NORTH CAROLINA COURT OF APPEALS REPORTS

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2009

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187 N.C. APP.

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

JOHN C. MARTIN

Judges

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

Emergency Recalled Judges

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

Former Chief Judges

R. A. HEDRICK[1]
GERALD ARNOLD
SIDNEY S. EAGLES, JR.

Former Judges

WILLIAM E. GRAHAM, JR.
JAMES H. CARSON, JR.
DAVID M. BRITT[2]
J. PHIL CARLTON
BURLEY B. MITCHELL, JR.
HARRY C. MARTIN
E. MAURICE BRASWELL
WILLIS P. WHICHARD
DONALD L. SMITH
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
SYDNOR THOMPSON
CLIFTON E. JOHNSON[3]
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE
RALPH A. WALKER
HUGH B. CAMPBELL, JR.
ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON
ERIC L. LEVINSON

---

1. Deceased 18 July 2009.
2. Deceased 5 May 2009.
3. Deceased 25 June 2009.

Administrative Counsel

DANIEL M. HORNE, JR.

Clerk

JOHN H. CONNELL

OFFICE OF STAFF COUNSEL

Director

Leslie Hollowell Davis

Assistant Director

Daniel M. Horne, Jr.

Staff Attorneys

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

ADMINISTRATIVE OFFICE OF THE COURTS

Director

John W. Smith[4]

Assistant Director

David F. Hoke

APPELLATE DIVISION REPORTER

Ralph A. White, Jr.

ASSISTANT APPELLATE DIVISION REPORTERS

H. James Hutcheson
Kimberly Woodell Sieredzki

---

4. Appointed by Chief Justice Sarah Parker effective 1 January 2009 to replace Ralph A. Walker who retired 31 December 2008.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

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

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

DISTRICT	JUDGES	ADDRESS
	J. Gentry Caudill	Charlotte
	David S. Cayer[3]	Charlotte
	Yvonne Mims Evans	Charlotte
	Linwood O. Foust	Charlotte
	Eric L. Levinson[4]	Charlotte
27A	Jesse B. Caldwell III	Gastonia
	Timothy L. Patti	Gastonia
27B	Forrest Donald Bridges	Shelby
	James W. Morgan	Shelby
	Eighth Division	
24	James L. Baker, Jr.	Marshall
	Charles Phillip Ginn	Boone
28	Dennis Jay Winner	Asheville
	Alan Z. Thornburg	Asheville
29A	Laura J. Bridges	Rutherfordton
29B	Mark E. Powell	Hendersonville
30A	James U. Downs	Franklin
30B	Bradley B. Letts[5]	Sylva

SPECIAL JUDGES

Marvin K. Blount[6]	Greenville
Albert Diaz	Charlotte
Richard L. Doughton	Sparta
Thomas D. Haigwood[7]	Greenville
James E. Hardin, Jr.	Hillsborough
A. Robinson Hassell[8]	Greensboro
D. Jack Hooks, Jr.	Whiteville
Jack W. Jenkins	Morehead City
John R. Jolly, Jr.	Raleigh
Shannon R. Joseph	Raleigh
Calvin Murphy	Charlotte
William R. Pittman	Raleigh
Ripley Eagles Rand	Raleigh
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Cressie H. Thigpen, Jr.	Raleigh
Gary E. Trawick, Jr.	Burgaw

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W. Douglas Albright	Greensboro
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Michael E. Beale	Rockingham
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Anthony M. Brannon	Durham
Stafford G. Bullock	Raleigh
Narley L. Cashwell	Wake Forest
C. Preston Cornelius	Mooresville

DISTRICT	JUDGES	ADDRESS
	B. Craig Ellis	Laurinburg
	Ernest B. Fullwood	Wilmington
	Zoro J. Guice, Jr.	Hendersonville
	Thomas D. Haigwood[9]	Greenville
	Michael E. Helms	North Wilkesboro
	Clarence E. Horton, Jr.	Kannapolis
	Donald M. Jacobs	Raleigh
	Clifton E. Johnson[10]	Charlotte
	Charles C. Lamm, Jr.	Terrell
	James E. Lanning[11]	Charlotte
	Gary Lynn Locklear	Pembroke
	Jerry Cash Martin	Mt. Airy
	James E. Ragan III	Oriental
	Donald L. Smith	Raleigh
	Susan C. Taylor[12]	Monroe
	John M. Tyson	Fayetteville
	George L. Wainwright	Morehead City

RETIRED/RECALLED JUDGES

	Frank R. Brown	Tarboro
	James C. Davis	Concord
	Larry G. Ford	Salisbury
	Marvin K. Gray	Charlotte
	Knox V. Jenkins	Four Oaks
	John B. Lewis, Jr.	Farmville
	Robert D. Lewis	Asheville
	Julius A. Rousseau, Jr.	Wilkesboro
	Thomas W. Seay	Spencer
	Ralph A. Walker, Jr.	Raleigh

1. Retired 30 June 2009.
2. Retired 31 July 2009.
3. Resigned 31 March 2009.
4. Appointed and sworn in 2 July 2009.
5. Appointed and sworn in 31 March 2009 to replace Janet Marlene Hyatt who retired 27 February 2009.
6. Appointed and sworn in 1 July 2009.
7. Retired 30 April 2009.
8. Appointed and sworn in 27 March 2009.
9. Appointed and sworn in 1 May 2009.
10. Deceased 25 June 2009.
11. Resigned 8 June 2009.
12. Appointed and sworn in 24 March 2009.

DISTRICT COURT DIVISION

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

DISTRICT	JUDGES	ADDRESS
	R. Leslie Turner	Kinston
	Timothy I. Finan	Goldsboro
	Elizabeth A. Heath	Kinston
	Charles P. Gaylor III	Goldsboro
9	Daniel Frederick Finch (Chief)	Oxford
	J. Henry Banks	Henderson
	John W. Davis	Louisburg
	Randolph Baskerville	Warrenton
	S. Quon Bridges	Oxford
	Carolyn J. Yancey	Henderson
9A	Mark E. Galloway (Chief)	Roxboro
	L. Michael Gentry	Pelham
10	Robert Blackwell Rader (Chief)	Raleigh
	James R. Fullwood	Raleigh
	Anne B. Salisbury	Raleigh
	Kristin H. Ruth	Raleigh
	Craig Croom	Raleigh
	Jennifer M. Green	Raleigh
	Monica M. Bousman	Raleigh
	Jane Powell Gray	Raleigh
	Jennifer Jane Knox	Raleigh
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	Vinston M. Rozier, Jr.	Raleigh
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	Christine M. Walczyk	Raleigh
	Eric Craig Chasse	Raleigh
	Ned Wilson Mangum	Raleigh
	Jacqueline L. Brewer	Apex
	Anna Elena Worley	Raleigh
11	Albert A. Corbett, Jr. (Chief)	Smithfield
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	Jimmy L. Love, Jr.	Sanford
	O. Henry Willis, Jr.	Lillington
	Addie M. Harris-Rawls	Smithfield
	Resson O. Faircloth II	Lillington
	Robert W. Bryant, Jr.	Smithfield
	R. Dale Stubbs	Smithfield
	Charles Patrick Bullock	Lillington
	Paul A. Holcombe	Smithfield
12	A. Elizabeth Keever (Chief)	Fayetteville
	Robert J. Stiehl III	Fayetteville
	Edward A. Pone	Fayetteville
	Kimbrell Kelly Tucker	Fayetteville
	John W. Dickson	Fayetteville
	Cheri Beasley[1]	Fayetteville
	Talmage Baggett	Fayetteville
	George J. Franks	Fayetteville
	David H. Hasty	Fayetteville
	Laura A. Devan	Fayetteville
	Toni S. King[2]	Fayetteville
13	Jerry A. Jolly (Chief)	Tabor City
	Napoleon B. Barefoot, Jr.	Supply

DISTRICT	JUDGES	ADDRESS
	Marion R. Warren	Exum
	William F. Fairley	Southport
	Scott Ussery	Whiteville
	Sherry D. Tyler[3]	Whiteville
14	Elaine M. Bushfan (Chief)	Durham
	Ann E. McKown	Durham
	Marcia H. Morey	Durham
	James T. Hill	Durham
	Nancy E. Gordon	Durham
	William Andrew Marsh III	Durham
	Brian C. Wilks	Durham
15A	James K. Roberson (Chief)	Graham
	Bradley Reid Allen, Sr.	Graham
	G. Wayne Abernathy	Graham
	David Thomas Lambeth, Jr.	Graham
15B	Joseph M. Buckner (Chief)	Hillsborough
	Alonzo Brown Coleman, Jr.[4]	Hillsborough
	Charles T. L. Anderson[5]	Hillsborough
	Beverly A. Scarlett	Hillsborough
	Page Vernon	Hillsborough
16A	William G. McIlwain (Chief)	Wagram
	Regina M. Joe	Raeford
	John H. Horne, Jr.	Laurinburg
16B	J. Stanley Carmical (Chief)	Lumberton
	Herbert L. Richardson	Lumberton
	John B. Carter, Jr.	Lumberton
	Judith Milsap Daniels	Lumberton
	William J. Moore[6]	Pembroke
17A	Fredrick B. Wilkins, Jr. (Chief)	Wentworth
	Stanley L. Allen	Wentworth
	James A. Grogan	Wentworth
17B	Charles Mitchell Neaves, Jr. (Chief)	Elkin
	Spencer Gray Key, Jr.	Elkin
	Angela B. Puckett	Elkin
	William F. Southern III	Elkin
18	Joseph E. Turner (Chief)	Greensboro
	Wendy M. Enochs	Greensboro
	Susan Elizabeth Bray	Greensboro
	Patrice A. Hinnant	Greensboro
	H. Thomas Jarrell, Jr.	High Point
	Susan R. Burch	Greensboro
	Theresa H. Vincent	Greensboro
	William K. Hunter	Greensboro
	Sherry Fowler Alloway	Greensboro
	Polly D. Sizemore	Greensboro
	Kimberly Michelle Fletcher	Greensboro
	Betty J. Brown	Greensboro
	Angela C. Foster	Greensboro
	Avery Michelle Crump	Greensboro
19A	William G. Hamby, Jr. (Chief)	Concord
	Donna G. Hedgepeth Johnson	Concord
	Martin B. McGee	Concord

DISTRICT	JUDGES	ADDRESS
	Michael Knox	Concord
19B	Michael A. Sabiston (Chief)	Troy
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	Jayrene Russell Maness	Carthage
	Lee W. Gavin	Asheboro
	Scott C. Etheridge	Asheboro
	Donald W. Creed, Jr.	Asheboro
	Robert M. Wilkins	Asheboro
19C	Charles E. Brown (Chief)	Salisbury
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	William C. Kluttz, Jr.	Salisbury
	Kevin G. Eddinger	Salisbury
	Roy Marshall Bickett, Jr.	Salisbury
20A	Lisa D. Thacker (Chief)	Wadesboro
	Scott T. Brewer	Monroe
	Amanda L. Wilson	Rockingham
	William Tucker[7]	Albemarle
20B	Christopher W. Bragg (Chief)	Monroe
	Joseph J. Williams	Monroe
	Hunt Gwyn	Monroe
	William F. Helms	Monroe
21	William B. Reingold (Chief)	Winston-Salem
	Chester C. Davis	Winston-Salem
	William Thomas Graham, Jr.	Winston-Salem
	Victoria Lane Roemer	Winston-Salem
	Laurie L. Hutchins	Winston-Salem
	Lisa V. L. Menefee	Winston-Salem
	Lawrence J. Fine	Winston-Salem
	Denise S. Hartsfield	Winston-Salem
	George Bedsworth	Winston-Salem
	Camille D. Banks-Payne	Winston-Salem
22A	L. Dale Graham (Chief)	Taylorsville
	H. Thomas Church	Statesville
	Deborah Brown	Statesville
	Edward L. Hendrick IV	Statesville
	Christine Underwood	Statesville
22B	Wayne L. Michael (Chief)	Lexington
	Jimmy L. Myers	Mocksville
	April C. Wood	Lexington
	Mary F. Covington	Mocksville
	Carlton Terry	Lexington
	J. Rodwell Penry[8]	Lexington
23	Mitchell L. McLean (Chief)	Wilkesboro
	David V. Byrd	Wilkesboro
	Jeanie Reavis Houston	Wilkesboro
	Michael D. Duncan	Wilkesboro
24	Alexander Lyerly (Chief)	Banner Elk
	William A. Leavell III	Bakersville
	R. Gregory Horne	Newland
	Theodore Wright McEntire	Newland
25	Robert M. Brady (Chief)	Lenoir
	Gregory R. Hayes	Hickory

DISTRICT	JUDGES	ADDRESS
	L. Suzanne Owsley	Hickory
	C. Thomas Edwards	Morganton
	Buford A. Cherry	Hickory
	Sherrie Wilson Elliott	Newton
	John R. Mull[9]	Morganton
	Amy R. Sigmon	Newton
	J. Gary Dellinger	Newton
26	Lisa C. Bell (Chief)	Charlotte
	H. William Constangy	Charlotte
	Rickye McKoy-Mitchell	Charlotte
	Louis A. Trosch, Jr.	Charlotte
	Regan A. Miller	Charlotte
	Hugh B. Lewis	Charlotte
	Becky Thorne Tin	Charlotte
	Thomas Moore, Jr.	Charlotte
	Christy Townley Mann	Charlotte
	Timothy M. Smith	Charlotte
	Ronald C. Chapman	Charlotte
	Paige B. McThenia	Charlotte
	Jena P. Culler	Charlotte
	William Irwin Belk	Charlotte
	Kimberly Y. Best	Charlotte
	Charlotte Brown-Williams	Charlotte
	John Totten	Charlotte
	Elizabeth Thornton Trosh	Charlotte
	Donnie Hoover	Charlotte
	Theofanis X. Nixon[10]	Charlotte
	Tyyawdi M. Hands[11]	Charlotte
27A	Ralph C. Gingles, Jr. (Chief)	Gastonia
	Angela G. Hoyle	Gastonia
	John K. Greenlee	Gastonia
	James A. Jackson	Gastonia
	Thomas Gregory Taylor	Belmont
	Michael K. Lands	Gastonia
	Richard Abernethy	Gastonia
27B	Larry James Wilson (Chief)	Shelby
	Anna F. Foster	Shelby
	K. Dean Black	Denver
	Ali B. Paksoy, Jr.	Shelby
	Meredith A. Shuford	Shelby
28	Gary S. Cash (Chief)	Asheville
	Shirley H. Brown	Asheville
	Rebecca B. Knight	Asheville
	Marvin P. Pope, Jr.	Asheville
	Patricia Kaufmann Young	Asheville
	Sharon Tracey Barrett	Asheville
	J. Calvin Hill	Asheville
29A	C. Randy Pool (Chief)	Marion
	Laura Anne Powell	Rutherfordton
	J. Thomas Davis	Rutherfordton
29B	Athena F. Brooks (Chief)	Cedar Mountain
	David Kennedy Fox	Hendersonville
	Thomas M. Brittain, Jr.	Hendersonville

DISTRICT	JUDGES	ADDRESS
	Peter Knight	Hendersonville
30	Danny E. Davis (Chief)	Waynesville
	Steven J. Bryant	Bryson City
	Richlyn D. Holt	Waynesville
	Monica Hayes Leslie	Waynesville
	Richard K. Walker	Waynesville
	Danya L. Vanhook[12]	Waynesville

EMERGENCY DISTRICT COURT JUDGES

Thomas V. Aldridge, Jr.	Whiteville
Kyle D. Austin	Pineola
Sarah P. Bailey	Rocky Mount
Grafton G. Beaman	Elizabeth City
Ronald E. Bogle	Raleigh
James Thomas Bowen III	Lincolnton
Hugh B. Campbell	Charlotte
Samuel Cathey	Charlotte
Shelly H. Desvouges	Raleigh
M. Patricia DeVine	Hillsborough
J. Patrick Exum	Kinston
J. Keaton Fonvielle	Shelby
Thomas G. Foster, Jr.	Greensboro
Earl J. Fowler, Jr.	Asheville
Rodney R. Goodman	Kinston
Joyce A. Hamilton	Raleigh
Lawrence Hammond, Jr.	Asheboro
James W. Hardison	Williamston
Jane V. Harper	Charlotte
James A. Harrill, Jr.	Winston-Salem
Resa Harris	Charlotte
Robert E. Hodges	Morganton
Shelly S. Holt	Wilmington
James M. Honeycutt	Lexington
William G. Jones	Charlotte
Lillian B. Jordan	Asheboro
David Q. LaBarre	Durham
William C. Lawton	Raleigh
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Harold Paul McCoy, Jr.	Halifax
Lawrence McSwain	Greensboro
Fritz Y. Mercer, Jr.	Charlotte
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Nancy Black Norelli	Charlotte
Otis M. Oliver	Dobson
Warren L. Pate	Raeford
Nancy C. Phillips	Elizabethtown
Nathaniel P. Proctor[13]	Charlotte
Dennis J. Redwing	Gastonia
J. Larry Senter	Raleigh
Joseph E. Setzer, Jr.	Goldsboro

DISTRICT	JUDGES	ADDRESS
	Russell Sherrill III	Raleigh
	Catherine C. Stevens	Chapel Hill
	J. Kent Washburn	Graham
	Charles W. Wilkinson, Jr.	Oxford

RETIRED/RECALLED JUDGES

Claude W. Allen, Jr.	Oxford
Donald L. Boone	High Point
Joyce A. Brown	Otto
Daphene L. Cantrell	Charlotte
Sol G. Cherry[14]	Boone
T. Yates Dobson, Jr.	Smithfield
Spencer B. Ennis	Graham
Harley B. Gaston, Jr.	Gastonia
Roland H. Hayes	Gastonia
Walter P. Henderson	Trenton
Charles A. Horn, Sr.	Shelby
Robert K. Keiger[15]	Winston-Salem
Jack E. Klass	Lexington
C. Jerome Leonard, Jr.	Charlotte
Edward H. McCormick	Lillington
J. Bruce Morton	Greensboro
Stanley Peele	Hillsborough
Margaret L. Sharpe	Winston-Salem
Samuel M. Tate	Morganton
John L. Whitley	Wilson

1. Elected and sworn in to the Court of Appeals 1 January 2009.
2. Appointed and sworn in 6 February 2009.
3. Appointed and sworn in 1 May 2009.
4. Retired 30 June 2009.
5. Resigned 30 June 2009.
6. Appointed and sworn in 20 April 2009.
7. Appointed and sworn in 31 March 2009.
8. Appointed and sworn in 20 March 2009.
9. Deceased 19 July 2009.
10. Appointed and sworn in 31 March 2009.
11. Appointed and sworn in 17 April 2009.
12. Appointed and sworn in 19 June 2009.
13. Resigned 13 April 2009.
14. Deceased 10 December 2008.
15. Resigned 23 April 2009.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
ROY COOPER

Chief of Staff
KRISTI HYMAN

Deputy Chief of Staff
NELS ROSELAND

General Counsel
J. B. KELLY

Senior Policy Advisor
JULIA WHITE

Chief Deputy Attorney General
GRAYSON G. KELLEY

Solicitor General
CHRIS BROWNING, JR.

Senior Deputy Attorneys General

JAMES J. COMAN
ANN REED DUNN
JAMES C. GULICK
WILLIAM P. HART
JULIE S. BRILL
REGINALD L. WATKINS

Assistant Solicitor General
JOHN F. MADDREY

Special Deputy Attorneys General

DANIEL D. ADDISON
STEVEN M. ARBOGAST
JOHN J. ALDRIDGE III
HAL F. ASKINS
JONATHAN P. BABB
ROBERT J. BLUM
WILLIAM H. BORDEN
HAROLD D. BOWMAN
MABEL Y. BULLOCK
JILL LEDFORD CHEEK
LEONIDAS CHESTNUT
KATHRYN J. COOPER
FRANCIS W. CRAWLEY
NEIL C. DALTON
MARK A. DAVIS
GAIL E. DAWSON
LEONARD DODD
ROBERT R. GELBLUM
GARY R. GOVERT
NORMA S. HARRELL
ROBERT T. HARGETT
RICHARD L. HARRISON
JANE T. HAUTIN
E. BURKE HAYWOOD
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CASES REPORTED WITHOUT PUBLISHED OPINIONS

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GENERAL STATUTES CITED

GENERAL STATUTES CITED

UNITED STATES CONSTITUTION CITED

RULES OF EVIDENCE CITED

RULES OF CIVIL PROCEDURE CITED

RULES OF CIVIL PROCEDURE CITED

RULES OF APPELLATE PROCEDURE CITED

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

KINESIS ADVERTISING, INC., PLAINTIFF, v. LARRY HILL, DAN ROBINETTE, AND ALTYRIS INCORPORATED, DEFENDANTS v. ROBERT K. ADKINS, NANCY J. ADKINS, AND ADKINS & ASSOCIATES, LTD. AND STEVE REAVIS,[1] ADDITIONAL COUNTERCLAIM DEFENDANTS

No. COA06-1224

(Filed 6 November 2007)

1. Appeal and Error— appealability—partial summary judgment—Rule 54(b) certification—substantial right

The trial court did not err by granting Rule 54(b) certification of both plaintiff's and defendants' appeals of the granting of partial summary judgment in the 16 May 2006 order, because, given the prolonged procedural history of the case, the number of claims and counterclaims, and the same set of operative facts underlying the entire case, the trial court properly determined that the claims that have been dismissed and those that remain are factually and legally intertwined such that proceeding to trial could result in verdicts inconsistent with the earlier dismissals. Additionally, the Court of Appeals determined the 30 June 2004 order dismissing several of defendants' claims likewise affect a substantial right and should be addressed on the merits.

2. Appeal and Error— appealability—denial of summary judgment—failure to show substantial right

The Court of Appeals dismissed those portions of defendants' appeals that concern the trial court's denial of their motion

1. Steve Reavis was not a named additional counterclaim defendant in the 16 May 2006 order but was listed as such in the 30 June 2004 order.

for summary judgment on the plaintiff's claims for trade secret violations, breach of contract on employee solicitation if based in tort, conversion, tortious interference with contract, constructive trust/unjust enrichment, unfair and deceptive trade practices, and an accounting, because defendants failed to argue any substantial right would be affected by allowing those claims to proceed to trial with the remaining counterclaims.

3. Employer and Employee— covenant not to compete—confidentiality agreement—nonsolicitation agreement—consideration—uncertified shares—summary judgment

The trial court erred by granting summary judgment to defendants as to plaintiff corporation's claims for breach of the covenant not to compete, confidentiality agreement, and nonsolicitation agreement, because although as a matter of law uncertified shares may constitute valuable consideration for purposes of making a contract valid and enforceable, a genuine issue of material fact remained as to whether plaintiff corporation actually issued and delivered the shares to the individual defendants such that they constituted valuable consideration to make the covenant not to compete, confidentiality agreement, and nonsolicitation agreement valid and enforceable.

4. Employer and Employee— covenant not to compete—reasonableness of restrictions

The trial court erred by concluding that defendants were entitled to summary judgment on the basis that the restrictions on the pertinent covenant not to compete were unreasonable as a matter of law, and the case is remanded for these claims to be heard by a jury with the others that are pending, because: (1) the language in the covenant not to compete signed by defendants would not bar them from any type of employment or activities with any company, but instead restricted them only from dealing with, soliciting the business of, or otherwise conducting business of the type similar to that of plaintiff employer for two years in two counties; (2) the restrictions imposed by plaintiff are no wider in scope than is necessary to protect the business of the employer; (3) whether the activities engaged in by defendants were similar to those of plaintiff is a question of fact for a jury to decide; and (4) the issues of actual damages suffered by plaintiff and whether defendants did in fact breach the covenant not to compete and confidentiality and nonsolicitation agreement are also questions of fact for the jury.

5. Employer and Employee— fiduciary duty

The trial court erred by granting summary judgment to defendants on plaintiff corporation's claim for breach of fiduciary duty by defendant Hill because: (1) although none of plaintiff's corporate records indicated that Hill was the president of plaintiff, there was deposition evidence that Hill was promoted to that position in January 2000 after he signed the pertinent agreements, and Hill's own business cards named him as president of plaintiff; and (2) whether Hill's level of control and authority rose to the level of a de facto officer, regardless of the official position of another as president, is a question of fact for the jury to decide.

