgment was arrested on one count of first-degree rape and one count of first-degree sexual offense where the jury found defendant guilty of rape on theories of statutory and forcible rape and found defendant guilty of sexual offense on theories of statutory and forcible sexual offense, even though the trial court consolidated the convictions for statutory and forcible rape in a single judgment and consolidated the convictions for statutory and forcible sexual offense in a single judgment, because separate convictions for those offenses, even when consolidated in a single judgment, have potentially severe adverse collateral consequences. **State v. Ridgeway, 423.**

SPECIFIC PERFORMANCE

Scope—breach of contract—The trial court did not err in a breach of contract case by ordering specific performance in a form that allegedly exceeded the actual terms of the contract, because: (1) the judgment does not require defendant to convey title of the subject property prior to receipt of payment, but instead the trial court ordered defendant to deliver a general warranty deed to plaintiffs' attorney to ensure that the closing would occur; (2) the actual transfer of title and funds will occur at the closing; and (3) the trial court's judgment requiring defendant to deliver clear title did not alter the terms of the agreement since "clear title" and "marketable title" are synonymous terms both referring to a title that is free from major defect such as a judgment or lien and can be freely conveyed to a reasonable buyer. **Kniep v. Templeton, 622.**

TORT CLAIMS ACT

Premises liability—findings of fact—sufficiency of evidence—In a case under the Tort Claims Act in which the Industrial Commission denied plaintiff's claim for injuries received from a falling ficus tree at the State Zoo, the evidence supported findings by the Commission that cables supporting the tree were checked the day before the accident and no problems were recorded; the Zoo staff lacked sufficient notice that the ficus tree could present a hazard to the public; on the day of the accident the tree looked healthy and free from decay; there were no indications that the tree was diseased or under stress; and the tree had stood for more than ten years under the protocols then in effect. **Cherney v. N.C. Zoological Park, 203.**

Second opinion—writ of mandamus—The Industrial Commission's second decision and order denying plaintiff's claim for personal injuries under the Tort Claims Act was not improper even though plaintiff contends our Supreme Court ruled in her favor in 2005 and allowed her petition for writ of mandamus in 2006, because: (1) at the time plaintiff submitted her brief to the Court of Appeals on 20 November 2006, plaintiff's writ of mandamus remained pending before our Supreme Court; and (2) on 14 December 2006, our Supreme Court denied plaintiff's petition for writ of mandamus and stated the mandate of its 5 May 2005 per curiam opinion was satisfied by the Commission's issuance of its new decision and order on 28 April 2006. **Cherney v. N.C. Zoological Park, 203.**

TRADE SECRETS

Misappropriation—attorney fees—The trial court did not err by denying attorney fees in a trade secret appropriation case based on a finding that defendant had not offered evidence of or made an argument to support bad faith. Although N.C.G.S. § 6-21 and N.C.G.S. § 66-154(d) both address the award of attorney fees in actions under the Trade Secrets Protection Act, a trial court may award attorney fees to the prevailing party only if a claim of misappropriation is made in bad faith or if willful and malicious misappropriation exists pursuant to N.C.G.S. § 66-154(d). **Bruning & Federle Mfg. Co. v. Mills, 153.**

TRIALS

Dismissal of counterclaims—erroneous order vacated—A portion of an order addressing the dismissal of respondents' claims was vacated where the order stated that respondents had voluntarily dismissed their claims, but the

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transcript confirmed that they had dismissed only their claims against petitioner. **Wiseman Mortuary, Inc. v. Burrell, 693.**

Questioning by judge—clarification of testimony—The trial court did not abuse its discretion by asking a witness two questions which were intended to clarify the witness's testimony. The questions did not communicate any opinion or prejudice defendant's case. **State v. Burke, 115.**

WORKERS' COMPENSATION

Anxiety and depression—causally related to knee injury—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff workers' anxiety and depression are not causally related to his knee injury. **Adams v. Frit Car, Inc., 714.**

Disability—date established—sufficiency of evidence—The evidence before the Industrial Commission in a workers' compensation case was sufficient to support a finding of total disability as of June 1 where there was medical evidence that established total disability as of 17 June, and testimony from plaintiff permitting the inference that his condition on 1 June was physically the same. **Britt v. Gator Wood, Inc., 677.**

Disability—economic downturn—The Industrial Commission's award of temporary total disability in a workers' compensation case was upheld where defendants contended that the loss of wage earning capacity was due to an economic downturn. Plaintiff here presented medical evidence showing an impairment of his earning capacity, and the burden shifted to defendants to show that there were suitable jobs that plaintiff could obtain. **Britt v. Gator Wood, Inc., 677.**

Disability—evidence—A workers' compensation award of temporary partial disability was upheld where plaintiff presented evidence that he obtained employment at lower wages, there was agreement among the doctors that he had permanent restrictions on the type of work he could do, and defendants presented no evidence of how he could have obtained employment at higher earnings (although they challenged the sincerity of his job search and argued about his background). **Britt v. Gator Wood, Inc., 677.**

Disability—medical proof—A workers' compensation disability award was remanded for further findings where plaintiff did not present medical evidence that he was incapable of work in any employment during the relevant period. A Form 60 does not give rise to a presumption of continuing disability. However, the absence of medical proof of disability does not preclude proof of disability under one of the other tests. **Britt v. Gator Wood, Inc., 677.**