6. Employer and Employee; Telecommunications— interception of wire communication—accessing voicemail and email accounts—business-related correspondence

The trial court did not err by granting summary judgment to plaintiff employer on defendants' counterclaim for interception of wire communication even though defendants contend plaintiff accessed their voicemail and email accounts after they had left the company, because: (1) even if such allegations are taken in the light most favorable to defendants, they would not constitute a violation of 18 U.S.C. § 2511(1)(a) or N.C.G.S. § 15A-287(a)(1) when plaintiff was the provider of both the voicemail and email accounts and had the right to access them to retrieve business-related correspondence to protect its rights and property; and (2) plaintiff accessed the messages after they had been received and stored in its system, and thus the messages were not intercepted within the meaning of the Electronic Communications Privacy Act.

7. Libel and Slander— affirmative defense of qualified privilege—failure to rebut good faith presumption

The trial court did not err by granting summary judgment to plaintiff corporation on defendants' counterclaim for defamation based on a shareholder's statement to a corporate employee that defendants had stolen millions of dollars from the corporation, because: (1) assuming arguendo that the statement was slanderous, the communication was privileged since the employee was tasked with conducting an inventory of plaintiff's assets to determine what property, if any, was taken by defendants; (2) the shareholder had an interest in the statement, and she made a statement limited in scope and publication which

was proper to the occasion of informing the employee as to the nature of his investigatory duties; (3) defendants failed to rebut the presumption that the shareholder was acting in good faith when she made the statement; and (4) plaintiff has successfully shown that defendants cannot overcome the affirmative defense of qualified privilege.

8. Jurisdiction— subject matter—fraudulent filing of tax information returns—concurrent jurisdiction

Although the trial court did not err by dismissing defendants' claim for fraudulent filing of tax information returns on the basis of lack of subject matter jurisdiction, the Court of Appeals disagreed with the grounds specified by the trial court, because: (1) even though the federal and state courts had concurrent jurisdiction over defendants' counterclaim, such matters are better left to the consideration of the federal courts; and (2) nothing required the trial court to exercise concurrent subject matter jurisdiction, and there was uncertainty in federal law as to whether the Schedule K-1s complained of by defendants are payee statements or information returns within the meaning of 26 U.S.C. § 7434.

9. Appeal and Error— appealability—mootness—reversal of summary judgment

The trial court erred by dismissing defendants' counterclaims for rescission, a declaratory judgment, and civil conspiracy on the grounds of mootness, because: (1) the trial court's decision was based on its grant of summary judgment as to plaintiff's claims for breach of the covenant not to compete and the solicitation and confidentiality agreements; and (2) the Court of Appeals reversed that grant of summary judgment making the counterclaims no longer moot.

10. Unfair Trade Practices— employer/employee relationship—covenant not to compete

The trial court did not err by dismissing defendants' counterclaim for unfair and deceptive trade practices based on an alleged failure to state a claim for which relief may be granted, because: (1) the Court of Appeals has consistently held that the employer/employee relationship does not fall within the intended scope and purpose of the Unfair and Deceptive Trade Practices Act (UDTP); and (2) the Court of Appeals has held that a violation of a covenant not to compete, essentially a breach of contract

within the employer/employee relationship, lies outside the scope of the UDTP.

Appeal by defendants from order entered 30 June 2004 by Judge Catherine C. Eagles and appeal by plaintiff and additional counterclaim defendants and cross-appeal by defendants from order entered 16 May 2006 by Judge John O. Craig, III in Superior Court, Guilford County. Heard in the Court of Appeals 8 May 2007.

Wishart, Norris, Henninger & Pittman, P.A., by Pamela S. Duffy and Molly A. Orndorff, for plaintiff-appellant/cross-appellee and additional counterclaim defendants-appellants/cross-appellees.

Saintsing, PLLC, by James R. Saintsing, for defendants-appellees/cross-appellants Larry Hill and Dan Robinette.

J. Michael Thomas, for defendant-appellee/cross-appellant Altyris, Inc.

WYNN, Judge.

This case stems from a business dispute between Plaintiff Kinesis Advertising, Inc., and Defendants Larry Hill and Dan Robinette, who worked at Kinesis before leaving and founding their own advertising agency, Defendant Altyris Incorporated. Among other issues, a covenant-not-to-compete, non-solicitation agreement, confidentiality agreement, and shareholders' agreement involving Mr. Hill and Mr. Robinette and Kinesis lie at the heart of this case. After a careful review of the trial courts' orders dismissing certain counterclaims and granting summary judgment as to other claims and counterclaims, we dismiss in part, reverse in part, and affirm in part.

On 8 January 2004, Kinesis filed a complaint against its two former employees, Mr. Hill and Mr. Robinette, and their new company, Altyris Incorporated (collectively, "Defendants"). The complaint alleged that Mr. Hill and Mr. Robinette had breached a covenant-not-to-compete by leaving Kinesis and starting Altyris, their own advertising agency. Additionally, Kinesis asserted in its complaint claims of breach of confidentiality, trade secrets violation, breach of employee solicitation, breach of fiduciary duty, conversion, tortious interference with contract, constructive trust or unjust enrichment, and unfair and deceptive trade practices. Kinesis sought an accounting from Defendants for their advertising services rendered before and

after leaving Kinesis. Kinesis also filed motions for a temporary restraining order and preliminary injunction, which were denied by the trial court.

On 25 February 2004, Kinesis was granted leave to amend its complaint to include information concerning property and confidential information that was allegedly missing after Mr. Hill and Mr. Robinette left Kinesis, as well as contentions that Mr. Hill and Mr. Robinette had engaged in specific acts intended to deplete the company's cash reserves.

According to the allegations of the complaint, Kinesis issued 3,500 shares of stock to Mr. Hill and five hundred shares to Mr. Robinette in January 2000, as consideration for signing a confidentiality, non-competition, and non-solicitation agreement and a shareholders' agreement with Kinesis. In September 2003, Mr. Hill and Mr. Robinette resigned from Kinesis and started their own company, Altyris, also engaged in advertising, with offices a block away from those of Kinesis.

Kinesis contends that, before leaving Kinesis and starting Altyris, Mr. Hill and Mr. Robinette engaged in negotiations with other shareholders of Kinesis, namely, Robert and Nancy Adkins, to buy their stock. However, Kinesis alleges that Mr. Hill and Mr. Robinette did not engage in these negotiations in good faith, but rather with the intention of establishing a competing business. Additionally, after Mr. Hill and Mr. Robinette left Kinesis and started Altyris, six of Kinesis's seven employees left Kinesis within a week and took positions at Altyris; Kinesis asserts that Mr. Hill and Mr. Robinette solicited these employees in violation of the agreements they signed with Kinesis.

On 13 April 2004, Altyris filed an answer to the Kinesis complaint, and set forth the defenses of failure to state a claim, breach of contract, and illegal restraint on trade. On 14 April 2004, Mr. Hill and Mr. Robinette also filed an answer and further asserted counterclaims against Kinesis and additional defendants Robert and Nancy Adkins, Adkins & Associates, and Steve Reavis. Mr. Hill and Mr. Robinette asserted defenses including failure of consideration of the alleged agreements, equitable estoppel, fraud, laches, waiver, and nebulosity with respect to the claim for trade secrets violation.

The counterclaims alleged by Mr. Hill and Mr. Robinette included: common law fraud, rescission of the agreements, piercing the corporate veil, unfair or deceptive trade practices, securities fraud under

North Carolina law, fraudulent filing of tax information returns, RICO violations by mailing fraudulent tax returns, interception of wire communications, defamation, violations of the Employee Retirement Income Security Act (ERISA), conversion, violations of the North Carolina Wage and Hour Act, and aiding and abetting fraudulent accounting practices. Mr. Hill and Mr. Robinette then amended their counterclaims to include a claim for civil conspiracy and to seek a declaratory judgment as to the question of the enforceability of the shareholders' and confidentiality, non-competition, and non-solicitation agreements and their liability for allegedly fraudulent tax returns filed by Kinesis and the Adkinses. Finally, Mr. Hill and Mr. Robinette later added a claim for declaratory judgment as to liability for credit card purchases on a Kinesis Visa card made prior to their departure from the company.

Kinesis moved to dismiss several of Defendants' counterclaims on 18 May 2004, asserting that they had failed to state a claim for which relief can be granted in their allegations of unfair and deceptive trade practices, RICO violations, ERISA violations, and North Carolina Wage and Hour Act violations. The trial court granted the Kinesis motion on 30 June 2004, dismissing those four counterclaims.

Following extensive discovery by all parties, including depositions, production of documents, and affidavits, as well as numerous other filings by the parties, Defendants moved for summary judgment on 20 January 2006 as to all of the claims asserted by Kinesis. On 30 January 2006, Kinesis likewise moved for partial summary judgment as to the counterclaims for fraud, rescission, piercing the corporate veil, securities fraud, fraudulent filing of tax information returns, interception of wire communications, and defamation. A hearing was held before the trial court on 6 February 2006, and all parties submitted extensive exhibits and other documents for the trial court's review.

On 16 May 2006, the trial court granted partial summary judgment to both sides of the dispute. Specifically, the trial court granted summary judgment to Defendants on the Kinesis claims for breach of the covenant-not-to-compete, breach of contract on confidential information, and breach of fiduciary duty, as well as for breach of contract on employee solicitation to the extent the claim was based on breach of the non-solicitation agreement and not in tort. Likewise, the trial court granted summary judgment to Kinesis on Defendants' counterclaims for interception of wire communications, defamation, fraudulent filing of tax returns, securities fraud, rescission, civil con-

spiracy, and declaratory judgment as to the shareholders' agreement and tax penalties.

Thus, following the trial court's 16 May 2006 order, the only claims remaining for Kinesis were for trade secrets violations, breach of contract on employee solicitation if based in tort, conversion, tortious interference with contract, constructive trust/unjust enrichment, unfair and deceptive trade practices, and an accounting. Defendants' only remaining counterclaims at that point were for common law fraud, piercing the corporate veil, and a declaratory judgment as to the credit card debt. The trial court certified its order as a final judgment under North Carolina Rule of Civil Procedure 54(b), finding that the claims that were dismissed and those that remain are "factually and legally intertwined and pertain to essentially the same conduct" such that proceeding to trial "could produce verdicts inconsistent with verdicts which may later result from trial of one or more of the [claims] which were dismissed."

Both parties now appeal from the trial court's 16 May 2006 summary judgment order, and Mr. Hill and Mr. Robinette also appeal from the 30 June 2004 order dismissing four of their claims.

In its appeal, Kinesis argues that the trial court erred by granting summary judgment to Defendants as to its claims for (I) breach of the covenant-not-to-compete, confidentiality agreement, and non-solicitation agreement; and (II) breach of fiduciary duty.

In their appeal, Mr. Hill and Mr. Robinette argue that the trial court erred by (I) granting summary judgment to Kinesis on the claim for interception of wire communications; (II) granting summary judgment on the claim for defamation; (III) dismissing the claim for fraudulent filing of tax information returns for lack of subject matter jurisdiction; (IV) dismissing as moot the claims for rescission, declaratory judgment, and civil conspiracy; and (V) dismissing their claim for unfair and deceptive trade practices. All Defendants further contend that the trial court erred by denying their motion for summary judgment as to each of the Kinesis claims remaining after the 16 May 2006 order.

[1] We note at the outset that the parties are appealing interlocutory orders that do not dispose of the entire case in controversy. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire contro-

versy."), *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Although such orders are not usually immediately appealable, *see id.*, our Rules of Civil Procedure allow a trial court to certify that his order is a "final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay" for an appeal. N.C. Gen. Stat. § 1A-1, Rule 54(b) (2005). Additionally, we allow interlocutory appeals from orders affecting a "substantial right," that is, "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a man is entitled to have preserved by law: a material right." *Ostreicher v. American Nat'l Stores, Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976).

Although not binding on this Court, we afford a trial court's Rule 54(b) certification great deference on appeal. *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998). Here, given the prolonged procedural history of the case, the number of claims and counterclaims, and the same set of operative facts underlying the entire case, we agree with the trial court's determination that the claims that have been dismissed and those that remain are "factually and legally intertwined" such that proceeding to trial could result in verdicts inconsistent with the earlier dismissals. We therefore affirm the trial court's Rule 54(b) certification and address the merits of both Kinesis's and Defendants' appeals of the granting of summary judgment in the 16 May 2006 order. Additionally, because we find that the 30 June 2004 order dismissing several of Defendants' claims likewise affects a substantial right, we address the merits of those arguments.

[2] However, Defendants also appeal the denial of summary judgment in their favor as to the remaining Kinesis claims. Because Defendants have failed to argue, and we do not find, that any substantial right will be affected by allowing those claims to proceed to trial with the other, remaining counterclaims, we decline to consider the merits of those contentions. Accordingly, we dismiss those portions of Defendants' appeals that concern the trial court's denial of their motion for summary judgment on the Kinesis claims for trade secrets violations, breach of contract on employee solicitation if based in tort, conversion, tortious interference with contract, constructive trust/unjust enrichment, unfair and deceptive trade practices, and an accounting.[2]

2. We note that those were the only arguments put forth by Defendant Altyris on appeal; therefore, Altyris's entire appeal is dismissed as interlocutory.

We review an appeal from summary judgment for whether the evidence, viewed in the light most favorable to the non-moving party, shows there is any genuine issue of material fact between the parties, or 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). Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). 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 County 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).

Kinesis Appeal

Kinesis argues that the trial court erred by granting summary judgment to Defendants as to its claims for (I) breach of the covenant-not-to-compete, confidentiality agreement, and non-solicitation agreement; and (II) breach of fiduciary duty.

I.

[3] First, Kinesis asserts that a genuine issue of material fact remains as to the value of the consideration offered to Mr. Hill and Mr. Robinette in exchange for signing the covenant-not-to-compete, confidentiality and non-solicitation agreement, and shareholders' agreement. Moreover, Kinesis contends that the restrictions imposed by the covenant-not-to-compete are not unreasonable as a matter of law, and that there is a genuine issue of material fact as to damages to Kinesis and whether Mr. Hill and Mr. Robinette breached the agreements.

In January 2000, while working for Kinesis, Mr. Hill and Mr. Robinette signed a shareholders' agreement, a covenant-not-to-compete, and confidentiality and non-solicitation agreement, all combined into one contract, for which Kinesis pledged to issue them shares of stock in Kinesis. By signing the agreements, Mr. Hill and Mr. Robinette agreed to hold confidential all "trade secrets" of Kinesis,

defined as financial, marketing, personal, client, and computer hardware, software, and programs information, and not "discuss, communicate or transmit to others, or make any unauthorized copy of or use the Trade Secrets in any capacity, position or business unrelated to [Kinesis]."

Moreover, Mr. Hill and Mr. Robinette agreed that, during their employment with Kinesis, and for a period of two years following the termination of that employment, they would:

> refrain from dealing with, soliciting the business of, or otherwise conducting business [whether on behalf of Employee or of any other person or entity for whom Employee is performing services or in which Employee has a financial interest after termination of Employee's employment] of the type similar to that of Employer (1) with any client of Employer at the time of such termination, or (2) within any county in North Carolina wherein the Employer had a client at the time of such termination of the Employee's employment.

During that same period, the non-solicitation portion of the agreement dictated that Mr. Hill and Mr. Robinette would "not solicit, induce, aid or suggest to any of the employees of, consultants to, or other persons having a substantial contractual relationship with [Kinesis] to leave such employment, cease such consulting or terminate such contractual relationship with [Kinesis]."

Consideration

Formation of a valid contract "requires an offer, acceptance and consideration." *Cap Care Group, Inc. v. McDonald*, 149 N.C. App. 817, 822, 561 S.E.2d 578, 582, *disc. review denied*, 356 N.C. 611, 574 S.E.2d 676 (2002). A covenant-not-to-compete further requires five conditions to be valid and enforceable: (1) in writing; (2) made a part of the employment contract; (3) based on valuable consideration; (4) reasonable as to time and territory; and (5) designed to protect a legitimate business interest of the employer. *Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276, 279, 530 S.E.2d 878, 881 (2000) (citation omitted); *see also A.E.P. Indus. v. McClure*, 308 N.C. 393, 402-03, 302 S.E.2d 754, 760 (1983). If the covenant-not-to-compete is entered after the start of employment, separate consideration must be issued in order for the covenant-not-to-compete to be enforceable. *Stevenson v. Parsons*, 96 N.C. App. 93, 97, 384 S.E.2d 291, 292-93 (1989), *disc. review denied*, 326 N.C. 366, 389 S.E.2d 819 (1990).

In consideration for Mr. Hill and Mr. Robinette being bound by all the terms of the contract, Kinesis pledged to issue 3,500 shares of stock to Mr. Hill and five hundred shares of stock to Mr. Robinette. However, the parties now disagree as to whether the shares were ever actually issued to Mr. Hill and Mr. Robinette, or if the contract was made void and Mr. Hill and Mr. Robinette were released from its terms by the failure of the consideration offered by Kinesis. Nevertheless, the parties do agree that Mr. Hill and Mr. Robinette never received stock certificates representing their shares. Thus, the question before us is whether, as a matter of law, uncertificated shares may constitute valuable consideration for purposes of making a contract valid and enforceable. We conclude that they do, but that a genuine issue of material fact remains as to whether Kinesis actually issued and delivered the shares to Mr. Hill and Mr. Robinette.

Under the North Carolina Business Corporation Act, a corporation, through its board of directors, may issue shares without a certificate unless its articles of incorporation or bylaws provide otherwise, with such shares being as valid and valuable as those with certificates. *See* N.C. Gen. Stat. §§ 55-6-25(a), 55-6-26(a) (2005). If a corporation decides to issue uncertificated shares, it must send the shareholder, within a reasonable time, a written statement to include: "(1) the name of the issuing corporation and that it is organized under the law of North Carolina; (2) the name of the person to whom issued; and (3) the number and class of shares and the designation of the shares, if any, the certificate represents." *Id.* §§ 55-6-25(b)(1)-(3), 55-6-26(b).

Both sides to the dispute assert facts that would support or contradict the contention that the uncertificated shares were actually issued. For example, Kinesis maintains that the shareholders' agreement signed by Mr. Hill and Mr. Robinette contained all of the information required by Section 55-6-25(b)(1), while Mr. Hill and Mr. Robinette assert that the agreement only states that Kinesis is "willing to give and grant" the shares in question and is not proof that Kinesis actually followed through on that promise.

Additionally, Mr. Hill and Mr. Robinette point to the absence of their names listed as shareholders in the Kinesis corporate books, as required by Section 55-16-01(c), which provides that corporations must "maintain a record of [their] shareholders, in a form that permits preparation of a list of the names and addresses of all shareholders, in alphabetical order by class of shares showing the number and class of shares held by each." *Id.* § 55-16-01(c). Kinesis responds that the

company amended its Schedule K-1s, a document required by the Internal Revenue Service to show the shareholders of an S corporation, to name Mr. Hill and Mr. Robinette as shareholders.

Mr. Hill and Mr. Robinette further note that Kinesis's Articles of Incorporation provide that "[t]ransfers of shares of the corporation shall be made only on the stock transfer books of the corporation by the holder of record," and Kinesis counters that making the shareholders' agreement a part of the corporate minute books satisfied that requirement.

The existence of these conflicting contentions, based on evidence in the record, reminds us that it is not our task on review of summary judgment to determine which side's evidence is most persuasive or compelling. Rather, we consider only whether a genuine issue of material fact remains or if judgment may be rendered as a matter of law. *Bruce-Terminix Co.*, 130 N.C. App. at 733, 504 S.E.2d at 577. Accordingly, we hold that a genuine issue of material fact remains as to whether the Kinesis shares promised to Mr. Hill and Mr. Robinette were actually issued, such that they constituted valuable consideration to make the covenant-not-to-compete and confidentiality and non-solicitation agreement valid and enforceable.

Reasonableness of Restrictions

[4] Next, Kinesis contends that the restrictions of the covenant-not-to-compete were not unreasonable as a matter of law, so Mr. Hill and Mr. Robinette were not entitled to summary judgment on that basis. We agree.

When considering the geographic limits outlined in a covenant-not-to-compete, we look to six overlapping factors:

> (1) the area, or scope, of the restriction; (2) the area assigned to the employee; (3) the area where the employee actually worked or was subject to work; (4) the area in which the employer operated; (5) the nature of the business involved; and (6) the nature of the employee's duty and his knowledge of the employer's business operation.

Hartman v. W.H. Odell & Assocs., Inc., 117 N.C. App. 307, 312, 450 S.E.2d 912, 917 (1994), *disc. review denied*, 339 N.C. 612, 454 S.E.2d 251 (1995).

Additionally, the time and geographic limitations of a covenant-not-to-compete must be considered in tandem, such that "[a] longer

period of time is acceptable where the geographic restriction is relatively small, and *vice versa*." *Baskin*, 138 N.C. App. at 280, 530 S.E.2d at 881 (citing *Jewel Box Stores Corp. v. Morrow*, 272 N.C. 659, 158 S.E.2d 840 (1968)). To show reasonableness of a geographic restriction, "an employer must first show where its customers are located and that the geographic scope of the covenant is necessary to maintain those customer relationships." *Hartman*, 117 N.C. App. at 312, 450 S.E.2d at 917. Nevertheless, to be valid, the restrictions "must be no wider in scope than is necessary to protect the business of the employer." *Manpower of Guilford County, Inc. v. Hedgecock*, 42 N.C. App. 515, 521, 257 S.E.2d 109, 114 (1979).

Here, the covenant-not-to-compete signed by Mr. Hill and Mr. Robinette had a two-year time restriction against soliciting or conducting business "of the type similar to that of [Kinesis]" with any Kinesis client or in any North Carolina county in which Kinesis did business at the time they left the company. Mr. Hill and Mr. Robinette do not challenge the reasonableness of the two-year time restriction, nor the geographic restriction that would have barred them from doing business similar to that of Kinesis in Forsyth and Guilford Counties, where Kinesis had clients at the time of their departure from the company. Rather, Mr. Hill and Mr. Robinette contend that the "similar to" language is impermissibly vague because it does not sufficiently describe the activities they would be barred from pursuing. We find this argument to be unpersuasive.

> We have previously held that a covenant-not-to-compete is
>
> overly broad in that, rather than attempting to prevent [the former employee] from competing for [] business, it requires [the former employee] to have no association whatsoever with any business that provides [similar] services. . . . Such a covenant would appear to prevent [the former employee] from working as a custodian for any "entity" which provides [similar] services.

Hartman, 117 N.C. App. at 317, 450 S.E.2d at 920. The language in the covenant-not-to-compete signed by Mr. Hill and Mr. Robinette would not bar them from any type of employment or activities with any company similar to Kinesis; rather, they are restricted only from "dealing with, soliciting the business of, or otherwise conducting business . . . of the type similar to that of [Kinesis]" for two years in two counties. We have concluded that similar language in other covenants-not-to-compete is not unreasonable as a matter of law. *See Okuma Am. Corp. v. Bowers*, 181 N.C. App. 85, ——, 638 S.E.2d 617, 622 (2007)

(finding language that would allow employment with a direct competitor in area that would not compete with business not to be overly broad as a matter of law); *Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 638-39, 568 S.E.2d 267, 273 (2002) (holding valid and enforceable a provision barring employment in an identical position with a direct competitor); *but see VisionAIR, Inc. v. James*, 167 N.C. App. 504, 606 S.E.2d 359 (2004) (finding language that would bar any type of employment with a business similar to the company in question to be overly broad).

Accordingly, we likewise hold here that the restrictions imposed by Kinesis in the covenant-not-to-compete are "no wider in scope than is necessary to protect the business of the employer." *Hedgecock*, 42 N.C. App. at 521, 257 S.E.2d at 114. Moreover, we note that whether the activities engaged in by Mr. Hill and Mr. Robinette were indeed "similar to" those of Kinesis is a question of fact for a jury to decide.

The issues of actual damages suffered by Kinesis and whether Mr. Hill and Mr. Robinette did, in fact, breach the covenant-not-to-compete and confidentiality and non-solicitation agreement are likewise questions of fact for a jury to decide. The parties have presented a voluminous number of documents, exhibits, and depositions to this Court in support of their positions; it is clear that there are two, if not several, sides to this story. Given that summary judgment should not have been granted on the basis of failure of consideration or the reasonableness of the restrictions imposed in the covenant-not-to-compete, we reverse the trial court and remand these claims to be heard by a jury with the others that are pending.

II.

[5] Next, Kinesis argues that a genuine issue of material fact remains as to whether Mr. Hill owed a fiduciary duty to Kinesis that he did, in fact, breach. We agree.

An officer of a corporation "with discretionary authority" must discharge his duties in good faith, conform to a reasonable standard of care, and act in a manner he reasonably believes is in the best interests of the corporation. N.C. Gen. Stat. § 55-8-42(a) (2005). Corporate officers are described in the corporation's bylaws or appointed by its board of directors in accordance with those bylaws. *Id.* 55-8-40(a). Additionally, in North Carolina, an individual may owe a fiduciary duty to the corporation if he is considered to be a *de facto* officer or director, with authority for tasks such as signing tax

returns, offering major input as to the company's formation and operation, or managing the company. *Lowder v. All Star Mills, Inc.*, 75 N.C. App. 233, 241, 330 S.E.2d 649, 654-55, *disc. review denied*, 314 N.C. 541, 335 S.E.2d 19 (1985).

In the instant case, Kinesis's bylaws provide for a President, Secretary, Treasurer, and "such Vice-Presidents, Assistant Secretaries, Assistant Treasurers, and other officers as may from time to time be appointed by or under the authority of the Board of Directors." The bylaws further state that the President "shall be the principal executive officer of the corporation and, subject to the control of the Board of Directors, shall in general supervise and control all of the business and affairs of the corporation." The President is authorized by the bylaws to sign certain legal instruments binding Kinesis, such as stock certificates, deeds, mortgages, bonds, and contracts.

Although none of Kinesis's corporate records indicate that Mr. Hill was the President of Kinesis, Ms. Adkins stated in her deposition that Mr. Hill was promoted to that position in January 2000, when he signed the covenant-not-to-compete, shareholders' agreement, and confidentiality and non-solicitation agreement. Moreover, Mr. Hill's own business cards named him as President of Kinesis. Although Mr. Adkins is named President in Kinesis's books and records, and Mr. Hill claimed to have no authority to sign legal documents and only limited authority over business decisions, Ms. Adkins explained that Mr. Hill "was not the elected president, but everybody received him as the president publicly. [Mr. Adkins] and I were not known basically to anyone outside of Kinesis."

Whether Mr. Hill's level of control and authority rose to the level of a *de facto* officer, regardless of the official position of Mr. Adkins as President, is a question of fact for the jury to decide. We therefore reverse the trial court's grant of summary judgment on this claim.

In sum, we hold that the trial court erred by granting summary judgment to Defendants on Kinesis's claims for breach of the covenant-not-to-compete and the confidentiality and non-solicitation agreements, and breach of fiduciary duty.

Hill and Robinette Appeal

In their remaining arguments on appeal, Mr. Hill and Mr. Robinette argue that the trial court erred by (I) granting summary judgment to Kinesis on the claim for interception of wire communi-

cations; (II) granting summary judgment on the claim for defamation; (III) dismissing the claim for fraudulent filing of tax information returns for lack of subject matter jurisdiction; (IV) dismissing as moot the claims for rescission, declaratory judgment, and civil conspiracy; and (V) dismissing their claim for unfair and deceptive trade practices.

I.

[6] First, Mr. Hill and Mr. Robinette argue that the trial court erred by granting summary judgment to Kinesis on their counterclaim for interception of wire communication. We disagree.

The Federal Electronic Communications Privacy Act bars individuals from "intentionally intercept[ing], endeavor[ing] to intercept, or procur[ing] any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication." 18 U.S.C. § 2511(1)(a) (2005). North Carolina likewise prohibits such actions. *See* N.C. Gen. Stat. § 15A-287(a)(1) (2005).[3] Nevertheless, both statutes allow for an exception for

> an officer, employee, or agent of a provider of electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of employment while engaged in any activity that is a necessary incident to . . . the protection of the rights or property of the provider of that service.

Id. § 15A-287(c). Moreover, the statute applies only to those communications that have been intercepted, not those that have been stored. *See id.* § 15A-286(13) (defining "intercept" as "the aural or other acquisition of the contents of any wire, oral, or electronic communication through the use of any electronic, mechanical, or other device[,]" and "aural transfer" as "containing the human voice at any point between and including the point of origin and the point of reception.").

Mr. Hill and Mr. Robinette contend that Kinesis accessed their voicemail and e-mail accounts after they had left the company and thereby violated the statutes. However, such allegations, even when

3. As previously noted by this Court, the federal and state wiretapping laws are substantially the same. *See State v. Price*, 170 N.C. App. 57, 65, 611 S.E.2d 891, 897 (2005). Accordingly, we will refer to the state law here, even though Defendants have brought their claim under both statutes, as both allow for a private right of action against an individual who violates the terms of the statute.

taken in the light most favorable to Mr. Hill and Mr. Robinette, would not constitute a violation of the Act. Kinesis was the provider of both the voicemail and e-mail accounts and had the right to access them to retrieve business-related correspondence and protect their rights and property. *Id.* § 15A-287(c). Additionally, Kinesis accessed the messages after they had been received and stored in its system; therefore, the messages were not "intercepted" within the meaning of the Act. Accordingly, we affirm the trial court's grant of summary judgment to Kinesis on this counterclaim.

II.

[7] Next, Mr. Hill and Mr. Robinette contend that the trial court erred by granting summary judgment to Kinesis on the counterclaim for defamation. 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 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 loathsome disease. *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29-30, 568 S.E.2d 893, 898 (2002), *disc. review denied and 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.

Nevertheless, this Court has noted that

> [E]ven where a statement is found to be actionable *per se*, the law regards certain communications as privileged. A qualified privilege exists when a communication is made:
>
> > (1) on subject matter (a) in which the declarant has an interest, or (b) in reference to which the declarant has a right or duty, (2) to a person having a corresponding interest, right, or duty, (3) on a privileged occasion, and (4) in a manner and under circumstances fairly warranted by the occasion and duty, right, or interest.
>
> The essential elements for the qualified privilege to exist are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion and publication in a manner and

> to the proper parties only. Whether a communication is privileged is a question of law for the court to resolve, unless a dispute concerning the circumstances of the communication exists, in which case it is a mixed question of law and fact. Where the privilege exists, a presumption arises that the communication was made in good faith and without malice. To rebut this presumption, the plaintiff must show actual malice or excessive publication.

DaimlerChrysler Corp. v. Kirkhart, 148 N.C. App. 572, 583, 561 S.E.2d 276, 284-85 (2002) (internal citations and quotations omitted), *disc. review denied and dismissed*, 356 N.C. 668, 577 S.E.2d 112 (2003).

Here, Mr. Hill and Mr. Robinette allege that Ms. Adkins made statements to T.R. Johns, a Kinesis employee, that they had stolen millions of dollars from Kinesis. Assuming *arguendo* that this statement is slanderous, we find that the communication was privileged because Mr. Johns was tasked with conducting an inventory of Kinesis assets to determine what Kinesis property, if any, was taken by Mr. Hill and Mr. Robinette. As such, Ms. Adkins had an interest in the statement, and she made a statement limited in scope and publication which was proper to the occasion of informing Mr. Johns as to the nature of his investigatory duties. Mr. Hill and Mr. Robinette have failed to rebut the presumption that Ms. Adkins was acting in good faith when she made the statement. Kinesis has successfully shown that Mr. Hill and Mr. Robinette cannot overcome the affirmative defense of qualified privilege. Accordingly, we affirm the trial court's grant of summary judgment to Kinesis on this counterclaim.

III.

[8] Next, Mr. Hill and Mr. Robinette contend that the trial court erred by dismissing their claim for fraudulent filing of tax information returns on the basis of lack of subject matter jurisdiction. We disagree with the grounds specified by the trial court but nevertheless affirm its dismissal of the claim.

Under federal law, a person may bring a civil action against any person who willfully "files a fraudulent *information return* with respect to payments purported to be made to any other person[.]" 26 U.S.C. § 7434 (2004) (emphasis added). This Court has held that federal tax matters are not exclusively vested in the federal courts and that state courts have concurrent jurisdiction over such matters. *Griffin v. Fraser*, 39 N.C. App. 582, 588, 251 S.E.2d 650, 654 (1979).

We also noted that "federal courts and the Internal Revenue Service have consistently ignored state court rulings on federal tax questions where the state rulings threatened to impair the uniformity of the national tax scheme." *Id.* Moreover, "[q]uestions of federal taxation are generally matters of substantial complexity, and the federal courts and the Internal Revenue Service have well established procedures for determining tax controversies and construing the meaning of federal tax statutes." *Id.*

Because this Court has previously determined that the federal and state courts have concurrent jurisdiction, the trial court did have subject matter jurisdiction over Mr. Hill's and Mr. Robinette's counterclaim. However, we note our earlier holding that such matters are better left to the consideration of the federal courts. Nothing requires the trial court to exercise the concurrent subject matter jurisdiction; we therefore affirm the trial court's dismissal of this claim, particularly in light of the uncertainty in federal law as to whether the Schedule K-1s complained of by Mr. Hill and Mr. Robinette are payee statements or information returns within the meaning of 26 U.S.C. § 7434.

IV.

[9] Mr. Hill and Mr. Robinette further contend that the trial court erred by dismissing their counterclaims for rescission, a declaratory judgment, and civil conspiracy on the grounds of mootness. We agree.

A matter is rendered moot when "(1) the alleged violation has ceased, and there is no reasonable expectation that it will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Comer v. Ammons*, 135 N.C. App. 531, 536, 522 S.E.2d 77, 80 (1999) (citing *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 59 L. Ed. 2d 642, 649 (1979)).

Here, the trial court concluded that Mr. Hill's and Mr. Robinette's counterclaims for rescission, declaratory judgment, and civil conspiracy were moot because summary judgment had been granted as to Kinesis's claims for breach of the covenant-not-to-compete and the non-solicitation and confidentiality agreements. Because we now reverse that grant of summary judgment, Mr. Hill's and Mr. Robinette's counterclaims for rescission, declaratory judgment, and civil conspiracy are no longer moot. We therefore reverse the trial court's dismissal of these claims.

V.

[10] Finally, Mr. Hill and Mr. Robinette argue that the trial court erred by dismissing their counterclaim for unfair and deceptive trade practices for failure to state a claim for which relief may be granted. We disagree.

We have consistently held that the employer/employee relationship does not fall within the intended scope and purpose of the Unfair and Deceptive Trade Practices Act (UDTP). *See, e.g.*, *Buie v. Daniel Int'l Corp.*, 56 N.C. App. 445, 448, 289 S.E.2d 118, 119-20, *disc. review denied*, 305 N.C. 759, 292 S.E.2d 574 (1982). Indeed, we have specifically held that a violation of a covenant-not-to-compete, essentially a breach of contract within the employer/employee relationship, lies outside the scope of the UDTP. *See American Marble Corp. v. Crawford*, 84 N.C. App. 86, 88, 351 S.E.2d 848, 849-50 (affirming summary judgment against a claim alleging that a covenant-not-to-compete violated the UDTP), *disc. review denied*, 319 N.C. 464, 356 S.E.2d 1 (1987). As such, the trial court properly dismissed the UDTP counterclaim for failure to state a claim for which relief may be granted. Accordingly, this assignment of error is overruled.

In sum, we dismiss those portions of Defendants' appeals that concern the trial court's denial of their motion for summary judgment on the Kinesis claims for trade secrets violations, breach of contract on employee solicitation if based in tort, conversion, tortious interference with contract, constructive trust/unjust enrichment, unfair and deceptive trade practices, and an accounting. We further hold that the trial court did not err by dismissing Mr. Hill's and Mr. Robinette's counterclaims for interception of wire communications, defamation, fraudulent filing of tax information returns, and unfair and deceptive trade practices. However, we reverse the trial court's ruling dismissing the counterclaims for rescission, declaratory judgment, and civil conspiracy, and we also reverse the trial court's grant of summary judgment to Defendants on Kinesis's claims for breach of the covenant-not-to-compete, confidentiality, and non-solicitation agreement, and for breach of fiduciary duty.

Dismissed in part, affirmed in part, and reversed in part.

Judges TYSON and CALABRIA concur.

MIDSOUTH GOLF, LLC, PLAINTIFF-APPELLANT v. FAIRFIELD HARBOURSIDE CONDOMINIUM ASSOCIATION, INC., FAIRFIELD HARBOURSIDE II CONDOMINIUM ASSOCIATION, INC., THE FAIRWAYS CONDOMINIUM PROPERTY OWNERS ASSOCIATION, INC., SAND CASTLE COVE CONDOMINIUM ASSOCIATION, INC., SAND CASTLE VILLAGE CONDOMINIUM ASSOCIATION, INC., SAND CASTLE VILLAGE II CONDOMINIUM ASSOCIATION, INC., WATERWOOD TOWNHOUSES PROPERTY OWNERS ASSOCIATION, INC., WINDJAMMER VILLAS ASSOCIATION, INC., AND WINDJAMMER VILLAS II CONDOMINIUM PROPERTY OWNERS ASSOCIATION, INC., DEFENDANTS-APPELLEES

No. COA07-64

(Filed 6 November 2007)

1. Appeal and Error— appealability—interlocutory order—writ of certiorari

Assuming arguendo that plaintiff's appeal from the 26 July 2006 order is an appeal from an interlocutory order, the Court of Appeals elected to consider the appeal by granting plaintiff's conditional petition for writ of certiorari.

2. Deeds— restrictive covenants—payment of recreational amenity fees—necessary parties

The trial court did not err by denying plaintiff's motion to dismiss defendants' counterclaims for failure to join all necessary parties including all property owners within Fairfield Harbour whose properties are subject to the Master Declaration, because: (1) the covenant at issue is one for the payment of amenity fees, not a residential use restriction; (2) only the owner of the recreational amenities has the power to levy a recreational amenity charge and to enforce this restrictive covenant; and (3) the extinguishment of the restrictive covenant would not deprive the other property owners of any property right.

3. Deeds— restrictive covenants—recreational amenity fees—personal covenant not running with land—touch and concern requirement

A covenant to pay recreational amenity fees was a personal covenant that did not run with the land and was not enforceable against time share communities by plaintiff as a successor in interest to the original covenantor, notwithstanding the parties to the Master Declaration intended that the covenant to pay amenity fees would run with the land, because the covenant did not touch and concern defendants' properties where the recreational amenities are not appurtenant to defendants' properties; defend-

ants do not have any easement rights in the recreational amenities financed by the recreational amenity charge but have easement rights only in the common areas, or parks, within the development; and defendants have only a revocable license to use the recreational amenities.

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

Although plaintiff contends that the 1993 covenants which are premised on the validity of the amenity fee provision of the Master Declaration should be declared unenforceable if the Master Declaration providing for payment of the amenity fee is held to be a personal covenant and unenforceable, the issue is not properly before the Court of Appeals because: (1) plaintiff did not make this argument before the trial court; and (2) this contention was not assigned as error as required by N.C. R. App. P. 10(a).

Appeal by Plaintiff from order entered 26 July 2006 by Judge W. Allen Cobb, Jr. in Superior Court, Craven County. Heard in the Court of Appeals 29 August 2007.

Ward and Smith, P.A., by Eric J. Remington, for Plaintiff-Appellant.

Troutman Sanders LLP, by Gary S. Parsons, Gavin B. Parsons, and D. Martin Warf, for Defendants-Appellees Fairfield Harbourside Condominium Association, Inc.; The Fairways Condominium Association, Inc.; Sandcastle Village Condominium Association Inc.; Windjammer Villas Association, Inc.; and Windjammer Villas Association II Condominium Property Owners Association, Inc.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Craig D. Justus, for Defendants-Appellees Fairfield Harbourside II Condominium Association, Inc.; Sandcastle Cove Condominium Association, Inc.; Sandcastle Village II Condominium Association, Inc.; and Waterwood Townhouses Property Owners Association, Inc.

McGEE, Judge.

Fairfield Harbour, Inc. (FHI) recorded a set of restrictive covenants, entitled Master Declaration of Fairfield Harbour (the Master Declaration), in 1979. The Master Declaration governs the

property development known as Fairfield Harbour, which is located in New Bern, North Carolina, and which was, in 1979, owned by FHI. The Master Declaration applies to all properties within Fairfield Harbour, including

> each subdivided lot therein, each unit in a tract of land submitted to the provisions of the Unit Ownership Act (Chapter 47A of the North Carolina General Statutes) or to any similar act providing for condominium or unit ownership of property, and to such other divisions of land or interests therein, including interval ownership interests[.]

In Article I, entitled "Recreational Amenities Charge," the Master Declaration sets forth the restrictive covenant at issue in the present case (hereinafter, the covenant to pay amenity fees):

> 1. FHI shall have the power to levy an annual charge, the amount of said charge to be determined solely by FHI after consideration of current and future needs of FHI for the reasonable and proper operation, maintenance, repair and upkeep of all recreational amenities owned by FHI and actually provided for the use of Purchasers at the date of levy of such charge, such recreational amenities to include but not be limited to dams, marinas, beaches, river and canal access tracts, golf courses, tennis courts, swimming pools, campgrounds, clubhouses and adjacent clubhouse grounds.

In Article II, the Master Declaration declares that every person acquiring title to property within Fairfield Harbour must become a member of the Fairfield Harbour Property Owners Association, Inc. (the Association). The Master Declaration further states that the Association "shall be responsible for the operation, maintenance, repair and upkeep of the parks and other common areas or amenities now or hereafter owned by [the Association] within Fairfield Harbour."

In Article III, the Master Declaration makes a further distinction between those recreational amenities owned by FHI, its successors, or assigns, and the parks or common areas owned by the Association:

> 1. . . . An easement for the use and enjoyment of each of the areas designated as parks is reserved to FHI, its successors and assigns; to the persons who are from time to time members or associate members of the [Association]; to the members and owners of any recreational facility; to the residents, tenants and

> occupants of any multi-family residential building, guest house, inn or hotel facility, and all other kinds of residential structures that may be erected within the boundaries of Fairfield Harbour; and to the invitees of all of the aforementioned persons, the use of which shall be subject to such rules and regulations as may be prescribed by FHI or the Association, if the Association is the owner of the facility or property involved.
>
> 2. The ownership of all of the recreational amenities within Fairfield Harbour . . . shall be in FHI or its successors, grantees, or assigns, and the use and enjoyment thereof shall be on such terms and conditions as FHI, its successors, grantees or assigns, from time to time shall license[.]

FHI continued to develop property within Fairfield Harbour and created the time share communities that are represented by Defendants in this case. FHI recorded restrictive covenants for each time share community and incorporated the covenant to pay amenity fees referenced in the Master Declaration.

FHI subsequently sold its recreational amenities to Harbour Recreation Club, Inc. (HRC) in 1993, and FHI and HRC agreed to a set of additional restrictive covenants (the 1993 covenants). The 1993 covenants purported to allow the owner of the recreational amenities to collect amenity fees from time share units at a rate of up to 5.556 times the fees collected from individual lot owners within Fairfield Harbour. However, based upon the pleadings, all parties agree that the 1993 covenants did not fall within the chains of title of Defendants or their respective time share members.

A dispute arose between Defendants and HRC as to the amount of amenity fees charged, and the parties entered into a settlement agreement (the 1998 settlement agreement). Pursuant to the 1998 settlement agreement, HRC could not assess amenity fees to individual time share units at a rate higher than the amenity fees assessed to individual lot owners.

HRC sold the recreational amenities it owned to Plaintiff in 1999. The purchase agreement between HRC and Plaintiff referenced the Master Declaration and the 1993 covenants, but did not reference the 1998 settlement agreement. From 2000 through 2004, Defendants, on behalf of their respective time share members, paid amenity fees to Plaintiff at the same rate that such fees were assessed to individual lot owners. Plaintiff sells golf and social memberships to those who

seek to use the recreational amenities, including members of the public who do not own property within Fairfield Harbour.

Plaintiff filed this action against Defendants on 4 November 2004, alleging it was entitled to collect amenity fees from Defendants at the rate of up to 5.556 times the fees collected from individual lot owners, as set forth in the 1993 covenants. Plaintiff also alleged it was owed over $1.8 million in past due amenity fees. Defendants filed their amended answers, raising, *inter alia*, the following defense:

> The Master Declaration establishes a license arrangement between the owner of amenities and the property owners subject to an amenity fee as to the use of any facilities. As such, and because said amenity fee is not tied to any reciprocal benefits and burdens arising from the ownership of property in Fairfield Harbour, said obligation is a personal covenant and not binding on Defendants or their members.

Defendants also filed amended counterclaims for breach of contract, unjust enrichment, and declaratory judgment.

Plaintiff filed a motion to dismiss Defendants' amended counterclaims for failure to join all necessary parties. Defendants filed motions for partial summary judgment on the ground that the covenant to pay amenity fees was a personal covenant and was therefore not binding on Defendants or their members.

[1] The trial court entered an order on 26 July 2006 granting Defendants' motions for partial summary judgment and denying Plaintiff's motion to dismiss. Subsequently, Defendants Fairfield Harbourside II Condominium Association, Inc., Sandcastle Cove Condominium Association, Inc., Sandcastle Village II Condominium Association, Inc., and Waterwood Townhouses Property Owners Association, Inc. voluntarily dismissed their counterclaims without prejudice. However, the remaining Defendants did not dismiss their counterclaims. Accordingly, Plaintiff's appeal from the trial court's 26 July 2006 order is interlocutory. Nevertheless, assuming *arguendo* that Plaintiff appeals from a nonappealable interlocutory order, we elect to consider the appeal by granting Plaintiff's conditional petition for writ of certiorari. *See Williams v. Poland*, 154 N.C. App. 709, 711, 573 S.E.2d 230, 232 (2002) (stating: "Assuming, *arguendo*, that the case here is an interlocutory appeal, we elect to consider the appeal by granting [the] appellant's petition for writ of certiorari according to N.C.R. App. P. 21(a)(1).").

I.

[2] Plaintiff first argues the trial court erred by denying its motion to dismiss Defendants' counterclaims for failure to join all necessary parties. Specifically, Plaintiff argues that all property owners within Fairfield Harbor, whose properties are subject to the Master Declaration, are necessary parties. We disagree.

N.C. Gen. Stat. § 1A-1, Rule 19(a) (2005) governs the necessary joinder of parties and provides:

> Subject to the provisions of Rule 23, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of anyone who should have been joined as plaintiff cannot be obtained he may be made a defendant, the reason therefor being stated in the complaint; provided, however, in all cases of joint contracts, a claim may be asserted against all or any number of the persons making such contracts.

" 'Necessary parties must be joined in an action. Proper parties may be joined.' " *Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 438, 527 S.E.2d 40, 44 (2000) (quoting *Booker v. Everhart*, 294 N.C. 146, 156, 240 S.E.2d 360, 365 (1978)). "A necessary party is one who 'is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without [that party's] presence.' " *Id.* at 438-39, 527 S.E.2d at 44 (quoting *Strickland v. Hughes*, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968)). However, "[a] proper party is one whose interest may be affected by a judgment but whose presence is not essential for adjudication of the action." *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990) (citing *Strickland*, 273 N.C. at 485, 160 S.E.2d at 316).

In support of its argument that all property owners within Fairfield Harbour are necessary parties, Plaintiff relies upon *Karner*, where the plaintiffs and the defendants owned lots in a subdivision. *Karner*, 351 N.C. at 434, 527 S.E.2d at 41. Our Court stated that "[w]hen the developer began conveying lots in 1907, each deed included a covenant restricting the use of each parcel to residential use only." *Id.* The defendants sought to demolish the residential structures on three lots in the subdivision and sought to construct a commercial building upon those lots. *Id.* The plaintiffs, who owned lots adjacent to the defendants' lots, filed an action to enjoin the defendants. *Id.* The defendants raised the affirmative defense that "a

change of circumstances had occurred making use of the lots for residential purposes no longer feasible." *Id.*

The intervenor-plaintiffs, who also owned property within the subdivision, were allowed to intervene, and the plaintiffs and the intervenor-plaintiffs filed a motion to join all other property owners within the subdivision as necessary parties. *Id.* at 434-35, 527 S.E.2d at 41-42. However, the trial court denied the motion for joinder, and the Court of Appeals, in a split decision, affirmed the denial of the motion. *Id.* at 435-36, 527 S.E.2d at 42.