Disability—physical restrictions caused by knee injury—The Industrial Commission did not err in a workers' compensation case by finding that plaintiff worker had failed to establish disability due to his physical restrictions caused by his knee injury, because: (1) plaintiff essentially asks the Court of Appeals to reweigh the evidence on appeal, which is outside its standard of review; and (2) the full Commission's findings of fact are supported by competent evidence, and its conclusions that plaintiff failed to establish disability and that he was terminated for his own misconduct are also supported by its findings. **Adams v. Frit Car, Inc., 714.**

WORKERS' COMPENSATION—Continued

Disability—retirement before claim filed—The Industrial Commission did not err by awarding plaintiff disability benefits where defendant argued that plaintiff had retired voluntarily and not due to pulmonary problems. Defendant cited no authority for the proposition that a claimant cannot recover for an occupational disease if he voluntarily retired before filing a claim, and long-established precedent is to the contrary. **Austin v. Continental Gen. Tire, 488.**

Future medical treatment—knee injury—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff is entitled to future medical treatment for his knee injury, because: (1) in light of the depositions of two doctors, the full Commission had sufficient evidence to support its findings of fact and to conclude that there was a substantial likelihood that plaintiff will need additional treatment for his knee in the future regardless of what that treatment might entail; and (2) the Court of Appeals cannot reweigh the evidence. **Adams v. Frit Car, Inc., 714.**

Premiums—calculation—In an action to determine the calculation of workers' compensation insurance premiums, the trial court did not err by concluding that the work of T-N-T subcontractors and their helpers is "Labor Only" under the contract. The use of trailers and heavy-duty pickup trucks to transport materials to job site locations does not transform T-N-T subcontractors from "Labor Only" employees to "Mobile Equipment with Operators" employees for purposes of calculating the policy premiums. **N.C. Farm Bureau Mut. Ins. Co. v. T-N-T Carports, Inc., 686.**

Remand—disability—not an issue in first hearing—Plaintiff's disability was not a contested issue in a prior Industrial Commission hearing, and the Commission was not barred from taking new evidence on remand. Even if the Commission had addressed the issue at the first hearing, defendant cites no authority for the proposition that the Commission would have been barred from reconsideration of the issue. **Austin v. Continental Gen. Tire, 488.**

Remand—new evidence—The Industrial Commission was not barred from taking new evidence following remand; defendant cited no authority for the propositions that the Commission's authority was limited to newly discovered evidence, that plaintiff's failure to present disability evidence at the first hearing bars him from doing so on remand, or that the Commission's authority to take new evidence is limited to those issues on which plaintiff presented evidence. **Austin v. Continental Gen. Tire, 488.**

Remand—new hearing—The Industrial Commission's remand of a workers' compensation case to a deputy commissioner for a hearing did not violate a remand from the Supreme Court which ordered the Commission to conduct "proceedings not inconsistent with this opinion and [the] dissent below." **Austin v. Continental Gen. Tire, 488.**

Remand—res judicata—Plaintiff did not show prejudice (assuming error) from an Industrial Commission finding on remand that the findings from the first hearing were res judicata. **Austin v. Continental Gen. Tire, 488.**

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Motorcycle accident—not survivorship action—When a single negligent act of the defendant causes a decedent's injuries and those injuries unquestionably

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result in the decedent's death, the plaintiff's remedy for the decedent's pain and suffering and medical expenses lies only in a wrongful death statute and must be asserted under that statute. Recovery is distributed in accordance with the intestate succession statute and is not subject to claims against the estate; otherwise, the two-year statute of limitations for wrongful death actions could be circumvented. **State Auto Ins. Co. v. Blind, 707.**

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Appeal of special use permit—adjoining landowners—standing—Adjoing landowners had standing to appeal to superior court the issuance of the special use permit for the construction of a Wal-Mart Store on a tract in a planned unit development. The evidence showed that they had suffered special damages which are unique in character and quantity and distinct from those inflicted upon the community at large, including a reduction in the values of their properties. **Cook v. Union Cty. Zoning Bd. of Adjust., 582.**

Appeal of special use permit—county as aggrieved person—Union County did not need to show that it is an aggrieved person to have standing to appeal to superior court the decision of the Union County Board of Adjustment granting a special use permit. The statute setting forth the powers and duties of a board of adjustment indicate that such an appeal is permitted, and respondents cited no case or authority prohibiting a county from appealing a decision by its own board of adjustment. **Cook v. Union Cty. Zoning Bd. of Adjust., 582.**

Board of adjustment—rules of procedure—The board of adjustment was required to follow its own rules of procedure. No authority was found for the proposition that a formal objection needs to be made when a county board of adjustment fails to follow its own rules; the Rules of Appellate Procedure do not apply to appeals by certiorari to the superior court from a hearing before a county board of adjustment. **Cook v. Union Cty. Zoning Bd. of Adjust., 582.**

Board of adjustment hearing—due process rights—presentation of evidence—revised site plan—Petitioners were denied their due process rights to present evidence before a board of adjustment before it made its decision to grant Wal-Mart's special use permit. Wal-Mart's revised site plan and its explanation of that plan were crucial to the board of adjustment's decision, but the board of adjustment essentially cut off the rights of petitioners to present evidence or conduct cross-examination while continuing to hold sessions of the hearing and permitting Wal-Mart to present evidence. **Cook v. Union Cty. Zoning Bd. of Adjust., 582.**

Special use permit—county and adjoining landowners—status as parties—Petitioners Union County and adjoining landowners were not required to make a motion before the board of adjustment or superior court to intervene as parties in an action involving a special use permit issued to Wal-Mart. No ordinance or statute has been identified indicating an additional procedural step they could have taken to gain status as parties. **Cook v. Union Cty. Zoning Bd. of Adjust., 582.**

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