The Supreme Court in *Karner* recognized that "[t]he placement of the same restrictive covenant in all of the deeds conveying lots out of a subdivision according to a common plan of development" allows a grantee to "enforce the restriction against any other grantee governed by the common plan of development." *Id.* at 436-37, 527 S.E.2d at 42-43 (citing *Hawthorne v. Realty Syndicate, Inc.*, 300 N.C. 660, 665, 268 S.E.2d 494, 497, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 442 (1980)). Our Supreme Court further recognized that the right of one grantee to enforce a residential restrictive covenant against another is a property right with value. *Id.* at 437-38, 527 S.E.2d at 43 (citing *Tull v. Doctors Building, Inc.*, 255 N.C. 23, 41, 120 S.E.2d 817, 829 (1961)). Therefore, our Supreme Court held that "each property owner within [the subdivision] has the right to enforce the residential restriction against any other property owner seeking to violate that covenant[,]" and that such a right is a valuable property right. *Id.* at 439, 527 S.E.2d at 44. The Supreme Court also held that if the defendants successfully abrogated the restrictive covenant as to their lots, "each property owner within the subdivision would lose the right to enforce that same restriction." *Id.* at 439-40, 527 S.E.2d at 44. Accordingly, because they were subject to lose a property right, our Supreme Court concluded that the nonparty property owners in the subdivision were necessary parties, and the Supreme Court reversed on this issue. *Id.* at 440, 527 S.E.2d at 44-45.

In the present case, unlike in *Karner*, the covenant at issue is one for the payment of amenity fees, not a residential use restriction. Pursuant to the Master Declaration, only the owner of the recreational amenities has the power to levy such a recreational amenity charge. As such, only the owner of the recreational amenities has the power to enforce this restrictive covenant. None of the property owners within Fairfield Harbour have the right to enforce the covenant to pay amenity fees against any of the other owners. Accordingly, the extinguishment of the restrictive covenant in the present case would

not deprive the other property owners of any property right akin to the right that the nonparty property owners were deprived of in *Karner*. As a result, *Karner* is distinguishable.

Plaintiff also relies upon *Page v. Bald Head Ass'n*, 170 N.C. App. 151, 611 S.E.2d 463, *disc. review denied*, 359 N.C. 635, 616 S.E.2d 542 (2005), where the defendants, the Bald Head Association and its individual directors, recorded a revised covenant that provided for a "general assessment to be levied against all units 'at a level which is reasonably expected to produce total income for the Association equal to the total budgeted Common Expenses, including reserves.' " *Id.* at 152-53, 611 S.E.2d at 464. The plaintiffs ceased paying annual dues on several lots, which resulted in liens being placed on those properties. *Id.* at 153, 611 S.E.2d at 465. The plaintiffs filed an action seeking, *inter alia*, to have the new assessment provisions declared null and void, and the defendants filed a motion to dismiss for failure to join all necessary parties. *Id.* The trial court dismissed without prejudice the plaintiffs' claim to invalidate the assessment provisions for failure to join all property owners on Bald Head Island. *Id.*

On appeal, our Court recited the holding of *Karner* as follows: "[A]ll property owners affected by a residential use restrictive covenant [are] necessary parties to an action to invalidate that covenant." *Id.* at 154, 611 S.E.2d at 465 (citing *Karner*, 170 N.C. App. at 438-40, 527 S.E.2d at 43-44). However, while the plaintiffs in *Page* argued on appeal that the trial court erred by dismissing their claim, the plaintiffs "acknowledge[d] that *Karner* [was] controlling . . . and concede[d] that this Court [was] bound by prior decisions of our Supreme Court." *Id.* at 154, 611 S.E.2d at 465. Therefore, our Court found the plaintiffs' assignment of error to be without merit, and affirmed the trial court's dismissal. *Id.*

In the present case, Plaintiff argues that *Page* is controlling because the covenant at issue in *Page* was a covenant for the payment of assessments, which was similar to the one at issue in the present case. However, *Page* does not reveal sufficient facts for us to determine whether the covenant at issue was similar to the one at issue in the present case. Moreover, *Page* does not discuss how the nonparty property owners were in danger of losing a property right by invalidation of the covenant because the plaintiffs effectively conceded that *Karner* applied and that the Court was bound by *Karner*. *See id.* While invalidation of the covenant in the present case could have some effect on nonparty property owners in Fairfield

Harbor, invalidation of the covenant would not deprive them of any property right, which is required under *Karner* to make them necessary parties.

For the reasons stated above, we hold the trial court did not err by denying Plaintiff's motion to dismiss Defendants' counterclaims. We overrule these assignments of error.

II.

[3] Plaintiff also argues the trial court erred by granting Defendants' motions for partial summary judgment. Specifically, Plaintiff argues the trial court erred by concluding that the covenant to pay amenity fees was a personal covenant that did not run with the land. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). The party who moves for summary judgment has the burden of "establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). "[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.*

The following principles also apply to our review of the restrictive covenant at issue in the present case. "A covenant is either real or personal. Covenants that run with the land are real as distinguished from personal covenants that do not run with the land." *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 669, 248 S.E.2d 904, 907 (1978).

> The significant distinction between these types of covenants is that a personal covenant creates a personal obligation or right enforceable at law only between the original covenanting parties, . . . whereas a real covenant creates a servitude upon the land subject to the covenant ("the servient estate") for the benefit of another parcel of land ("the dominant estate")[.]

Runyon v. Paley, 331 N.C. 293, 299, 416 S.E.2d 177, 182 (1992) (citations omitted). The three essential elements for the creation of a real covenant are "(1) the intent of the parties as can be determined from

the instruments of record; (2) the covenant must be so closely connected with the real property that it touches and concerns the land; and, (3) there must be privity of estate between the parties to the covenant." *Raintree*, 38 N.C. App. at 669, 248 S.E.2d at 908.

A. Intent of the Parties

As to the intent requirement, our Court has held that a recital that the covenant is to run with the land "is not controlling. The express intent of the parties can prohibit a covenant from running with the land, but it cannot make a personal covenant run with the land." *Raintree*, 38 N.C. App. at 669, 248 S.E.2d at 908. Our Court has further clarified that "[i]ntent alone is not sufficient to make the covenant run. The other legal requirements must be met." *Id.* (citing *Neponsit Property Owners' Ass'n v. Emigrant I. Sav. Bank*, 15 N.E.2d 793 (N.Y. 1938)).

"Whether restrictions imposed upon land by a grantor create a personal obligation or impose a servitude upon the land enforceable by subsequent purchasers from his grantee is determined by the intention of the parties at the time the deed containing the restriction was delivered." *Stegall v. Housing Authority*, 278 N.C. 95, 100, 178 S.E.2d 824, 828 (1971). "Restrictions in a deed will be regarded as for the personal benefit of the grantor unless a contrary intention appears, and the burden of showing that they constitute covenants running with the land is upon the party claiming the benefit of the restriction." *Id.* at 101, 178 S.E.2d at 828. In *Raintree*, our Court further recognized that "[t]hese principles apply with especial force to persons who (such as Raintree) are not parties to the instrument containing the restrictions." *Raintree*, 38 N.C. App. at 669, 248 S.E.2d at 908 (citing *Stegall*, 278 N.C. 95, 178 S.E.2d 824).

In the present case, the Master Declaration states that all restrictions "shall be deemed to be restrictions running with the land and binding on Purchasers, their heirs, successors and assigns[.]" The Master Declaration also specifically declares that "[t]he power to levy [a recreational amenities charge] shall inure also to the successors and assigns of each such recreational amenity[.]" Moreover, the Master Declaration provides that the provisions set forth therein "shall, as to the owner of each such property [within Fairfield Harbour], his heirs, successors or assigns, operate as covenants running with the land for the benefit of each and all other properties in Fairfield Harbour and their respective owners."

Defendants counter that the provisions setting forth the intent that the restrictive covenants run with the land are merely "boilerplate recitals." Defendants specifically contend that because the Master Declaration only gave property owners a license to use recreational amenities, the parties did not intend for the covenant to pay amenity fees to run with the land. We disagree. While the fact that property owners merely have a license in the recreational amenities is material to our analysis of the touch and concern requirement, discussed below, it has no bearing on the intent of the parties. We hold that by virtue of the several declarations discussed above, the parties intended that the covenant to pay amenity fees would run with the land. However, as we have already recognized, "[i]ntent alone is not sufficient to make the covenant run. The other legal requirements must be met." *Raintree*, 38 N.C. App. at 669, 248 S.E.2d at 908.

B. Touch and Concern

Regarding the touch and concern requirement, our Supreme Court has recognized that this element "is not capable of being reduced to an absolute test or precise definition." *Runyon*, 331 N.C. at 300, 416 S.E.2d at 183. Our Court has stated one of the historical tests as follows: " '[I]t may be laid down as a rule without any exception, that a covenant to run with the land, and bind the assignee, must respect the thing granted or demised, and that the act covenanted to be done or omitted, must concern the lands or estate conveyed.' " *Raintree*, 38 N.C. App. at 670, 248 S.E.2d at 908 (quoting *Nesbit v. Nesbit*, 1 N.C. 490, 495 (1801)). Our Court has further stated that "[t]o touch and concern the land, the object of the covenant must be 'annexed to, inherent in, or connected with, land or other real property,' or related to the land granted or demised." *Id.* (quoting 20 Am. Jur. 2d *Covenants*, *Conditions*, *Etc.* § 29 (1965)).

At common law, courts drew a distinction between negative covenants, which prohibit something, and affirmative covenants, which require a positive act. *Id.* At common law, negative covenants ran with the land, while affirmative covenants did not. *Id.* "As a result of the common law rule on affirmative covenants, the requirements for a covenant to run are to be more strictly applied to affirmative covenants than negative covenants." *Id.*

In *Raintree*, the plaintiff, Raintree Corporation, purchased the original developer's interest in a planned residential community named the Village of Raintree. *Raintree*, 38 N.C. App. at 665, 248 S.E.2d at 906. Pursuant to certain recorded covenants, conditions

and restrictions, every owner of a lot in the Village of Raintree was a mandatory member of Raintree Country Club and was obligated to pay club dues. *Id.* at 665-66, 248 S.E.2d at 906. The plaintiff sued the defendants, who owned a lot in the Village of Raintree, to collect, *inter alia*, unpaid country club dues. *Id.* at 665, 248 S.E.2d at 906. The defendants moved to dismiss on the ground that the plaintiff was not the real party in interest, and the trial court, which treated the motion as one for summary judgment, dismissed the action. *Id.* at 666, 248 S.E.2d at 906.

In order to determine whether the plaintiff was the real party in interest, our Court had to examine whether the covenant was real or personal. *Id.* at 668-71, 248 S.E.2d at 907-09. Our Court determined that the developer intended the covenants to run with the land. *Id.* at 669, 248 S.E.2d at 908. However, because this determination was not dispositive of the issue, our Court examined whether the covenant at issue touched and concerned the land, holding:

> This covenant creates an affirmative duty, a charge or obligation to pay money, *i.e.*, country club dues, for the services and use of the country club facilities which are not upon, connected with, or attached to the defendants' land in any way. The defendants are required to pay, whether they use the facilities or not. The payment of a collateral sum of money does not concern the land. *Nesbit v. Nesbit*, *supra*. Courts have generally held that covenants to pay money do not touch and concern the land. *Neponsit Property Owners' Ass'n v. Bank*, *supra*. . . . We find that the performance by the defendants of this covenant is not connected with the use of their land and does not touch or concern their land to a substantial degree.

Id. at 670, 248 S.E.2d at 908-09. Therefore, the Court held that the covenant to pay country club dues was a personal covenant. *Id.* at 671, 248 S.E.2d at 909. Accordingly, because personal covenants are not assignable, our Court held that the plaintiff was not the real party in interest and, therefore, affirmed the trial court. *Id.* at 671-72, 248 S.E.2d at 909.

Like the covenant at issue in *Raintree*, the covenant at issue in the present case is an affirmative covenant. Therefore, we must strictly construe the requirements for creation of a real covenant. *See Raintree*, 38 N.C. App. at 670, 148 S.E.2d at 908. Also, as in *Raintree*, Defendants in the present case are required to pay the recreational amenity fees whether or not they use the amenities

financed by the charge. Additionally, the recreational amenities are open, for a fee, to members of the public who do not own property within Fairfield Harbour.

In support of its holding in *Raintree*, our Court recognized that the country club facilities were "not upon, connected with, or attached to the defendants' land in any way[,]" and that "the performance by the defendants of this covenant is not connected with the use of their land and does not touch or concern their land to a substantial degree." *Id.* at 670, 248 S.E.2d at 908-09. However, our Court did not explain why the performance of the covenant was not sufficiently connected with the use of the defendants' land. In support of its holding in *Raintree*, our Court did cite a New York case, *Neponsit Property Owners' Ass'n v. Emigrant I. Sav. Bank*, 15 N.E.2d 793 (N.Y. 1938), and we find *Neponsit* instructive on this issue.

In *Neponsit*, the plaintiff's predecessor in interest had sold lots in a residential community, including the land sold to the defendant's predecessor in title, subject to restrictive covenants. *Neponsit*, 15 N.E.2d at 793-94. One of the covenants provided for payment of a sum of money "devoted to the maintenance of the roads, paths, parks, beach, sewers and such other public purposes as shall from time to time be determined by the party of the first part, its successors or assigns." *Id.* at 794. The Court of Appeals of New York determined that the covenant was a real covenant that ran with the defendant's land. *Id.* at 797. The Court of Appeals of New York emphasized that the grantees of the plaintiff's predecessor in title "obtained not only title to particular lots, but an *easement or right of common enjoyment* with other property owners in roads, beaches, public parks or spaces and improvements in the same tract." *Id.* (emphasis added). The Court further held as follows:

> For full enjoyment in common by the defendant and other property owners of these easements or rights, the roads and public places must be maintained. In order that the burden of maintaining public improvements should rest upon the land benefited by the improvements, the grantor exacted from the grantee of the land with its appurtenant easement or right of enjoyment a covenant that the burden of paying the cost should be inseparably attached to the land which enjoys the benefit. It is plain that any distinction or definition which would exclude such a covenant from the classification of covenants which 'touch' or 'concern' the land would be based on form and not on substance.

Id.

In *Neponsit*, the fact that the grantees of lots within the development received an easement in the common areas and amenities financed by those fees was central to the Court's holding that the covenant to pay a fee touched and concerned the land. *See id.* In contrast, by virtue of the unique set of covenants at issue in the present case, Defendants do not have any easement rights in the recreational amenities financed by the recreational amenity charge; they only have easement rights in the common areas, or parks, within Fairfield Harbour. The Master Declaration provides that "the use and enjoyment [of the recreational amenities] shall be on such terms and conditions as FHI, its successors, grantees or assigns, from time to time shall license[.]" Therefore, Defendants merely have a revocable license to use the recreational amenities. We find this to be a key distinction, and hold that in the present case, the covenant to pay amenity fees did not touch and concern Defendants' properties.

Our decision is further supported by *Homeowners Assoc. v. Sellers*, 62 N.C. App. 205, 302 S.E.2d 848, *cert. denied*, 309 N.C. 461, 307 S.E.2d 364 (1983), where our Court dealt with an affirmative covenant for the payment of maintenance assessments in common areas and amenities in which the lot owners had easement rights. In *Homeowners Assoc.*, the plaintiff homeowners' association filed an action against the defendants for unpaid monthly assessments which were required by the subdivision's restrictive covenants. *Id.* at 206, 302 S.E.2d at 850. The restrictive covenants provided that the plaintiff could levy assessments "to provide funds for, among other things, maintenance, landscaping, and beautification of the common areas of the subdivision." *Id.* Importantly, the covenants further provided as follows: "The common areas are all the real property owned by the Association for the use and enjoyment of members of the Association. Every owner has a nonexclusive right and easement of enjoyment in the common areas. The easements are appurtenant to each lot." *Id.*

The trial court found and concluded that the defendants were required to pay the maintenance assessments, and the defendants appealed. *Id.* at 206-07, 302 S.E.2d at 850. However, because the defendants failed to except to any of the trial court's findings of fact and conclusions of law, our Court's review was limited to the questions of "whether the judgment rendered [was] supported by the findings of fact and whether any error of law appear[ed] on the face of the record." *Id.* at 209-10, 302 S.E.2d at 851-52. Because the trial court "found [that] the covenants and restrictions ran with the land, and

[that] [the] defendants were delinquent in paying the required assessments, the judgment obviously was supported by the findings of fact and conclusions of law." *Id.* at 210, 302 S.E.2d at 852.

Nevertheless, our Court went on to state that "[a]lthough not necessary to the disposition of this case, we will briefly address the issues [the] defendants have attempted to raise in their brief." *Id.* Although dicta, our Court's analysis is instructive. The defendants argued that the covenant "[did] not touch and concern the land because some of the recreational facilities, which [were] financed by the maintenance fees, [were] several blocks away from [the] defendants' lots." *Id.* Our Court stated that

> [t]he covenant, however, runs with each lot in the entire subdivision of which [the] defendants' lots are but a small part. The recreational facilities are in the subdivision, for the use of all the people who live in the subdivision. It does not matter that the facilities are not adjacent to each lot, it is sufficient that they touch and concern the entire subdivision.

Id. Our Court further stated that "[t]his case is easily distinguishable from *Raintree* because the recreation facilities here are not in a country club, but are actually on the . . . subdivision *for the benefit of lot owners*." *Id.* at 211, 302 S.E.2d at 853 (emphasis added).

In *Homeowners Assoc.*, the lot owners had easement rights in the common areas, which included some recreational facilities. However, Defendants in the present case do not have easement rights in the recreational amenities; they only have easement rights in the common areas, or parks, within Fairfield Harbour. In *Homeowners Assoc.*, although not explicitly stated, it appears that by virtue of the defendants' easement rights, and because the common areas were therefore "appurtenant to" the defendants' lots, the covenant for payment of assessments to maintain those common areas touched and concerned the defendants' land. *See Homeowners Assoc.*, 62 N.C. App. at 206-11, 302 S.E.2d at 850-53. In contrast, in the present case, the recreational amenities are not appurtenant to Defendants' properties, and therefore, the covenant to pay amenity fees does not touch and concern Defendants' properties.

Plaintiff argues that *Runyon* provides support for its argument that a covenant for maintenance of recreational amenities touches and concerns land within a subdivision if the value of the lots within the subdivision are affected by the maintenance of the recreational amenities. We disagree.

In *Runyon*, the plaintiffs sought to enjoin the defendants from constructing condominiums on their property in violation of a restrictive covenant placed on the defendants' property by the plaintiffs' predecessor in interest. *Runyon*, 331 N.C. at 297-98, 416 S.E.2d at 181-82. In determining whether the plaintiffs were entitled to enforce the covenant, our Supreme Court analyzed the touch and concern requirement. *Id.* at 300-01, 416 S.E.2d at 183-84. The Supreme Court recognized that "the nature of the restrictive covenants at issue in this case (building or use restrictions) is strong evidence that the covenants touch and concern the dominant and servient estates." *Id.* at 301, 416 S.E.2d at 183. The Supreme Court then concluded as follows:

> Considering the close proximity of the lands involved here and the relatively secluded nature of the area where the properties are located, we conclude that the right to restrict the use of [the] defendants' property would affect [the] plaintiffs' ownership interests in the property owned by them, and therefore the covenants touch and concern their lands.

Id. at 301, 416 S.E.2d at 184.

Plaintiff makes much of the Supreme Court's language in *Runyon* that for a covenant to touch and concern land, "[i]t is sufficient that the covenant have some economic impact on the parties' ownership rights by, for example, enhancing the value of the dominant estate and decreasing the value of the servient estate." *Id.* at 300, 416 S.E.2d at 183. However, *Runyon* is clearly distinguishable from the present case because it dealt with a negative, rather than an affirmative covenant. While the negative nature of the covenant in *Runyon* was "strong evidence" that it ran with the land, the affirmative nature of the covenant in the present case is strong evidence that the covenant did not run with the land. *See Runyon*, 331 N.C. at 301, 416 S.E.2d at 183; *see also Raintree*, 38 N.C. App. at 670, 248 S.E.2d at 908 (recognizing that "[a]s a result of the common law rule on affirmative covenants, the requirements for a covenant to run are to be more strictly applied to affirmative covenants than negative covenants."). Furthermore, *Runyon* did not deal with a covenant common to an entire subdivision, like the one at issue in the present case. Rather, the covenant at issue in *Runyon* was between two parties with properties in close proximity to one another. Accordingly, *Runyon* does not analogize well with the present case, and does not provide support for Plaintiff's argument.

Both Plaintiff and Defendants also cite *Bermuda Run Country Club v. Atwell*, 121 N.C. App. 137, 465 S.E.2d 9 (1995), where a set of restrictive covenants provided that the Board of Governors of a country club had to approve increases in assessments and club dues. *Id.* at 138, 465 S.E.2d at 11. The plaintiff corporation, which owned and operated the country club, sought a declaration that the restrictive covenants were null and void. *Id.* at 139-40, 465 S.E.2d at 12. The plaintiff argued that the covenants created rights and responsibilities that existed independently of the parties' ownership interests in the land and that the covenants did not run with the land. *Id.* at 142, 465 S.E.2d at 13. However, the defendants argued that the covenants did run with the land, arguing "that the country club is located within a residential community, and thus, the residents' interests in protecting the value of their investment and membership in the club would be substantially impaired and diminished if the covenants were not upheld." *Id.* Our Court held: "The covenants at issue here[] allow the Board of Governors to give or veto approval of increases in assessments or dues of the country club. These covenants are not directly connected with the land in the instant case; therefore, they do not touch and concern the land." *Id.*

In the present case, Plaintiff makes an argument similar to the one rejected by our Court in *Bermuda Run*. In *Bermuda Run*, the defendants argued that "the residents' interests in protecting the value of their investment and membership in the club would be substantially impaired and diminished if the covenants were not upheld." *Id.* However, the Court held that the covenants were not "directly connected with the land[.]" *Id.* Like the defendants in *Bermuda Run*, Plaintiff in the present case argues that if the covenant is not upheld, it will diminish the value of the land in Fairfield Harbour. However, as in *Bermuda Run*, the covenant in the present case, which calls for payment of a recreational amenities charge, is not "directly connected" to Defendants' properties because Defendants merely have a license to use the recreational amenities; those recreational amenities are not appurtenant to Defendants' properties.

For all the reasons stated above, we hold that the covenant to pay amenity fees did not touch and concern Defendants' properties.

C. Privity of Estate

Defendants do not appear to challenge whether privity of estate existed in the present case. In fact, one set of Defendants concedes

the existence of privity of estate. However, because we hold that the covenant to pay amenity fees did not touch and concern the land, we need not address the issue of privity of estate. *See Raintree*, 38 N.C. App. at 670-71, 248 S.E.2d at 909 (holding that "[s]ince the covenant does not touch and concern the land, an essential requirement is absent and it is not necessary to discuss the question of privity of estate.").

D. Conclusion

Because we hold that the covenant to pay amenity fees did not touch and concern Defendants' properties, we hold that the covenant was a personal covenant. As such, the covenant did not run with the land and was not enforceable by Plaintiff, as a successor in interest to the original covenantor. Accordingly, the trial court did not err by granting Defendants' motions for partial summary judgment.

III.

[4] Plaintiff also argues that "if the provision of the Master Declaration providing for payment of the amenity fee is held to be a personal covenant and unenforceable, the 1993 covenants which are premised on the validity of the amenity fee provision of the Master Declaration also should be declared unenforceable." However, it does not appear that Plaintiff made this argument before the trial court. Therefore, this issue is not properly before us. *See Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003), *disc. review denied*, 358 N.C. 550, 600 S.E.2d 469 (2004) (recognizing that "a contention not raised and argued in the trial court may not be raised and argued for the first time in the appellate court."). Moreover, because this contention was not assigned as error, this issue is not properly presented for review. *See* N.C.R. App. P. 10(a) (stating: "Except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10."). Accordingly, this argument is not properly before us.

Affirmed.

Judges HUNTER and SMITH concur.

TOMMY DAVIS NATHAN CAMERON, AND WIFE, LISA CAMERON, PLAINTIFFS v. MERISEL PROPERTIES, INC., AND BRIAN GOLDSWORTHY, DEFENDANTS

No. COA07-54

(Filed 6 November 2007)

1. Premises Liability— toxic mold in workplace—motion for JNOV—more than scintilla of evidence

The trial court did not err in a case seeking damages for bilateral vestibular dysfunction, allegedly caused by exposure to toxic mold in the workplace, by denying defendant's motion for JNOV, because plaintiff presented more than a scintilla of evidence through the testimony of several doctors that his condition was caused by exposure to mold in defendant's Cary facility, thus passing the threshold to submit the issue of causation to the jury.

2. Premises Liability— toxic mold in workplace—denial of motion for directed verdict—abuse of discretion standard

The trial court did not err in a case seeking damages for bilateral vestibular dysfunction, allegedly caused by exposure to toxic mold in the workplace, by denying defendant's motion for directed verdict even though defendant points to various weaknesses or inconsistencies in plaintiff's evidence, because: (1) the evidence must be viewed in the light most favorable to plaintiffs, deeming their evidence to be true, resolving all conflicts in their favor, and giving them the benefit of every reasonable favorable inference; (2) the Court of Appeals does not have the right to weigh the evidence and decide the issue on the basis of its weight; and (3) although defendant contends, as an alternative, entitlement to a new trial on the grounds that the jury's verdict was against the greater weight of evidence, defendant failed to articulate any specific abuse of discretion.

3. Evidence— toxic mold in workplace—respiratory and other medical complaints of co-workers

The trial court did not abuse its discretion in a case seeking damages for bilateral vestibular dysfunction, allegedly caused by exposure to toxic mold in the workplace, by admitting testimony of several of plaintiff's co-workers about respiratory and other medical complaints they reported to defendant because: (1) even assuming arguendo that defendant preserved its right to appellate review of the admission of the challenged evidence, the trial

court did not commit reversible error in its admission when defendant acknowledged the testimony was admitted solely to show notice to defendant and that the trial court gave a limiting instruction to that effect; and (2) plaintiff's health problems were sufficiently similar to those of his co-workers when the witnesses testified about problems with upper respiratory conditions and health effects to their ear, nose, or throat, and plaintiff's condition is centered in his inner ear.

4. Evidence— letter—addressed to associated corporate entity—notice

The trial court did not err in a case seeking damages for bilateral vestibular dysfunction, allegedly caused by exposure to toxic mold in the workplace, by admitting evidence that in January 2000, the individual in charge of property management for defendant's Cary facility received an OSHA complaint about the Cary facility's air quality even though defendant contends the letter was addressed to nonparty Merisel Americas rather than to defendant Merisel Properties, Inc., because: (1) the letter was admitted on the issue of notice to defendant of the presence of mold in the building, and a limiting instruction to that effect was given; (2) defendant cited no cases, and none were found, holding that otherwise admissible evidence of notice is rendered inadmissible when the information was in an envelope addressed to an associated corporate entity rather than to defendant; and (3) even assuming arguendo some error, the admission of the OSHA complaint did not change the outcome of the trial.

5. Evidence— toxic mold in workplace—past and future economic damages

The trial court did not abuse its discretion in a case seeking damages for bilateral vestibular dysfunction, allegedly caused by exposure to toxic mold in the workplace, by admitting the testimony of two witnesses, including defendant's former supervisor and an expert in the evaluation of past and future economic damages, because: (1) not only did defense counsel fail to object to the former supervisor's testimony, but he explicitly told the trial court that proper questions were asked; and (2) the expert's trial testimony included certain revised lower figures for plaintiff's projected lost earnings than his previous higher numbers during deposition, his basic approach remained the same, and he indicated during his deposition that his figures were somewhat preliminary since the former supervisor had not been deposed yet.

6. Damages and Remedies— remittitur—no showing of excessive award

Defendant is not entitled to a new trial on damages or to a remittitur in a case seeking damages for bilateral vestibular dysfunction, allegedly caused by exposure to toxic mold in the workplace, even though it contends the jury's award was excessive and unsupported by competent evidence, because: (1) plaintiff's expert calculated plaintiff's lost earnings at between $4,000,000 and $6,000,000; (2) the jury verdict of $1,600,000 was significantly below the minimum figure projected by the expert; and (3) there was no evidence to show the trial court abused its discretion by failing to grant a new trial.

Appeal by Defendant from an order entered 14 February 2006 by Judge Michael R. Morgan; and from orders entered on 6 March 2006, 17 March 2006, 22 March 2006 and 10 May 2006, and judgment entered 4 April 2006, by Judge Robert H. Hobgood; all in Wake County Superior Court. Heard in the Court of Appeals 10 September 2007.

Hunton & Williams LLP, by Steven B. Epstein, John D. Burns, and L. Neal Ellis, Jr., for Plaintiffs-Appellees.

Clausen Miller P.C., by Melissa A. Murphy-Petros and Edward M. Kay; and Cranfill, Sumner & Hartzog, L.L.P., by William W. Pollock, Jaye E. Bingham, and Dexter Campbell, III, for Defendants-Appellants.

ARROWOOD, Judge.

Defendant, Merisel Properties, Inc., appeals from entry of judgment and from the denial of pretrial and posttrial motions. We affirm.

Merisel Americas, Inc., is a computer hardware and software company with an office in Cary, North Carolina (the Cary facility). Plaintiff Nathan Cameron (Cameron) worked at the Cary facility, which had a history of leaks and dampness, between December 1998 and April 2000. During this time he developed irreversible damage to his vestibular system, which is the inner ear organ responsible for balance. In 2002 Cameron and his wife, Plaintiff Lisa Cameron, filed a complaint "alleging that they suffered injury from a toxic workplace maintained by Merisel, Inc. (Merisel), Merisel Properties, Inc. (Merisel Properties), Merisel Americas, Inc. (Merisel Americas), and Brian Goldsworthy (Goldsworthy) (collectively Defendants). Specifically, Plaintiffs alleged that [D]efendants knew that the work-

place at which Mr. Cameron was employed was contaminated with toxic molds . . . [and] that due to [D]efendants' failure to warn or to take action to correct the mold problem, Mr. Cameron sustained debilitating, irreversible, and disabling injuries." *Cameron v. Merisel, Inc.*, 163 N.C. App. 224, 225, 593 S.E.2d 416, 418-19 (2004) (*Merisel I*). Plaintiffs brought claims against (1) Goldsworthy for willful and wanton conduct; (2) Merisel and Merisel Americas under *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), for intentional misconduct substantially certain to cause serious injury; and (3) Merisel Properties for simple negligence under a theory of premises liability. In addition, Plaintiffs sought punitive damages from all Defendants, and Lisa Cameron brought a claim for loss of consortium against all Defendants.

On 19 August 2002 the trial court granted Defendants' motion to dismiss Plaintiffs' complaint. On appeal, this Court affirmed the trial court's dismissal of Plaintiffs' *Woodson* claim as to Merisel and Merisel Americas; reversed the trial court's dismissal of Plaintiffs' claim against Goldsworthy and the associated claims for loss of consortium and punitive damages; reversed the trial court's dismissal of Plaintiffs' premises liability claim against Merisel Properties and associated claim for loss of consortium; and affirmed dismissal of Plaintiffs' punitive damages claim against Merisel Properties. The Court remanded for trial of Plaintiffs' "claim against Goldsworthy and the related loss of consortium and punitive damages claims[,] . . . as well as [P]laintiffs' premises liability claim against Merisel Properties and the corresponding loss of consortium claim." *Merisel I*, 163 N.C. App. at 235, 593 S.E.2d at 424.

On remand, Plaintiffs sought sanctions against Defendant Merisel Properties for abuse of discovery. By order entered 27 December 2005, the trial court sanctioned Merisel Properties by barring it from raising any defense or offering any evidence that the Cary facility was leased, and "establish[ing] as a fact" that the building was not subject to a lease. Defendants' pretrial motions for summary judgment and for exclusion of certain evidence were denied. Prior to trial Plaintiffs dismissed their claim for punitive damages.

The case was tried before a Wake County jury in March 2006. At the close of Plaintiffs' evidence and again at the close of all the evidence, Defendants moved for a directed verdict. Both motions were denied. On 27 March 2006 the jury returned a verdict finding Defendant Merisel Properties liable for damages of $1,600,000 for Cameron's claim and $200,000 for Lisa Cameron's loss of consortium

claim. Goldsworthy, who is not a party to this appeal, was found not liable. Defendant's posttrial motions for judgment notwithstanding the verdict (JNOV), a new trial, or remittitur of damages were denied on 10 May 2006. Defendant appeals from the entry of judgment; the denial of its pretrial motions in limine and motion for summary judgment; and the denial of its posttrial motion for JNOV, a new trial or remittitur.

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[1] Defendant argues first that the trial court erred by denying its motion for JNOV. The trial court denied Defendant's motion for directed verdict at the end of Plaintiffs' evidence and its renewed directed verdict motion at the close of all the evidence. Defendant then moved for JNOV, on the grounds that its earlier directed verdict motions should have been granted.

> Our standard of review of the denial of a motion for directed verdict and of the denial of a motion for judgment notwithstanding the verdict are identical. "The standard of review of a ruling entered upon a motion for judgment notwithstanding the verdict [or a motion for directed 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 and resolving all conflicts of any evidence in favor of the non-movant, the evidence is sufficient to be submitted to the jury."

Denson v. Richmond Cty., 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003) (quoting *Branch v. High Rock Lake Realty, Inc.*, 151 N.C. App. 244, 249-50, 565 S.E.2d 248, 252 (2002)) (citation omitted). A motion for either directed verdict or 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.' " *Branch*, 151 N.C. App. at 250, 565 S.E.2d at 252 (quoting *Norman Owen Trucking v. Morkoski*, 131 N.C. App. 168, 172, 506 S.E.2d 267, 270 (1998)).

Plaintiffs' claim for premises liability was "based upon allegations of negligence. . . . 'It is well established that . . . the essential elements of negligence [are] duty, breach of duty, proximate cause, and damages.' " *Thomas v. Weddle*, 167 N.C. App. 283, 286, 605 S.E.2d 244, 246 (2004) (quoting *Camalier v. Jeffries*, 340 N.C. 699, 706, 460 S.E.2d 133, 136 (1995)). Defendant challenges the sufficiency of the evidence of causation. Cameron was diagnosed with bilateral vestibular dysfunction, which he claimed was caused by his exposure to toxic

molds at work. We next determine whether Plaintiffs presented "more than a scintilla", *Norman Owen Trucking*, 131 N.C. App. at 172, 506 S.E.2d at 270, of evidence that Cameron's disorder was proximately caused by his exposure to mold.

Bilateral vestibular dysfunction is a complex medical condition, and in "cases involving 'complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury.' . . . 'The evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation.' " *Holley v. ACTS, Inc.*, 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003) (quoting *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980); and *Gilmore v. Hoke Cty. Bd. of Educ.*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942)). "The quantum and quality of the evidence required to establish *prima facie* the causal relationship will of course vary with the complexity of the injury itself." *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). However,

> "[a]lthough medical certainty is not required, an expert's speculation is insufficient to establish causation. Thus, could or might expert testimony [is] insufficient to support a causal connection when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation."

Singletary v. N.C. Baptist Hosp., 174 N.C. App. 147, 154, 619 S.E.2d 888, 893 (2005) (quoting *Holley*, 357 N.C. at 234, 581 S.E.2d at 754) (internal quotations and citations omitted). "Indeed, in order to be sufficient to support a finding that a stated cause produced a stated result, evidence on causation 'must indicate a reasonable scientific probability that the stated cause produced the stated result.' " *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 542, 463 S.E.2d 259, 262 (1995) (quoting *Hinson v. National Starch & Chem. Corp.*, 99 N.C. App. 198, 202, 392 S.E.2d 657, 659 (1990)).

In the instant case, Plaintiffs' evidence tended to show, in relevant part, the following: Before Defendant purchased the Cary facility in 1998, it obtained inspection reports indicating that the building had pre-existing problems with moisture and leaking in the building's windows and walls. Employees testified that they had seen mold on walls and noticed leaks and unpleasant "musty" smells in certain areas. Cameron began working at the Cary facility in December 1998,

and immediately noticed that the windows in his office leaked during every rainstorm. The walls, carpeting, and ceiling of his office all showed evidence of water damage, including the presence of mold. These problems increased during 1999; the office next to Cameron's flooded, areas of carpeting in the Cary facility were saturated with water, and mold spread on some walls.

Several of Cameron's co-workers testified that they experienced an array of respiratory, ear, nose, and throat problems, including asthma, sore throats, eye irritation, sinus congestion, frequent colds, hearing problems, and vertigo. These employees notified Defendant Goldsworthy, who was responsible for building maintenance. Goldsworthy in turn informed Defendant's administrators, but the Cary facility's problems with mold and moisture continued to worsen during most of 1999. Goldsworthy expressed the opinion that employees who claimed their health problems were related to moisture in the building were simply trying to avoid work.

In early 2000, Defendant assigned Candace Jost Miller to investigate and solve the moisture problems at the Cary facility. Air quality tests performed in November 1999 confirmed the presence of mold, and in January 2000 an employee lodged a complaint with the North Carolina OSHA. Thereafter, Miller assumed responsibility for the building maintenance that previously was assigned to Goldsworthy. In March 2000 further testing revealed the presence of *Stachbotrys* mold in Cameron's office.

When Cameron started working for Defendant, he was in excellent health. After working at the Cary facility for a few weeks, Cameron started to have problems with balance and vision. Over the following six months he suffered from periods of dizziness, visual anomalies, problems with balance, and increasing fatigue and difficulty concentrating. In July 1999 Cameron sought emergency medical treatment at Western Wake Medical Center for his condition. In the fall of 1999 he was diagnosed with permanent and irreversible bilateral vestibular dysfunction, or loss of the balance function in both inner ears. He was treated for vestibular dysfunction by Dr. Joseph Farmer.

Dr. Farmer testified at trial as an expert in the field of physiology of injuries or illnesses affecting the human ear. He told the jury that he had tested Cameron and eliminated most known causes of vestibular dysfunction, including brain tumor, chemotherapy drugs, ototoxic

chemicals, autoimmune illnesses, Arnold-Chiari syndrome, syphilis, skull fracture, and other diseases and agents that may damage vestibular function. Dr. Farmer concluded that Cameron's bilateral vestibular dysfunction was caused by ototoxicity, or poisoning of the ears. When he reviewed the results of the air quality sampling performed at the Cary facility in 2000, he learned that Cameron had been exposed to toxigenic molds, including *Stachybotrys* mold. Based on Cameron's exposure to *Stachybotrys* mold, the fact that Cameron's symptoms were sometimes associated with the mold, and the fact that Dr. Farmer had ruled out other known causes, Dr. Farmer concluded "that the cause of [Cameron's] loss of vestibular function in both ears was likely due to ototoxic—to a mycotoxin from the *Stachybotrys* fungus." On cross-examination, Dr. Farmer reiterated that "my best medical judgment is this was caused by the mold that he was exposed to, and the data indicate that he would have had a significant exposure."

Dr. Farmer's medical notes provide further support for his opinion. In *Workman v. Rutherford Elec. Membership. Corp.*, 170 N.C. App. 481, 495, 613 S.E.2d 243, 252 (2005), this Court held that Plaintiff's "expert evidence of causation exceeded 'speculation' " where the Defendant's "testimony of 'could or might,' together with his impression recorded in his treatment notes that [P]laintiff's [accident] 'more likely than not [was] related to his injury' is competent evidence to sustain the Commission's conclusion of law that [P]laintiff's [medical] conditions were caused by the accident." In the instant case, Dr. Farmer's medical notes stated that "I advised [Mr. Cameron] that it is my best medical judgment that the loss of balance function in both vestibular end organs was likely related to the exposure to toxic mold."

Dr. Eckhardt Johanning testified as an expert in the area of occupational and environmental medicine and the effects of mold on human health. Johanning testified that "more likely than not" the "competent cause" of Cameron's disorder was his exposure to mold. Plaintiffs also presented testimony from Dr. Tulis, who was qualified as an expert in mold science and assessment, control, and remediation of mold in indoor environments. Dr. Tulis testified that Cameron was exposed to mold and mycotoxins at the Cary facility, and that these presented a health hazard.

We conclude that Plaintiffs presented far more than a scintilla of evidence that his bilateral vestibular dysfunction was caused by exposure to mold in the Cary facility. Plaintiffs' evidence easily passes

the threshold to submit the issue of causation to the jury, and thus the trial court did not err by denying Defendant's motion for directed verdict and JNOV. We have considered Defendant's arguments to the contrary and reject them.

Defendant argues that Dr. Farmer's opinion was based on "mere conjecture and speculation." As discussed above, Dr. Farmer performed various tests on Mr. Cameron, and his notes indicate that "neurological work ups including MRI scans of the cervical spine and brain were unremarkable. There was no indication of other causes such as Arnold Chiari Syndrome, multiple sclerosis, brain tumor or posterior fossa tumor, or other degenerative central nervous system disease. Also, there is no past history of known ototoxic drug exposure." Having eliminated the other causes of Cameron's symptoms, Dr. Farmer concluded that Cameron's vestibular dysfunction was most likely caused by ototoxicity, or poisoning of the ear. Other evidence established that exposure to toxigenic molds can cause vestibular dysfunction, and that Cameron had been exposed to toxic mold at the Cary facility. When Dr. Farmer learned this, he concluded that the ototoxin causing Cameron's vestibular dysfunction was a mycotoxin, or mold byproduct, to which Cameron was exposed at the Cary facility. Clearly, his opinion was based on far more than speculation.

Defendant also urges that our determination of the sufficiency of expert evidence of medical causation "depends upon the totality of the evidence," in support of which Defendant cites *Poole v. Copland, Inc.*, 125 N.C. App. 235, 481 S.E.2d 88 (1997), *rev'd on other grounds*, 348 N.C. 260, 498 S.E.2d 602 (1998). However, *Poole* does not hold that appellate review of expert medical causation must include assessment of the totality of the evidence. Rather, it addresses a situation not present in the instant case, when an expert's testimony is limited to the opinion that something "might" or "could" have caused a Plaintiff's condition: "Whether 'could' or 'might' will be considered sufficient depends upon the general state of the evidence. . . . Cases finding 'could' or 'might' expert testimony to be sufficient often share a common theme—additional evidence which tends to support the expert's testimony." *Poole*, 125 N.C. App. at 241, 481 S.E.2d at 92. Thus, *Poole* permits review of additional evidence, but certainly does not require a whole record type of analysis. Accordingly, we reject Defendant's suggestion that the testimony of Dr. Farmer should be "viewed as a whole with the testimony of Drs. Johanning, Tulis, Darcey and Sandler[.]"

Defendant acknowledges that Dr. Farmer "tested [P]laintiff extensively" and "ruled out both the primary known causes of vestibular dysfunction . . . and the lesser known causes" before diagnosing Plaintiff with bilateral vestibular dysfunction that Dr. Farmer believed was caused by ototoxicity, or exposure of the inner ear to a toxic substance. It also concedes that Dr. Farmer subsequently identified *Stachybotrys* mold as the toxic agent that probably was responsible for Plaintiff's condition. The record is clear that Dr. Farmer's diagnosis was based on his testing of Plaintiff to rule out other causes, Plaintiff's history of exposure to mold toxins, and Dr. Farmer's review of Dr. Johanning's article on the subject. This being sufficient to defeat Defendant's directed verdict motion, we do not engage in weighing this evidence in the context of all the evidence. This assignment of error is overruled.

[2] Defendant's remaining arguments regarding causation attempt to draw our attention to various weaknesses or inconsistencies in Plaintiffs' evidence, or to Defendant's contrary evidence. However, in our review of whether Plaintiffs "made out a *prima facie* case sufficient to withstand a motion for a directed verdict, the evidence must be viewed in the light most favorable to caveators, deeming their evidence to be true, resolving all conflicts in their favor, and giving them the benefit of every reasonable favorable inference." *In re Will of Dupree*, 80 N.C. App. 519, 521, 343 S.E.2d 9, 10 (1986) (citations omitted). "[T]his Court 'does not have the right to weigh the evidence and decide the issue on the basis of its weight.' . . . Although by doing so, it is possible to find a few excerpts that might be speculative, this Court's role is not to engage in such a weighing of the evidence." *Alexander v. Wal-Mart Stores, Inc.*, 166 N.C. App. 563, 573, 603 S.E.2d 552, 558 (2004) (Hudson, J., dissenting) (quoting *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998)), *rev'd per dissent*, 359 N.C. 403, 610 S.E.2d 374 (2005).

Without making any new arguments Defendant also asserts that if this Court disagrees that the motion for JNOV should have been granted, Defendant is nonetheless entitled to a new trial, on the grounds that the jury's verdict was against the greater weight of the evidence.

> "The power of the court to set aside the verdict as a matter of discretion has always been inherent, and is necessary to the proper administration of justice." The trial judge is "vested with the discretionary authority to set aside a verdict and order a new trial whenever in his opinion the verdict is contrary to the

> greater weight of the credible testimony." Since such a motion requires his appraisal of the testimony, it necessarily invokes the exercise of his discretion. It raises no question of law, and his ruling thereon is irreviewable in the absence of manifest abuse of discretion.

Britt v. Allen, 291 N.C. 630, 634-35, 231 S.E.2d 607, 611 (1977) (quoting *Bird v. Bradburn*, 131 N.C. 488, 489, 42 S.E. 936 (1902); and *Roberts v. Hill*, 240 N.C. 373, 380, 82 S.E.2d 373, 380 (1954)). "Our review of a discretionary ruling denying a motion for a new trial is limited to determining whether the record demonstrates that the trial court manifestly abused its discretion." *Godfrey v. Res-Care, Inc.*, 165 N.C. App. 68, 83, 598 S.E.2d 396, 406 (citing *Pittman v. Nationwide Mutual Fire Ins. Co.*, 79 N.C. App. 431, 434, 339 S.E.2d 441, 444 (1986)), *disc. review denied*, 359 N.C. 67, 604 S.E.2d 310 (2004).

Defendant fails to articulate any specific abuse of discretion, and we conclude that the trial court did not abuse its discretion in overruling Defendant's motion. This assignment of error is overruled.

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[3] Defendant next challenges the admission of the following evidence: (1) testimony of several of Cameron's co-workers about respiratory and other medical complaints they reported to Defendant; (2) evidence of an OSHA complaint addressed to Merisel Americas, not a party in the trial; and (3) testimony by Dr. Albert Link and Ken Kopel pertaining to damages. Defendant argues that is entitled to a new trial because the trial court erroneously admitted this evidence. We disagree.

Preliminarily, we note Plaintiffs' argument that Defendant failed to preserve for appellate review the admissibility of much of the testimony challenged on appeal. For example, Defendant did not renew his objections at trial to the testimony of Cameron's co-workers. Nor did Defendant object to the trial court's jury instructions. Further, Defendant explicitly informed the trial court that it did not object to Ken Kopel's testimony, but only to certain conclusions that might be drawn from such testimony. Plaintiffs' waiver arguments may well have merit. However, we conclude that even assuming, *arguendo*, that Defendant preserved its right to appellate review of the admission of the challenged evidence, the trial court did not commit reversible error in its admission.

"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.' Under an abuse of discretion standard, we defer to the trial court's discretion and will reverse its decision 'only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.' " *Gibbs v. Mayo*, 162 N.C. App. 549, 561, 591 S.E.2d 905, 913 (quoting *Sloan v. Miller Building Corp.*, 128 N.C. App. 37, 45, 493 S.E.2d 460, 465 (1997); and *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)), *disc review denied*, 358 N.C. 543, 599 S.E.2d 45 (2004).

We first consider the testimony of certain of Plaintiff's co-workers about upper respiratory and ear, nose, and throat medical problems they experienced between 1998-2000, and their efforts to bring this to the attention of Defendant's personnel. Defendant acknowledges that this testimony was admitted solely to show notice to Defendant, and that the trial court gave the jury a limiting instruction to that effect. Defendant contends, however, that the testimony was inadmissible and that the limiting instruction was insufficient to cure the prejudicial effect of this testimony. We disagree.

Defendant asserts that the testimony was inadmissible because Cameron's co-workers' health problems were "dissimilar." The record shows that the witnesses testified about problems with upper respiratory conditions and health effects to their ear, nose, or throat. Cameron's condition is centered in his inner ear. The trial court did not abuse its discretion in finding Cameron's and his co-workers' health problems to be sufficiently similar. Defendant also argues that the jury was confused by the testimony, based on a question from one juror about the phrase "if you so find" in one of the trial court's instructions. We conclude that the juror's question, seeking clarification of what was modified by the phrase "if you so find" did not show a general misunderstanding of the issues in the case.

"The general rule regarding admission of evidence is that '[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly, or by [the Rules of Evidence].' N.C.G.S. § 8C-1, Rule 402 [(2005)]." *State v. Campbell*, 359 N.C. 644, 672, 617 S.E.2d 1, 19 (2005). It is true 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 needless

presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2005). However:

> The decision whether to exclude evidence under Rule 403 of the Rules of Evidence is within the discretion of the trial court and will not be overturned absent an abuse of discretion. "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision."

Campbell, 359 N.C. at 673, 617 S.E.2d at 19 (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)) (citations omitted). We conclude that the trial court acted within its discretion to admit the testimony of Cameron's co-workers.

[4] Defendant also argues that the trial court erred by admitting evidence that in January 2000 Candace Miller, at that time in charge of property management for the Cary facility, received an OSHA complaint about the Cary facility's air quality. The basis of Defendant's objection is that the letter was addressed to non-party Merisel Americas, rather than to Defendant Merisel Properties, Inc. We find this argument without merit. The letter was admitted on the issue of notice to Defendant of the presence of mold in the building, and a limiting instruction to that effect was given. The purpose of this evidence was to show that Defendant had notice. Defendant cites no cases, and we find none, holding that otherwise admissible evidence of notice is rendered inadmissible because the information was in an envelope addressed to an associated corporate entity, rather than to Defendant. We conclude that the trial court did not err by admitting this evidence.

Moreover, even assuming, *arguendo*, some error, we further conclude that the admission of the OSHA complaint did not change the outcome of the trial. " 'The burden is on the appellant not only to show error, but to show prejudicial error, *i.e.*, that a different result would have likely ensued had the error not occurred. G.S. § 1A-1, Rule 61 [(2005)].' . . . We also observe that, based on our own review of the evidence, it is highly unlikely that this testimony had any significant effect on the jury's verdict." *O'Mara v. Wake Forest Univ. Health Sciences*, 184 N.C. App. 428, 441, 646 S.E.2d 400, 407 (2007) (quoting *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 271, 302 S.E.2d 204, 214 (1983)). This assignment of error is overruled.

[5] Defendant further argues that the trial court erred by admitting the testimony of Ken Kopel and Dr. Albert Link. Ken Kopel is the former president of Ziff Davis Publishing Company and former president and CEO of PC Connection, where Defendant worked after leaving Merisel. Kopel was Defendant's supervisor at PC Connection. Dr. Link was qualified as an expert in the evaluation of past and future economic damages. Defendant argues that it is entitled to a new trial on damages, on the grounds that their testimony should have been excluded. We disagree.

Regarding Ken Kopel, Defendant states that it "independently objected" to his testimony. This is inaccurate. Defense counsel not only did not object to Kopel's testimony, but it explicitly told the trial court that:

> I don't have an objection to Mr. Kopel's testimony or to questions that were asked to him. They're—they're—they're proper questions. And they ask Mr. Kopel, "Do you think that the [P]laintiff could have had this other position?" And his testimony is, well, that he may—he could have been a candidate for the—for that—for that position. And that's fine.

Defendant's only concern about Kopel's testimony was that "the argument that's going to be made from that [by Dr. Link] is, "Well, Mr. Cameron would have had this position[.]" We conclude that the trial court did not err by allowing Ken Kopel to testify.

Regarding Dr. Link's testimony, the record shows that his projections of Cameron's lost income were anchored by several known data points, including Cameron's salary when he left Merisel, his salary at subsequent jobs, and the salary associated with job offers he had been unable to accept. Dr. Link also incorporated the opinions of Cameron's former supervisor, Ken Kopel, into his analysis of the future income Cameron would lose as a result of his disorder. At the time he was deposed, Kopel had not yet been deposed, although Dr. Link was provided with a summary of what Plaintiffs believed Ken Kopel's deposition testimony would be. After Kopel's deposition was taken, Dr. Link was able to refine some of his calculations, based on additional data points. As a result, his projections of Cameron's lost income decreased somewhat. Defendant argues that Dr. Link's testimony should have been excluded, on the grounds that his trial testimony included "previously undisclosed opinions"; that Dr. Link "used a Power Point slide show at trial" which Defendant had not previ-

ously seen; and that Dr. Link had "changed his methodology" between the time of his deposition and the trial. We disagree.

Defendant contends that the differences between Dr. Link's deposition and his trial testimony constitute violation of the rules of discovery, requiring the trial court to strike his testimony. "While the trial court has the authority to impose discovery violation sanctions, it is not required to do so. Therefore, whether sanctions are imposed is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Moore*, 152 N.C. App. 156, 161, 566 S.E.2d 713, 716 (2002) (citing *State v. Hodge*, 118 N.C. App. 655, 657, 456 S.E.2d 855, 856 (1995)). An abuse of discretion exists only when a trial court's ruling is "so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

In the instant case, we conclude that the trial court did not abuse its discretion by denying Defendant's motion to strike Dr. Link's testimony. Dr. Link's trial testimony included certain revised, lower, figures for Cameron's projected lost earnings than his previous higher numbers during deposition. However, Dr. Link's basic approach remained the same: he used various known dollar amounts and percentages for several years before and after Cameron developed vestibular dysfunction, and interpolated where necessary, to create a trajectory that could be used to calculate the amount Cameron would have earned if he were healthy. Further, Dr. Link indicated during his deposition that his figures were somewhat preliminary because Ken Kopel had not yet been deposed. This assignment of error is overruled.

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[6] Finally, Defendant argues that it is entitled to a new trial on damages or to a remittitur, because the jury's damage award was excessive and unsupported by competent evidence. We disagree.

"It is well established that the trial courts in this State have no authority to grant remittitur without the consent of the prevailing party." *Gardner v. Harriss*, 122 N.C. App. 697, 699, 471 S.E.2d 447, 449 (1996) (citing *Pittman*, 79 N.C. App. at 434, 339 S.E.2d at 444).

Defendant contends that it is entitled to a new trial on damages under N.C. Gen. Stat. § 1A-1, Rule 59(a)(6) (2005) which authorizes the court to grant a new trial for "[e]xcessive or inadequate damages appearing to have been given under the influence of passion or prejudice[.]"

Regarding the amount of damages, we have concluded that the testimony of Ken Kopel and Dr. Link was competent on the issue of damages. Dr. Link's expert opinion calculated Cameron's lost earnings at between $4,000,000 and $6,000,000. The jury verdict of $1,600,000 is significantly below the minimum figure projected by Dr. Link. "Whether to grant or deny a new trial is within the sound discretion of the trial court and may not be reviewed absent a manifest abuse of discretion. As there is no evidence to show that the trial court abused its discretion by failing to grant a new trial on the ground that [$1,600,000.00] was an excessive award, [D]efendant's argument is without merit." *Chaney v. Young*, 122 N.C. App. 260, 265, 468 S.E.2d 837, 840 (1996) (citing *Munie v. Tangle Oaks Corp.*, 109 N.C. App. 336, 427 S.E.2d 149 (1993)). We conclude that Defendant is not entitled to a new trial on damages. This assignment of error is overruled.

For the reasons discussed above, we conclude that the trial court did not err and that the judgment below should be

Affirmed.

Chief Judge MARTIN and Judge STROUD concur.

ROBERT LEMOYNE WATSON, JR. v. GAYLE POWELL WATSON

No. COA06-1640

(Filed 6 November 2007)

1. Contempt— civil contempt—no entitlement to full protections of criminal contempt

The trial court did not err in a civil contempt case by failing to give defendant due notice of whether the contempt proceeding against her was civil or criminal in nature, because: (1) defendant admitted she was adjudicated in civil contempt, and she was not entitled to the full procedural and evidentiary protections of a criminal contempt proceeding; (2) the Court of Appeals has already rejected the argument that a defendant should have been granted the full protections of a criminal contempt proceeding when the notice of hearing did not state whether the proceeding was criminal or civil; and (3) the contempt proceeding was

clearly civil in nature, no relief of a punitive nature was ordered, and defendant had adequate notice of the proceeding.

2. Contempt— civil—scope of hearing—due notice

The trial court did not err in a civil contempt case by holding that defendant had due notice that the scope of the hearing would encompass issues related to the Chase and MBNA credit cards, because: (1) plaintiff's verified motion and the trial court's order to show cause read together constituted adequate notice to defendant that her inaction pertaining to the credit cards was alleged as a basis for contempt; (2) defendant did not object to the presentation of evidence on this issue at the contempt hearing, and defendant presented evidence relating to the credit card debt including offering exhibits; and (3) defendant's active participation in the hearing on this issue, without objection, defeated her contention that she was without notice.

3. Contempt— civil—equitable distribution—failure to pay credit cards

The trial court did not err by holding defendant in contempt for failure to comply with the court order in an equitable distribution case as it related to credit cards even though defendant contends the consent order merely required her to assume financial responsibility for the credit card debts, because: (1) the findings of fact pertaining to the credit card accounts are supported by competent evidence and are thus binding on the Court of Appeals; (2) nearly one year after the execution of the consent order, defendant failed to do the three things required of her by the consent order, and her obligation was to transfer the accounts into her name individually instead of removing plaintiff's name from the accounts; (3) the court clearly and unambiguously articulated what action defendant was required to undertake relating to the credit cards in order to purge herself of contempt; (4) the trial court properly ordered defendant to pay the credit card debt as the only means of forcing defendant to comply with the terms of the consent order; and (5) contrary to defendant's assertion, there was competent evidence in the record to support the court's finding that the Chase card ending in -9036 was defendant's responsibility.

4. Contempt— civil—present ability to pay

The trial court did not err in a civil contempt case by finding that defendant had the present means and ability to satisfy the

credit card obligations, because: (1) the court found that defendant had in excess of $580,000 of equity in real estate in her name individually, and the court afforded defendant 90 days from the time of the contempt hearing on 5 June 2006 to comply with the order thus providing defendant an opportunity to sell the properties and acquire the funds to satisfy the order; and (2) prior findings of a present ability to pay may be res judicata as to future proceedings on that issue, and the court found that defendant had the ability to take reasonable measures to comply with the court order at the time of the 20 June 2006 contempt order.

5. Contempt— civil—willful failure to execute joint tax returns

The trial court did not err by holding defendant in civil contempt based on her failure to execute the parties' 2001 and 2002 joint tax returns, because: (1) defendant refused to sign 1040x forms for each tax year, and those forms were part of the process of filing the amended joint tax returns; (2) defendant's refusal to execute the forms was knowingly, deliberate, and part of a series of recalcitrant acts designed to frustrate the filing of amended joint tax returns required by the express terms of the consent order; and (3) although defendant contends the purpose of the consent order was no longer served by execution of these documents when the IRS had already disallowed the 2001 joint tax return and the deadline for filing the 2002 return passed five days prior to the contempt order, there was competent evidence that signing the forms would still accomplish the order's purpose since plaintiff's CPA testified that the signing would show the parties' due diligence when requesting an extension for the 2002 return from the IRS.

6. Costs— attorney fees—expert witness fees—civil contempt

Although the trial court's order in a civil contempt proceeding to enforce an equitable distribution consent order requiring defendant to pay attorney fees was proper, it was error for the court to assess an expert witness fee against defendant, and that portion of the order is reversed.

Appeal by defendant from judgment entered 20 June 2006 by Judge G. Wayne Abernathy in Alamance County District Court. Heard in the Court of Appeals 23 August 2007.

Vernon, Vernon, Wooten, Brown, Andrews & Garrett, P.A., by Benjamin D. Overby and Wiley P. Wooten, for plaintiff-appellee.

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

STEELMAN, Judge.

When defendant is held in civil contempt of court, the constitutional notice requirements applicable to criminal contempt proceedings are not implicated. When defendant is served with a copy of the motion for an order to show cause, which states the grounds for the alleged civil contempt, as well as the show cause order referencing the motion, there is adequate notice of the nature of the contempt proceedings. When the parties' consent order provided that defendant is to "assume financial responsibility" for credit card debt, and defendant has the present means and ability to comply, it is not error for the court to hold defendant in contempt of court for failing to comply with the consent order as it related to the credit card accounts, and to order defendant to pay off the debt as a condition of purging herself of contempt. When defendant refused to execute forms requested by the Internal Revenue Service in order to file amended tax returns, as required under the parties' consent order, it is not error for the court to order defendant to sign these forms. While it was appropriate for the court to order the payment of attorneys' fees in a contempt proceeding for failure to comply with an equitable distribution consent order, the court erred in assessing expert witness fees against defendant.

I. Factual Background

Robert Lemoyne Watson (plaintiff) filed suit against his wife, Gayle Powell Watson (defendant), in October 2003 seeking equitable distribution of the parties' marital property. The parties entered into a consent order, which was filed 17 June 2005. The consent order included the following pertinent provisions:

> 3. [N]o later than August 1, 2005, the Defendant will deliver to Mike Minikus, CPA, all tax-related materials which she and/or Mr. Minikus considers necessary to the preparation of her 2001, 2002 and 2003 tax returns and upon the preparation of joint returns for the parties for 2001, 2002 and 2003 by Mr. Minikus, Defendant will execute the same, provided it is lawful for her to do so.
>
> . . .

5. Defendant hereby assumes all financial responsibility on all obligations listed on Schedule B attached hereto, and agrees to indemnify the Plaintiff and hold him harmless for any liability thereon . . .

6. Upon entry of this Order each party will promptly undertake to transfer to their name individually the balance owed on each debt assumed by the said party per Schedules B and C. Neither party will incur any obligation on behalf of the other party or attempt to pledge the other's credit.

Schedule B included certain credit card debts owed to MBNA, CitiFinancial, and Chase.

On 27 July 2005, plaintiff filed a motion for contempt. On 27 July 2005, the trial court entered an order requiring defendant to appear and show cause on 22 August 2005 why she should not be held in contempt of court for failing to abide by the terms of the consent order. On 25 August 2005, the court continued the matter upon defendant's motion based upon the withdrawal of defendant's counsel from the case, and to allow defendant time to deliver documents required by paragraph 3 of the consent order. Arising out of the 30 August 2005 hearing, the court entered an order finding that defendant had failed to comply with certain terms of the consent order and that she was in contempt of court.

Defendant was ordered incarcerated in the common jail of Alamance County until she complied with the terms of the consent order. The incarceration was stayed upon the following conditions:

1) By 2 October 2005 defendant take action required to remove plaintiff from debts assigned to defendant under the consent order;

2) Send a copy of the consent order to each major credit reporting agency with a letter acknowledging her responsibility for the debts;

3) Deliver to plaintiff's accountant all documentation for her 2002 and 2003 tax returns;

4) Appear before the court on 3 October 2005 and bring with her completed 2002 and 2003 separate income tax returns, as well as a joint tax return for 2001, and any evidence that she contends that it would be unlawful for her to sign a joint return;

5) Appear before that court on 17 October 2005 with completed 2002 and 2003 joint income tax returns prepared by plaintiff's accountant. If she contends that the execution of these returns is unlawful, she is to produce evidence of such, and also present what she intends would be lawful returns for her to sign.

On 14 October 2005, defendant failed to appear before the court and had failed to comply with other conditions that stayed her incarceration. The court found defendant to be in criminal contempt for violating the court's prior orders. Defendant was directed to appear before the court on 17 October 2005.

On 17 October 2005, defendant, in open court, executed the 2001 joint tax return. The remaining matters could not be reached and were continued until 31 October 2005. Defendant went out of state on 31 October 2005 and the matter was continued to 7 November 2005.

On 7 November 2005, defendant did not appear in court. Her attorney advised the court that he had received a fax that morning discharging him from further representation. Defendant's counsel was allowed to withdraw. The trial court entered another show cause order directing defendant to appear on 28 November 2005 to show cause why she should not be punished for contempt for failure to sign the 2002 and 2003 joint tax returns and failing to comply with the provisions of the consent order as to the debts assigned to her. The court further ordered that if defendant failed to appear on 28 November 2005 she was to be arrested. Defendant was arrested and released from custody on 12 December 2005.

On 6 April 2006, plaintiff filed a motion alleging that although defendant had executed the 2001, 2002 and 2003 joint returns, that the Internal Revenue Service ("IRS") requested that additional documents be filed in conjunction with the amended returns, and that defendant refused to sign the documents. The motion further asserted that the forms had to be filed immediately because of a statute of limitations issue. In addition, plaintiff alleged that defendant had refused to pay off the credit card debts. The motion sought a show cause order from the court, which was issued on 6 April 2006, setting a hearing for 8 May 2006.

The 8 May 2006 hearing was continued based upon a note from defendant's physician until 5 June 2006. On that date, a hearing was conducted, with defendant appearing *pro se*. The trial court entered

an order concluding that defendant was in contempt of court and once again ordering defendant's incarceration in the Alamance County jail. Defendant could purge herself of contempt by doing the following:

1) Signing form 1040X as to the 2001, 2002 and 2003 joint tax returns by 9 June 2006;

2) Paying to accountant Michael J. Minikus the sum of $11,724.00 as an expert witness fee by 5 September 2006;

3) Paying attorney's fees to plaintiff's counsel in the amount of $11,235.53 by 5 September 2006;

4) Paying in full the two credit card debts by 5 September 2006.

From this order, defendant appeals.

II. Notice of Contempt Proceedings

[1] In defendant's first argument, she contends that the court erred in not giving her due notice of whether the contempt proceedings against her were civil or criminal in nature. We disagree.

Contempt of court may be civil or criminal in nature. *Bishop v. Bishop*, 90 N.C. App. 499, 503, 369 S.E.2d 106, 108 (1988). "A major factor in determining whether contempt is criminal or civil is the *purpose* for which the power is exercised." *Id.* (quoting *O'Briant v. O'Briant*, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985)).

Criminal contempt is imposed in order to preserve the court's authority and to punish disobedience of its orders. *O'Briant*, 313 N.C. at 434, 329 S.E.2d at 372. Criminal contempt is a crime, and constitutional safeguards are triggered accordingly. *Id.* at 435, 329 S.E.2d at 373. On the other hand, when the court seeks to compel obedience with court orders, and a party may avoid the contempt sentence or fine by performing the acts required in the court order, the contempt is best characterized as civil. *Bishop*, 90 N.C. App at 504, 369 S.E.2d at 109; *O'Briant*, 313 N.C. at 434, 329 S.E.2d at 372. A civil contempt proceeding does not command the procedural and evidentiary safeguards that are required by criminal contempt proceedings. *Hartsell v. Hartsell*, 99 N.C. App. 380, 388, 393 S.E.2d 570, 575 (1990) (citing *Bishop*, 90 N.C. App. at 505-06, 369 S.E.2d at 109-10).

Both parties agree that the nature of the contempt proceedings in this case was civil. The 20 June 2006 order provided that the defendant is to be incarcerated "*until such time as* she complies

with the 16 June 2005 consent order." (emphasis added). The order further articulated specific actions required by defendant to avoid being held in contempt.

Although defendant admits that the trial court adjudicated her in civil contempt, she argues that she nonetheless should have been granted the full protections of a criminal contempt proceeding, since the notice of hearing did not clearly state whether the proceedings were criminal or civil. However, as acknowledged in plaintiff's brief, this Court in *Hartsell* rejected this argument. *Hartsell*, 99 N.C. App. at 386-89, 393 S.E.2d at 574-76. This Court is bound by its own decisions on an issue, even if the issue was decided in a different case, unless it has been overturned by a higher court. *In re Civil Penalty*, 324 N.C. 373, 383-84, 379 S.E.2d 30, 36-7 (1989). *Hartsell* constitutes binding precedent upon this Court, and we hold that because the contempt proceedings were clearly civil in nature, and since no relief of a punitive nature was ordered, defendant was not entitled to the procedural and evidentiary safeguards required in a criminal contempt proceeding. Defendant had adequate notice of the proceedings, and this assignment of error is without merit.

III. Notice of Nature of Contempt Proceedings

[2] In defendant's second argument, she contends that, even if her notice of the contempt proceeding was proper, the trial court's order as it pertains to the Chase and MBNA credit cards should be vacated because she did not have due notice that the scope of the hearing would encompass issues related to those credit cards. We disagree.

N.C. Gen. Stat. § 5A-23(a)(1) (2005) governs civil contempt proceedings and provides that:

> Proceedings for civil contempt may be initiated by motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt.

The statute further requires a copy of the motion and notice to be served on the alleged contemnor at least five days before the hearing. *Id.* The party alleging civil contempt must include a sworn statement with the motion "setting forth the reasons why the alleged contemnor should be held in civil contempt." *Id.*

The record reveals that plaintiff's verified motion for an order to show cause filed 6 April 2006 alleged that "the Defendant has failed

and refused to pay off the credit cards as ordered by the Court which failure has adversely affected the Plaintiff and his credit." In its 6 April 2006 order to show cause, the court specifically referenced plaintiff's motion. Defendant was properly served with both the motion and the court's order. Read together, these documents constitute adequate notice to defendant that her inaction pertaining to the credit cards was alleged as a basis for contempt.

Furthermore, defendant did not object to the presentation of evidence on this issue at the contempt hearing. On the contrary, defendant presented evidence relating to the credit card debt, including offering exhibits. "[W]hen the contemnor [comes] into court to answer the charges of the show cause order, [s]he waive[s] procedural requirements." *Lowder v. Mills, Inc.*, 301 N.C. 561, 583, 273 S.E.2d 247, 260 (1981) (citation omitted). Defendant's active participation in the hearing on this issue, without objection, defeats her contention that she was without notice that the 5 June 2006 proceeding would include a review of her failure to take responsibility for the credit card payments.

This argument is without merit.

IV. Authority of Trial Court to Order Payment of Debt

[3] In her third argument, defendant contends that the consent order merely required her to assume financial responsibility for the credit card debts, and that the trial court erred in holding her in contempt for her failure to comply with the court order as it related to the credit cards. We disagree.

The consent order provided that defendant "hereby assumes all financial responsibility on all obligations listed on Schedule B attached hereto, and agrees to indemnify the Plaintiff and hold him harmless for any liability thereon . . ." Schedule B indicates that at the time of the consent order there were three outstanding credit cards, including an MBNA card, a CitiFinancial card, and a Chase card. The consent order further provided that "[u]pon entry of this Order each party will promptly undertake to transfer to their name individually the balance owed on each debt assumed by the said party . . ." The clear purpose of these provisions of the consent order was to relieve plaintiff of responsibility for those debts assumed by defendant.

The trial court made the following findings of fact pertaining to these debts:

10. That the Defendant has failed and refused to comply with the June 16, 2005 Consent Order and subsequent Orders entered by this Court requiring the Defendant to assume all financial responsibility for MBNA credit card account number [0237], Citi Financial credit card number [2486], Chase credit card account number [4034] as well as any other outstanding and unpaid obligation incurred by the Defendant and not disclosed in the June 16, 2005 Consent Order.

11. That, at the present time, there is a balance owed on the Chase account in the amount of $10,299.57 and an amount owed on the MBNA account in the amount of $21,815.11. Both accounts continue to be listed as Plaintiffs obligation.

Defendant argues that she made good faith efforts to have plaintiff's name removed from these accounts, but was unable to do so.

The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997) (citation omitted). "Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment." *Hartsell*, 99 N.C. App. at 385, 393 S.E.2d at 573 (citation omitted). "North Carolina's appellate courts are deferential to trial courts in reviewing their findings of fact." *Harrison v. Harrison*, 180 N.C. App. 452, 637 S.E.2d 284, 286 (2006).

We hold that the findings of fact pertaining to the credit card accounts are supported by competent evidence, and are thus binding upon this Court.

We next turn to whether these findings support the trial court's conclusion that defendant was in contempt of court for "her failure to comply with the Court Order as it relates to two credit card accounts." The consent order required defendant to do three things: (1) assume all financial responsibility on all obligations listed on Schedule B; (2) indemnify and hold harmless plaintiff from "any liability thereon"; and (3) promptly undertake to transfer to her name the Schedule B debts. Defendant has done none of these things. Her obligation was to transfer the accounts into her name individually, not to remove plaintiff's name from the accounts. Nearly one year after the execution of the consent order defendant had failed to com-

ply with these provisions. These debts had been the subject of court orders entered on 23 August 2005 and 14 October 2005. Given this history, the trial court properly found that defendant was in contempt of court for failure to comply with these provisions of the consent order.

"The order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt." N.C. Gen. Stat. § 5A-22 (2005). The court's conditions under which defendant can purge herself of contempt cannot be vague such that it is impossible for defendant to purge herself of contempt, *Cox v. Cox*, 133 N.C. App. 221, 226, 515 S.E.2d 61, 65 (1999), and a contemnor cannot be required to pay compensatory damages. *Hartsell*, 99 N.C. App. 380, 390-92, 393 S.E.2d 570, 577-78.

In the instant case, the court clearly and unambiguously articulated what action defendant was required to undertake relating to the credit cards in order to purge herself of contempt:

> d. Pay in full the Chase credit card account number [9036] (present account number) and MBNA credit card account number [7652] (present number) on or before September 5, 2006.

The consent order obligated defendant to relieve plaintiff of financial responsibility for the credit cards. Although defendant contends that the obligation to "assume financial responsibility" for the credit cards is not synonymous with paying off the credit card obligations, we hold that the trial court properly ordered defendant to pay the credit card debt as the only means of forcing defendant to comply with the terms of the consent order. This assignment of error is without merit.

Defendant further contends that she was not responsible for the Chase credit card ending in -9036. While she acknowledges that she agreed to take responsibility for the Chase credit card ending in -4034 listed in Schedule B, as well as "any other outstanding and unpaid obligation incurred by the defendant and not disclosed hereunder," she challenges the court's finding that either: 1) she incurred an obligation for the Chase credit card ending in -9036, or 2) the Chase credit card ending in -9036 was a transfer of the balance of the previous Chase card ending in -4034.

In accordance with the appropriate standard of review in contempt proceedings, we examine the record to determine whether there was competent evidence to support a finding that the Chase

card ending in -9036 was encompassed in the debts listed in Schedule B to the consent order. *See Sharpe*, 127 N.C. App. at 709, 493 S.E.2d at 291. The record reveals that plaintiff testified that the -9036 account was a transfer from "one of those three accounts." Plaintiff testified that he learned of the account when he received a letter from an attorney firm hired by Chase Manhattan to collect the balance on the account, and that the billing address of the -9036 card was that of defendant's place of business. Defendant neither contradicted plaintiff's testimony nor objected to it. We cannot agree with defendant's contention that "there is no evidence that [she] incurred any obligation for the Chase credit card account ending in -9036." We find that there is competent evidence in the record to support the court's finding that the Chase card ending in -9036 was defendant's responsibility. This argument is without merit.

V. Present Means and Ability to Comply

[4] In her fourth argument, defendant contends that the trial court's finding that she had the present means and ability to satisfy the credit card obligations is not supported by competent evidence. We disagree.

Civil contempt is designed to coerce compliance with a court order, and a party's ability to satisfy that order is essential. *Adkins v. Adkins*, 82 N.C. App. 289, 293, 346 S.E.2d 220, 222 (1986). Because civil contempt is based on a willful violation of a lawful court order, a person does not act willfully if compliance is out of his or her power. *Henderson v. Henderson*, 307 N.C. 401, 408, 298 S.E.2d 345, 350 (1983). "Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so." *Sowers v. Toliver*, 150 N.C. App. 114, 118, 562 S.E.2d 593, 596 (2002) (citation omitted). Ability to comply has been interpreted as not only the present means to comply, but also the ability to take reasonable measures to comply. *Teachey v. Teachey*, 46 N.C. App. 332, 334, 264 S.E.2d 786, 787 (1980). A general finding of present ability to comply is sufficient when there is evidence in the record regarding defendant's assets. *Adkins*, 82 N.C. App. at 292, 346 S.E.2d at 222.

In the instant case, the trial court found that the defendant was able to take reasonable measures to comply with the court order to pay off the credit card debts. In its 14 October 2005 order, the court found that defendant had in excess of $580,000.00 of equity in real estate in her name individually. In the June 2006 Contempt Order, the court made the following findings of fact:

12. Defendant continues to own all of the realty awarded to her under the June 16, 2005 Consent Order which the Court has earlier found to have a combined net equity in excess of $500,000.00. Defendant contends two of the properties are currently listed for sale and the Chapel Hill property continues to be rented.

. . .

14. That the Defendant has had and *continues to have* the present means and ability with which to satisfy the credit card obligations assigned to her . . . (emphasis added).

The court afforded defendant 90 days from the time of the contempt hearing on 5 June 2006 to comply with the order, providing defendant an opportunity to sell the properties and acquire the funds to satisfy the order.

This Court has held that prior findings of a present ability to pay may be *res judicata* as to future proceedings on that issue. *Abernethy v. Abernethy*, 64 N.C. App. 386, 387-88, 307 S.E.2d 396, 397 (1983). Defendant attempts to distinguish *Abernethy* by pointing out that, since no set sum was ordered in the consent order or the 14 October 2005 order, her ability to pay has not been litigated. However, since we hold that at the time of the 20 June 2006 contempt order defendant had the ability to take reasonable measures to comply with the court order, *Abernethy* is thus irrelevant to our review.

We hold there was competent evidence to support the court's finding that defendant had the present means and ability to satisfy the credit card debt obligations. This argument is without merit.

VI. Failure to Execute Joint Tax Returns

[5] In her fifth argument, defendant contends that the trial court erred in holding her in contempt for failure to execute the 2001 and 2002 joint tax returns. We disagree.

In order to find a party in civil contempt, a court must find that "[t]he purpose of the order may still be served by compliance with the order[.]" N.C. Gen. Stat. § 5A-21(a)(2) (2005). Civil contempt is inappropriate where a defendant has complied with the previous court orders prior to the contempt hearing. *Hudson v. Hudson*, 31 N.C. App. 547, 551, 230 S.E.2d 188, 190 (1976).

The consent order that the parties entered into provided that defendant would execute the parties' joint tax returns upon their preparation by plaintiff's CPA as long as it was lawful for her to do so. The purpose of filing amended joint tax returns was to decrease plaintiff's tax liability. Defendant argues that, since she did in fact sign the 2001 and 2002 joint tax returns prior to the contempt hearing, the court was without the authority to adjudicate her in civil contempt for failing to execute the additional documents required by the IRS. Defendant refused to sign 1040X forms for each tax year. At the contempt hearing, CPA Mike Minikus (Minikus) explained he received notices from the IRS that the joint returns could not be processed until the parties each signed and filed a 1040X form for each year. Thus, the 1040X forms which defendant refused to execute were part of the process of filing the amended joint tax returns. The trial court was correct in concluding that defendant willfully failed to timely execute the amended tax returns.

Defendant argues that she had a valid excuse for refusing to execute the 2001 and 2002 1040X forms. She claims that she received information from an IRS agent regarding the 2001 1040X form and was told she did not need to file it. Defendant argues that her failure to comply with the consent order cannot be willful due to a valid excuse. We disagree.

Defendant relies on *Hancock v. Hancock* to support her argument that her conduct was not willful. In *Hancock*, this Court found that plaintiff "did everything possible" to comply with the trial court's order, and that plaintiff could not be held in contempt because she did not act purposefully, deliberately, or with knowledge and stubborn resistance to violate the court order. *Hancock*, 122 N.C. App. 518, 523, 471 S.E.2d 415, 419 (1996). The instant case is distinguishable from *Hancock*. Minikus testified that he personally contacted defendant and requested that she execute the 1040X form for 2001. Further, defendant testified at the hearing that she had no objection to signing the documents. We hold defendant's refusal to execute the 1040X forms was knowingly, deliberate, and part of a series of recalcitrant acts designed to frustrate the filing of amended joint tax returns required by the express terms of the consent order. There was competent evidence to support the court's finding of contempt for defendant's failure to execute the 2001 and 2002 joint tax returns.

Defendant further argues that the IRS had already disallowed the 2001 joint tax return, and that Minikus testified that the deadline for filing the 2002 return passed on 15 April 2006, five days prior to the

contempt order. Defendant argues that she could not be held in contempt for failing to execute the 1040X forms for 2001 and 2002 because the purpose of the consent order was no longer served by the execution of these documents.

We reject this argument. First, the purpose of the order could still be served by defendant's signing of the 1040X form for 2003. Second, Minikus testified at the hearing that the signing of the form 1040X "would be helpful" and would show the parties' due diligence when requesting an extension for the 2002 return from the IRS. Thus, we find that there is competent evidence that signing the 1040X forms would still accomplish the order's purpose. This argument is without merit.

VII. Attorneys' Fees and Expert Witness Fees

[6] In her sixth argument, defendant contends the trial court erred in ordering her to pay attorneys' fees and expert witness fees. We agree in part and disagree in part.

A. Attorneys' Fees

"It is settled law in North Carolina that ordinarily attorneys fees are not recoverable as an item of damages or of costs, absent express statutory authority for fixing and awarding them." *Baxley v. Jackson*, 179 N.C. App. 635, 634 S.E.2d 905, 908 (2006) (quoting *Records v. Tape Corp. and Broadcasting System v. Tape Corp.*, 18 N.C. App. 183, 187, 196 S.E.2d 598, 602 (1973)). Generally, attorney's fees and expert witness fees may not be taxed as costs against a party in a contempt action. *Id.* (citation omitted).

However, our Courts have ruled that the trial court may award attorney's fees in certain civil contempt actions. *Id.* In *Conrad v. Conrad*, this Court held that:

> [T]he contempt power of the district court includes the authority to require one to pay attorney fees in order to purge oneself from a previous order of contempt for failing and refusing to comply with an equitable distribution order.

Conrad, 82 N.C. App. 758, 760, 348 S.E.2d 349, 350 (1986). Defendant acknowledges the holding in *Conrad* in her brief, but makes no attempt to distinguish the holding from the facts of this case.

In its 20 June 2006 contempt order, the court ordered defendant to pay $11,235.53 towards plaintiff's counsel fees as a condition of

purging herself of contempt. The attorneys' fees ordered in this case relate to the enforcement of the parties' June 2005 equitable distribution consent order. Defendant makes no argument that the amount of fees awarded was improper or not supported by the evidence. This argument is without merit.

B. Expert Witness Fees

"The general rule is that, unless authorized by express statute provision, witness fees cannot be allowed and taxed for a party to the action." *City of Charlotte v. McNeely*, 281 N.C. 684, 692, 190 S.E.2d 179, 186 (1972) (citation omitted). While it is proper for a court to award attorney's fees in a contempt proceeding, we have held that a court has no authority to award *costs* to a private party. *See Green v. Crane*, 96 N.C. App. 654, 659, 386 S.E.2d 757, 760 (1990) (citation omitted). The statute governing civil contempt, N.C. Gen. Stat. § 5A-21, does not authorize a trial court to award costs to a party in a contempt proceeding to enforce an equitable distribution consent order.

The court ordered defendant to pay fees to Minikus, plaintiff's CPA, in the amount of $11,724.00. Although the court's order requiring defendant to pay attorneys' fees was proper, we hold that it was error for the court to assess an expert witness fee against defendant. The portion of the court's order requiring defendant to pay expert witness fees is reversed.

Remaining 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 in part and REVERSED in part.

Judges ELMORE and STROUD concur.

GREENE v. ROYSTER

[187 N.C. App. 71 (2007)]

STACEY N. GREENE, PLAINTIFF v. WARREN O. ROYSTER, BARBARA R. JACKSON A/K/A BARBARA R. ROYSTER, KEVIN ROYSTER, AND BRENDA J. MCCLAIN, ALL D/B/A EAST COAST IMPORTS, DEFENDANTS

No. COA06-1259

(Filed 6 November 2007)

1. Civil Procedure— motion for new trial— Rule 59—standard of review—abuse of discretion

Where defendants move for a new trial under only N.C.G.S. § 1A-1, Rule 59(a)(5), (6), and (7), a trial court's discretionary order under Rule 59 for or against a new trial may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly shown.

2. Damages and Remedies— punitive damages—denial of motion for new trial

The trial court did not abuse its discretion in a fraud case involving the sale of an automobile to plaintiff that was unfit for operation by denying defendants' motion for a new trial under N.C.G.S. § 1A-1, Rule 59 even though defendants contend the jury manifestly disregarded the trial court's instructions under N.C.P.I.—Civil 810.98 when it awarded punitive damages to plaintiff, because: (1) the findings support an award of punitive damages under the jury instructions as given based on the reprehensibility of defendants' motives and conduct, the degree of defendants' awareness of the probable consequences of their conduct, the duration of defendants' conduct, the concealment by defendants of the conduct, the existence and frequency of similar past conduct by defendants, and that defendants profited from their conduct; and (2) the trial court's conclusion that the jury's verdict on punitive damages was supported by the evidence was neither arbitrary nor manifestly unsupported by reason.

3. Damages and Remedies— punitive damages—not awarded under influence of passion or prejudice

The trial court did not abuse its discretion in a fraud case by denying defendants' motion for a new trial under N.C.G.S. § 1A-1, Rule 59 even though defendants contend the jury awarded excessive punitive damages under the influence of passion or prejudice, because: (1) neither jury selection nor closing arguments could be considered on appeal when they were not included in the record or transcripts; (2) defendant's assertion that the jury

concluded its deliberations quickly was hardly evidence of passion and prejudice per se; and (3) defendants offered no support for their argument that the jury acted with passion and prejudice.

4. Fraud— denial of motion for new trial—sufficiency of evidence

The trial court did not abuse its discretion in a fraud case by denying defendants' motion for a new trial as to defendant Kevin Royster based on alleged insufficient evidence that he participated in the transaction complained of by plaintiff or committed fraud against plaintiff, because: (1) defendant did not object to the jury instructions on fraud when given the opportunity by the trial court, nor did he object to the issue as it was stated to the jury or request that a separate issue be submitted regarding his actions only; and (2) the jury's verdict was amply supported by the evidence.

5. Appeal and Error— preservation of issues—cross-assignment of error—aggrieved party

Although plaintiff cross-assigned error to the denial of her motion for directed verdict in a fraud case, this assignment of error is dismissed because: (1) the judgment of the trial court in plaintiff's favor remained undisturbed; and (2) plaintiff was not an aggrieved party within the meaning of N.C.G.S. § 1-271.

Appeal by defendants from Judgment entered 13 October 2005 and order entered 23 March 2006 by Judge W. Russell Duke, Jr., in Onslow County Superior Court. Heard in the Court of Appeals 21 March 2007.

Robert W. Detwiler for plaintiff-appellee.

Smith Moore LLP, by Sidney S. Eagles, Jr., for defendants-appellants.

STROUD, Judge.

Defendants appeal from judgment entered 13 October 2005 granting compensatory and punitive damages to plaintiff upon the jury verdict in an action for fraud, an order entered 23 March 2006 denying defendants' motion for a new trial pursuant to Rule 59 of the North Carolina Rules of Civil Procedure. For the reasons that follow, we affirm.

I. Background

On 10 September 2001, plaintiff purchased a vehicle, represented as a 1993 Saturn with 77,024 miles on the odometer, from East Coast Imports. East Coast Imports, located at 6315 Gum Branch Road, Jacksonville, North Carolina, was a licensed car dealer, primarily purchasing and repairing salvaged vehicles for resale to the public.

The business known as East Coast Imports was originally started by defendant Warren Royster in the 1980s as Warren Royster & Sons, Inc. d/b/a East Coast Imports. Sometime around 1993, the business went bankrupt as the result of a fire and the assets were transferred to defendant Barbara Jackson, defendant Warren Royster's mother, as East Coast Imports, a sole proprietorship. Defendant Brenda McClain, defendant Warren Royster's ex-wife, worked as the secretary for the business.

On 26 February 2002, Inspector Andrew C. Heath of the North Carolina Division of Motor Vehicles, License and Theft Bureau, conducted a routine business inspection of East Coast Imports. Inspector Heath noticed three vehicle shells each of which had been stripped of its odometer, dashboard plate bearing the Vehicle Identification Number (VIN), and driver's side door containing the federally mandated identifying decal. Inspector Heath then located the confidential VIN for each vehicle.[1] The confidential VINs revealed that the three vehicles in question were a 1996 Chrysler LHS, a 1995 Dodge Neon and a 1993 Saturn SLI., titled to East Coast Imports, Kevin Klink, and plaintiff, respectively.

An investigation revealed that a 1994 Chrysler bearing the VIN of the 1996 Chrysler LHS was being driven by someone at the dealership. The Dodge Neon which was purchased from East Coast Imports by Kevin Klink was repossessed by Warren Royster against the advice of Inspector Heath, stored in a undisclosed location, and therefore not available for examination in conjunction with the investigation.

The investigation further revealed that the car which had been purchased by plaintiff as a 1993 Saturn with 77,024 miles was actually a 1992 Saturn with 226,945 miles. The 1992 Saturn had previously been purchased by East Coast Imports from an auto auction in Maryland as a parts-only vehicle, which Inspector Heath testified was

1. A confidential VIN is concealed on each vehicle in a location known only to the manufacturer and law enforcement as a theft prevention measure.

not fit for operation on the highway and could legally only be stripped for parts or resold to a salvage yard or other dealer. Inspector Heath testified that the dashboard VIN plate, driver's side door with the federal decal, and odometer which had been removed from the 1993 Saturn were found in the 1992 Saturn purchased by plaintiff; those 1993 identifiers had been painstakingly installed into the 1992 Saturn in such a manner as to appear to be original.

There were two Bills of Sale for plaintiff's Saturn: one showing that she had purchased a 1993 Saturn from Brenda McClain on behalf of East Coast Imports on 10 July 2001 for $1,911 and a second Bill of Sale that was sent to the Department of Motor Vehicles in Raleigh showed that plaintiff purchased a 1993 Saturn from Warren Royster on behalf of East Coast Imports on 21 September 2001 for $1,090. On the second Bill of Sale it appeared that plaintiff's signature had been misspelled, and plaintiff testified that she had never seen the second Bill of Sale until this lawsuit.

Inspector Heath identified the Certified North Carolina Title History for the 1993 Saturn which indicated that defendant Barbara Jackson had applied for a "bonded title" for the 1993 Saturn on 18 July 2001. Defendant Barbara Jackson furnished an affidavit showing East Coast Imports had purchased the 1993 Saturn on 25 October 2000 from an auto auction in Maryland, but the invoice from the auction showed it was actually purchased on 25 November 1998. The certified title history also indicated that defendant Barbara Jackson was issued a title to the 1993 Saturn on 12 September 2001, signing it over to plaintiff on 21 September 2001 with a mileage certificate of 77,024 miles and no disclosure of the salvage history or the parts-only designation of the 1992 Saturn which plaintiff actually received. Because the 1992 Saturn was not fit for operation on the highway and had been titled in violation of state law, it was seized from plaintiff and permanently impounded.

On 23 August 2002, as a result of Inspector Heath's investigation of the three cars with altered VINs, an order was entered revoking the motor vehicle dealer's license of East Coast Imports. Defendants continued to sell automobiles with questionable titles even after the revocation of their motor vehicle dealer's license. Evidence adduced at trial showed that on 3 December 2002, defendant Kevin Royster, on behalf of East Coast Imports, affirmatively denied the salvage title history of a 1996 Saab when he sold the car to defendants' trial counsel.

Sometime after the revocation of the motor vehicle dealer's license of East Coast Imports, the Royster family created a new North Carolina corporation, E. Coast Imports, Inc., d/b/a East Coast Imports. The new corporation obtained a motor vehicle dealer's license on 24 July 2004. Warren Royster owned 40% of the stock of E. Coast Imports, Inc. and Kevin Royster, Robert Royster and Jessica Royster, Robert Royster's wife, all held 20% each. Jessica Royster later divorced Robert Royster, and her interest was acquired by Brenda McClain, Warren Royster's ex-wife. The inventory of East Coast Imports was transferred to E. Coast Imports, Inc., and the business continued selling automobiles.

On 4 May 2004 plaintiff filed a complaint against Warren Royster, Barbara Jackson, Kellum [Kevin] Royster and Brenda J. McClain, all d/b/a East Coast Imports, alleging actual fraud and unfair and deceptive trade practices. Each defendant filed an answer, along with a Rule 12(b)(6) motion to dismiss the complaint, on 7 July 2004. The record does not contain any orders related to the Rule 12(b)(6) motions.

From 10 to 13 October 2005, this action was tried before a jury in Superior Court, Onslow County. On 13 October 2005, the jury returned a verdict for plaintiff on the fraud claim in the amount of $1,911 in compensatory damages and $500,000 in punitive damages, which was reduced to $250,000 pursuant to N.C. Gen. Stat. § 1D-25, and the trial court entered judgment thereon. On 24 October 2005, defendants filed a motion pursuant to Rule 59 of the N.C. Rules of Civil Procedure for a new trial. On 3 November 2005, plaintiff filed a Motion for Specific Findings of Fact pursuant to Rule 52 of the North Carolina Rules of Civil Procedure. On or about 23 March 2006 defendants' motion for a new trial came on for hearing before Judge W. Russell Duke, Jr. From the evidence presented at trial and arguments of counsel upon the defendants' motion for a new trial, the trial court made its findings of fact, conclusions of law and entered an order on 23 March 2006 denying defendants' motion for a new trial. Defendants appeal.

II. Issues

Defendants contend the trial court erred by denying their motion for a new trial. They contend the trial court's findings of fact in the order denying the motion for new trial were not supported by the evidence. They further contend that the amount awarded for punitive damages violated defendants' constitutional right to due process.

Lastly, they argue the trial court erred by not awarding a new trial to defendant Kevin Royster, on the basis that there was insufficient evidence at trial to support the jury verdict that defendant Kevin Royster committed fraud against plaintiff.

Plaintiff responds that defendants' argument regarding the constitutionality of the punitive damage award is untimely and should not be considered on appeal. Alternatively, they argue that even if this Court considers the constitutionality of the punitive damages award, the amount is within the bounds of due process. Further, they argue that the trial court did not abuse its discretion in denying defendants' Rule 59 motion for new trial for all defendants, because the trial court's findings of fact were supported by competent evidence and the findings of fact supported the trial court's conclusion that there was no justification for granting a new trial. Finally they contend that the evidence was sufficient to support the verdict, therefore the trial court did not err in failing to grant defendant Kevin Royster a new trial. Plaintiff also makes a cross-assignment of error claiming the trial court erred in denying their motion for a directed verdict at the close of defendants' evidence.

III. Standard of Review

[1] Though defendants' notice of appeal references both the underlying judgment and order denying their motion for a new trial, all of their assignments of error are based on the trial court's denial of their motion for a new trial. We will therefore review only the order denying defendants' motion for a new trial, and determine the standard of review accordingly. N.C.R. App. P. Rule 10(a) ("The scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal.").

Defendants concede that denial of a Rule 59 motion is generally reviewed only for abuse of discretion. They contend however, that "where the [Rule 59] motion involves a question of law or legal inference [this Court's] standard of review is *de novo*." *Kinsey v. Spann*, 139 N.C. App. 370, 372, 533 S.E.2d 487, 490 (2000). Additionally, they contend that "[t]his Court has recognized that '[a]ppellate courts should apply a *de novo* standard of review in deciding whether a punitive damages award is unconstitutionally excessive.' " Appellants Brief at 15 (quoting *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 698, 562 S.E.2d 82, 99-100 (2002) (Greene, J., dissenting) (citing *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 431, 149 L. Ed. 2d 674, 686-87 (2001))).

We note initially that the above-quoted language is from Judge Greene's dissent, and not from the opinion of this Court, an opinion which was subsequently affirmed by the North Carolina Supreme Court. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 190, 594 S.E.2d 1, 21 (2004). Furthermore, *Cooper Indus. v. Leatherman Tool Group*, the case cited by Judge Greene's dissent, expressly stated "that courts of appeals should apply a *de novo* standard of review when passing on *[trial] courts' determinations* of the constitutionality of punitive damages awards." 532 U.S. 424, 436, 149 L. Ed. 2d 674, 687 (emphasis added).

However, a constitutional question which has not been raised and determined in the trial court will not be considered on appeal. *State v. Elam*, 302 N.C. 157, 159, 273 S.E.2d 661, 663 (1981) (citing cases from both the North Carolina Supreme Court and the United States Supreme Court); *Rhyne*, 149 N.C. App. at 690, 562 S.E.2d at 95 ("It is a long-standing rule that a party in a civil case may not raise an issue on appeal that was not raised at the trial level."); *Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 31, 431 S.E.2d 828, 844 (declining to consider a constitutional argument which was not raised at the trial court), *disc. review denied and appeal dismissed*, 335 N.C. 175, 436 S.E.2d 379 (1993); *accord Browning-Ferris v. Kelco Disposal*, 492 U.S. 257, 276-79, 106 L. Ed. 2d 219, 239-41 (1989) (declining to review a punitive damages award for due process violation when that argument was not raised below and instead applying abuse of discretion review pursuant to denial of a Rule 59 motion). Defendants did not raise the constitutionality of the punitive damages award to the trial court, so we will not review this issue, *de novo* or otherwise.

As to the issues that were raised to and determined by the trial court, defendants' contention that *Kinsey* entitles them to *de novo* review is similarly misplaced. According to Rule 59,[2] "[a] new trial may be granted" for the reasons enumerated in the Rule. By using the word "may," Rule 59 expressly grants the trial court the discretion to

2. N.C. Gen. Stat. § 1A-1, Rule 59(a) states:

> A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:
>
> (1) Any irregularity by which any party was prevented from having a fair trial;
>
> (2) Misconduct of the jury or prevailing party;
>
> (3) Accident or surprise which ordinary prudence could not have guarded against;

determine whether a new trial should be granted. Generally, therefore, the trial court's decision on a motion for a new trial under Rule 59 will not be disturbed on appeal, absent abuse of discretion. *Mumford v. Hutton & Bourbonnais Co.*, 47 N.C. App. 440, 445, 267 S.E.2d 511, 514 (1980). *Kinsey* recognized a narrow exception to the general rule, applying a *de novo* standard of review to a motion for a new trial pursuant to Rule 59(a)(8), which is an "[e]rror in law occurring at the trial and objected to by the party making the motion[.]" 139 N.C. App. at 373, 533 S.E.2d at 490.

However, where as here, the defendants move for a new trial pursuant to only Rule 59(a)(5), (6), and (7), "it is plain that a trial judge's *discretionary* order pursuant to G.S. 1A-1, Rule 59 for or against a new trial . . . may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly shown." *Worthington v. Bynum*, 305 N.C. 478, 484, 290 S.E.2d 599, 603 (1982) (emphasis in original) (applying abuse of discretion standard when only Rule 59(a)(5), (6), and (7) were raised to the trial court as grounds for a new trial). "Abuse of discretion results where the [trial] court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

IV. Punitive Damages

[2] Defendants' contended in their motion for new trial that the jury manifestly disregarded the instructions of the court, specifically N.C.P.I.—Civil 810.98, when it awarded punitive damages to plaintiff. N.C. Gen. Stat. § 1A-1, Rule 59(a)(5). Alternatively, defendants argued that the jury awarded excessive punitive damages under the influence of passion or prejudice. N.C. Gen. Stat. § 1A-1, Rule 59(a)(6).

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(4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial;

(5) Manifest disregard by the jury of the instructions of the court;

(6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

(7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;

(8) Error in law occurring at the trial and objected to by the party making the motion, or

(9) Any other reason heretofore recognized as grounds for new trial.

In its order entered 23 March 2006, the trial court concluded that: (1) the verdict was amply supported by the evidence, and (2) defendants failed to provide evidence of any misconduct by the jury. Accordingly, it denied defendants' motion for a new trial.

The trial court had instructed the jury on punitive damages using N.C.P.I.—Civil 810.98, as follows:

> Are the Defendants liable to the Plaintiff for punitive damages?
>
> You are to answer this issue only if you have awarded the Plaintiff relief [for the underlying fraud].
>
> . . . .
>
> What amount of punitive damages, if any, does the jury in its discretion award to the Plaintiff? You are to answer this issue only if you've answered the [previous] issue, yes, in favor of the Plaintiff. Whether to award punitive damages is a matter within the sound discretion of the jury. Punitive damages are not awarded for the purpose of compensating the plaintiff for her damage, nor are they awarded as a matter of right.
>
> If you decide, in your discretion, to award punitive damages, any amount you award must bear a rational relationship to the sum reasonably needed to punish the Defendants for egregiously wrongful acts and to deter the Defendants and others from committing similar wrongful acts. In making this determination, you may consider only that evidence which relates to the reprehensibility of the Defendants' motives and conduct, the likelihood, at the relevant time, of serious harm to the Plaintiff or others similarly situated, the degree of the Defendants' awareness of the probable consequences of their conduct, the duration of the Defendants' conduct, the actual damages suffered by the Plaintiff, any concealment by the Defendants of the facts or consequences of his conduct, the existence and frequency of any similar past conduct by the Defendants, whether the Defendants profited by the conduct, the Defendants' ability to pay punitive damages, as evidenced by his revenues or net worth.
>
> Finally, if you determine, in your discretion, to award punitive damages, then you may award to the Plaintiff an amount which bears a rational relationship to the sum reasonably needed to punish the Defendants for egregiously wrongful acts and to deter

> the Defendants and others from committing similar wrongful acts. That amount should be written in the space provided on the verdict sheet.
>
> If, on the other hand, you determine, in your discretion not to award the Plaintiff any amount, then you should write the word, none, in the space provided on the verdict sheet.

When the trial court denied defendants's motion for a new trial, it found facts, all supported by evidence adduced at trial, in support of its conclusion that the jury's punitive damages verdict was amply supported by the evidence. The facts found by the trial court may be succinctly summarized as follows: (1) defendants sold plaintiff a car that was unfit for operation, in violation of state law; (2) considerable efforts were expended to conceal facts of similar conduct by defendants; (3) defendants were well-aware that they were selling unfit vehicles; (4) defendants deliberately concealed information concerning their net worth; and (5) defendants, undaunted by the revocation of their motor vehicle dealers' license, reformed their business as a different corporate entity and continued to sell cars. These findings all support an award of punitive damages under the jury instructions as given, relating to the reprehensibility of defendants' motives and conduct, the degree of the defendants' awareness of the probable consequences of their conduct, the duration of defendants' conduct, the concealment by defendants of the conduct, the existence and frequency of similar past conduct by defendants, and that defendants profited from the conduct.

On these facts, we hold that the trial court's conclusion that the jury's verdict on punitive damages was supported by the evidence that they were instructed to consider was neither arbitrary nor manifestly unsupported by reason. Accordingly, the trial court did not abuse its discretion when it denied defendants' motion for a new trial on that ground.

[3] In their Rule 59 motion, defendants argued, in the alternative, that the jury verdict for punitive damages was rendered under the influence of passion and prejudice. Defendants supported this argument with three assertions: (1) a potential juror was dismissed because he admitted to being incapable of objectivity, (2) plaintiff's closing argument stated that the jury had the ability to close defendants' business, and (3) the jury returned a verdict after deliberating for less than 20 minutes.

Neither jury selection nor closing arguments appear in the record or the transcripts, so we are not able to consider them on appeal. N.C.R. App. P. 9(a). Defendants remaining assertion, that the jury concluded its deliberations quickly, is hardly evidence of passion and prejudice *per se*, and even defendants' Rule 59 motion states only that a short period of deliberation "giv[es] rise to at least the perception of being influenced by passion and prejudice." In sum, defendants offered the trial court no facts which support their argument that the jury acted with passion and prejudice. Accordingly, the trial court did not abuse its discretion when it concluded that there was no evidence of jury misconduct, and denied defendants' motion for a new trial on that ground.

V. Kevin Royster

[4] Defendants next contend the trial court erred in denying its motion for a new trial as to defendant Kevin Royster, because there was no evidence that defendant Kevin Royster participated in the transaction complained of by plaintiff and no evidence that defendant Kevin Royster committed fraud against plaintiff.

At trial, the jury was instructed to answer the question: "Was the Plaintiff, Stacey N. Greene, damaged by the fraud of the Defendants?" The jury was then correctly instructed on the essential elements of fraud: (1) defendant made a false representation of a material fact, (2) calculated to deceive, (3) which was made with intent to deceive, (4) does in fact deceive, (5) was reasonably relied on by the plaintiff, and (6) resulted in injury to the plaintiff. *See* N.C.P.I.—Civil 800.00 (2004). Defendant Kevin Royster did not object to the jury instructions on fraud when given opportunity by the trial court. He also did not object to the issue as it was stated to the jury and did not request that a separate issue be submitted regarding his actions only. The jury unanimously answered yes to the question of fraud.

In its order denying the Rule 59 motion, the trial court made findings of fact, all supported by evidence adduced at trial, which may be succinctly summarized as follows: (1) defendants intentionally changed the VIN on a 1992 Saturn in a deliberate effort to contravene the law and to conceal the fact that the vehicle was unfit for operation; (2) plaintiff purchased the vehicle in reliance on defendants' representation that it was a road-worthy 1993 Saturn; and (3) the State of North Carolina impounded the vehicle, leaving plaintiff without the use of her automobile for more than three years. On these facts, we conclude that the jury's verdict was amply

supported by the evidence, and we hold that the trial court did not abuse its discretion when it denied defendants' motion for a new trial for defendant Kevin Royster.

VI. Plaintiff's Cross Assignment of Error

[5] Plaintiff cross-assigned error to the denial of her motion for directed verdict. However, because "the judgment of the Superior Court in [plaintiff's] favor remains undisturbed," plaintiff is not an aggrieved party within the meaning of N.C. Gen. Stat. § 1-271. *Teague v. Duke Power Co.*, 258 N.C. 759, 765, 129 S.E.2d 507, 512 (1963); N.C. Gen. Stat. § 1-271 (2005). Accordingly, plaintiff's cross-assignment of error is dismissed.

VII. Conclusion

For the foregoing reasons, we conclude the trial court did not abuse its discretion when it entered an order denying defendants' Rule 59 motion for a new trial. Accordingly, that order is affirmed, and the 13 October 2005 judgment of the trial court remains undisturbed.

Affirmed.

Judges McCULLOUGH and CALABRIA concur.

CITIFINANCIAL MORTGAGE CO. F/K/A ASSOCIATES MORTGAGE AND FINANCIAL SERVICES, INC., PLAINTIFF v. RONNIE GRAY, TERESA R. GARREN AND HUSBAND, CLINT S. GARREN, DEFENDANTS

No. COA06-1620

(Filed 6 November 2007)

1. Reformation of Instruments— equitable reformation— original intent of parties—mistake due to inadvertence of draftsmen

The trial court did not err in equitably reforming real property instruments to effectuate the original intent of the parties as to the number of acres conveyed because: (1) there was competent evidence of mistake due to the inadvertence of the draftsmen of the challenged instruments; (2) all purchasers were put on constructive notice of the conveyance of the pertinent one acre

based on the duly recorded document entitled "Explanation Statement to Correct Obvious Minor Error(s) Made in an Instrument as Originally Recorded Re: Book 976 Page 399;" (3) the parties on both sides of the transactions of each instrument possessed mutuality regarding one of the essential terms of the transaction, namely the amount of acreage to convey; and (4) each instrument in the chain of title revealed evidence of a facial mistake, and the record revealed no reason other than inadvertence or oversight on the part of the drafter of the instruments to explain the omission of the accurate and bargained for acreage of land.

2. Mortgages and Deed of Trust— sufficiency of service of process—equitable authority to reform written instrument—actual notice—constructive notice

The trial court did not err in finding defendant Garrens never received proper service of process and that the purported foreclosure as to the Garrens's one-acre tract of land was ineffective, because: (1) even if the matter was not properly before the trial court, defendant was still not entitled to any relief since the trial court had the equitable authority to reform the pertinent instruments due to multiple draftsmen errors in the chain of title; and (2) plaintiff had actual and constructive notice of the acreage to be conveyed to defendant Gray, and defendant had constructive notice of the acreage that should have been conveyed to him.

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

Although defendant Gray contends the trial court erred in a declaratory judgment case by bifurcating the trial into two parts, this assignment of error is dismissed, because defendant abandoned this argument based on his failure to cite any authority in support of it as required by N.C. R. App. P. 28(b)(6).

Appeal by defendant Ronnie Gray from judgment entered 16 August 2006 by Judge Zoro J. Guice, Jr., in Henderson County Superior Court. Heard in the Court of Appeals 22 August 2007.

Ferikes & Bleynat, PLLC, by Joseph A. Ferikes, for plaintiff-appellee.

Biggers & Associates, PLLC, by William T. Biggers, for defendant-appellant Ronnie Gray.

SMITH, Judge.

Defendant Ronnie Gray (Gray) appeals a judgment entered in favor of plaintiff Citifinancial Mortgage Company (Citifinancial) which reformed several real property instruments. We affirm.

The pertinent facts may be summarized as follows: On 9 June 1997, Danny M. Banks and his wife, Dawn V. Banks (Banks), conveyed a 3.43-acre tract of land to plaintiff to secure a loan in the amount of Ninety Thousand Four Hundred Seventy-five and 87/100 Dollars ($90,475.87), via a Deed of Trust recorded in Book 701, Page 459, Henderson County Registry. Sometime prior to January 15, 1999, defendants Clint S. and Teresa R. Garren (Garrens) agreed to purchase a one-acre portion of the Banks' 3.43-acre tract of land. Citifinancial had consented to this transaction and agreed to record a Release Deed releasing said one-acre tract from the Deed of Trust recorded in Book 701, Page 459, Henderson County Registry. However, no deed of release was recorded.

On 15 January 1999, the Banks conveyed the entire 3.43 acres to the Garrens by General Warranty Deed recorded in Book 976, Page 399, Henderson County Registry. On 8 February 1999, a deed was recorded in Book 978, Page 488, Henderson County Registry, which corrected the prior conveyance and provided that the deed from the Banks to the Garrens conveyed only the one-acre parcel of land, rather than the entire 3.43-acre tract conveyed in the previous instrument. Also, on 15 January 1999, the Garrens conveyed the entire 3.43-acre tract of land to plaintiff to secure a loan in the amount of Sixty Thousand Seven Hundred Seventy-six and 72/100 Dollars ($60,776.72), via a Deed of Trust recorded in Book 800, Page 420, Henderson County Registry.

Had there been no errors made in these prior transactions, the status of the parties would have been that the Banks owned an approximate 2.6-acre parcel of land subject to the Deed of Trust recorded in Book 701, Page 459, Henderson County Registry; and, the Garrens would have owned an approximate one-acre parcel of land subject to the Deed of Trust recorded in Book 800, Page 420, Henderson County Registry.

The Banks defaulted in 2003, and plaintiff sought foreclosure of the Banks' property by filing foreclosure proceedings under Docket #03 SP 391, Henderson County, North Carolina. However, the Substitute Trustee erroneously filed the foreclosure proceedings on the

entire 3.43-acre tract and named the following people as having an interest in the property: Danny Banks, Dawn Banks, Teresa Garren, Clint Garren, Michael Ledbetter and Amy Ledbetter. (The Ledbetters are not involved in or parties to this lawsuit). All of these parties had the same designated address for service: Post Office Box 1151, Mountain Home, N.C. All the notices were returned by the Post Office as not deliverable. On 24 June 2003, the assistant clerk of superior court entered an order allowing foreclosure. The clerk's order indicates that all of the parties were served pursuant to the provisions of N.C. Gen. Stat. § 45-21.16 (2005) by the Sheriff of Henderson County posting notice of foreclosure. The Return of Service indicates that all six (6) of the respondents were served by posting the Notice on the front door of 231 Hyder Drive, Mountain Home, North Carolina 28758, on May 16, 2003. However, the Garrens' address was not 231 Hyder Drive, but was 233 Hyder Drive, Mountain Home, North Carolina 28758.

Thereafter, at the foreclosure sale, plaintiff was the highest bidder and the substitute trustee conveyed to plaintiff by deed the entire 3.43-acre tract of land. On 26 September 2003, plaintiff conveyed the entire 3.43-acre tract of land to defendant Gray by Special Warranty Deed.

On 2 September 2004, plaintiff filed a complaint to judicially reform the asserted errors made during the course of these various transactions. In its complaint, plaintiff first requested a declaratory judgment to reform the deed of conveyance from plaintiff to defendant Gray on the grounds that plaintiff had only contracted to sell defendant Gray a 2.6-acre tract of land; but instead, due to a mistake, conveyed to Gray the entire 3.43-acre tract of land. Plaintiff's second claim requested a separate declaratory judgment against the Garrens, wherein plaintiff alleged that, due to a mistake, it had inadvertently foreclosed upon the property of the Garrens. Plaintiff sought a declaratory judgment to correct the previous judgment foreclosing upon the property of the Garrens in File #03 SP 391, Henderson County. Additionally, plaintiff sought a declaratory ruling that the Deed of Trust on the Garrens' property still constituted a valid and continuing first deed of trust and first lien of record upon the property. Finally, plaintiff asserted a third claim for relief against all defendants and sought a declaratory ruling correcting the previous mistakes, and reforming the various instruments referenced in the Complaint to place the parties in legal positions in accordance with their original intentions. Defendant Gray filed an answer generally

denying that any mistakes were made in the various proceedings and conveyances.

Following a bench trial, which only included the testimony of plaintiff's litigation specialist, Deborah Guffey, the trial court made the following pertinent findings of fact:

> 1. On June 9, 1997, a Deed of Trust was recorded in the Henderson County, North Carolina Register of Deeds office (hereinafter, "Henderson Registry") in Book 701, page 459 with the grantor of said deed of trust being Danny M. Banks, and wife, Dawn D. Banks, and the beneficiary being Associate Financial Services of America, Inc. (now known as CitiFinancial Mortgage Co.) (hereinafter "Associates" or ["]CitiFinancial"). This deed of trust conveyed a 3.43 acre tract of land to secure a loan in the amount of $90,475.87.
>
> 2. Sometime prior to January 15, 1999, defendants Teresa R. Garren and husband, Clint S. Garren (hereinafter, "Garrens") agreed to purchase a 1 acre portion of the 3.43 acre tract described in Book 701, Page 459, Henderson Registry. Prior to January 15, 1999, Citifinancial had consented to this transaction and agreed to record a Release Deed releasing said 1 acre tract from the deed of trust recorded in Book 701, page 459, Henderson Registry.
>
> 3. The Release Deed to release said 1 acre tract from the deed of trust recorded in Book 701, page 459, Henderson Registry was never recorded.
>
> 4. On January 15, 1999, Banks, in error, recorded a deed conveying 3.43 acres to the Garrens by deed recorded in Book 976, page 399, Henderson Registry. Thereafter, on February 8, 1999, a deed of correction was recorded in Book 978, page 488, Henderson Registry, correcting the deed from Banks to Garren recorded in Book 976, page 399 from 3.43 acres to 1 acre.
>
> 5. On January 15, 1999, the Garrens, as grantors, conveyed a deed of trust to Associates as beneficiary of the 3.43 acre tract to plaintiff to secure a loan in the amount of $60,776.72. This deed of trust was recorded in Book 800, page 420, Henderson Registry. The description of the property in said deed of trust was in error as it should only have been the 1 acre tract described in the Deed of Correction recorded in Book 978, page 488, Henderson Registry.

6. Thereafter, on May 13, 2003, a Notice of Hearing on foreclosure of the deed of trust recorded in Book 701, page 459 was filed in the office of the Clerk of Henderson County, North Carolina bearing docket number 03 SP 391.

. . . .

10. The Garrens never received proper and legal service of process with regard to the foreclosure bearing docket number 03 SP 391, Henderson County, and therefore the purported foreclosure as to the Garrens and/or their 1 acre tract of land as described in Book 978, page 488 is ineffective and of no force and effect.

Based upon, *inter alia*, the above findings, the trial court concluded, in pertinent part, that:

2. This Court has the equitable power to reform any and all deeds and deeds of trust referred to herein in order to reflect the true intentions of the parties and to restore property inadvertently foreclosed upon as stated herein.

Accordingly, the trial court ordered, in relevant part, that:

1. The deed of trust recorded in Book 800, page 420, Henderson Registry is hereby reformed to reflect the true intentions of the parties so that the property described therein is that certain 1 acre tract recorded in Book 978, page 488, Henderson Registry.

2. The Order allowing foreclosure of the deed of trust recorded in Book 701, page 459, Henderson Registry of a 3.43 acre tract said Order bearing docket number 03 SP 391 is hereby reformed to be effective only as to an approximate 2.6 acre portion of said property. The 2.6 acre tract can be determined by reference to the Banks' original deed recorded in Book 868, page 787, Henderson Registry, less the 1 acre portion conveyed to the Garrens by deed recorded in Book 978, page 488, Henderson Registry. Any purported foreclosure of the Garrens 1 acre tract is hereby declared null and void.

3. The deed dated August 15, 2003 from Kellum and Pettit, P.A., Substitute Trustee, to Associates Mortgage and Financial Services, Inc. n/k/a Cityfinancial Mortgage Company, Inc. purporting to convey 3.43 acres to Citifinancial and recorded in Book 1150, Page 503, Henderson Registry, is hereby reformed and amended to reflect only a conveyance of the property the substi-

> tute Trustee acquired by foreclosure in 03 SP 391 which included all that property described in Book 701, Page 459, Henderson Registry, less the property described in Book 978, Page 488, Henderson Registry [2.6 acres].
>
> 4. The deed dated September 26, 2003 from plaintiff to defendant Ronnie Gray purporting to convey 3.43 acres to Gray and recorded in Book 1155, page 691, Henderson Registry is hereby reformed and amended to reflect only a conveyance of the property plaintiff acquired by foreclosure in 03 SP 391 which included all that property described in Book 701, page 459, Henderson Registry, less the property described in Book 978, Page 488, Henderson Registry [2.6 acres].

Defendant Gray filed timely notice of appeal.

> This Court has stated that, in a bench trial,
>
> in which the superior court sits without a jury, 'the standard of review is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial . . . are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.'

Luna v. Division of Soc. Servs., 162 N.C. App. 1, 4, 589 S.E.2d 917, 919 (2004) (quoting *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)). In addition, findings of fact to which error is not assigned are binding on this Court. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003).

[1] In defendant's first argument on appeal, Gray contends the trial court erred by equitably reforming the following written instruments because plaintiff failed to present clear and convincing evidence of any mistake in: (1) the 15 January 1999 deed of trust in which the Garrens conveyed the entire 3.43-acre tract of land to plaintiff to secure a loan, which was reformed to reflect 1.0 acre; (2) the foreclosure of the deed of trust, recorded in Book 701, Page 459, Henderson County registry that conveyed 3.43 acres, which was reformed to reflect 2.6 acres and also decreed that the Garrens 1.0 acre was unaffected; (3) the 15 August 2003 deed in which, after the foreclosure sale, the substitute trustee conveyed to plaintiff the entire 3.43 acre tract of land, which was reformed to reflect 2.6 acres;

and (4) the 26 September 2003 deed in which plaintiff conveyed the entire 3.43-acre tract of land to Gray, which was reformed to reflect 2.6 acres.

It is a well-settled principle of our jurisprudence that:

> . . . a Court of Equity, or a court exercising equitable jurisdiction, will decree the reformation of a deed or written instrument, from which a stipulation of the parties, with respect to some material matter, has been omitted by the mistake or inadvertence of the draughtsman, is well settled, and frequently applied. The equity for the reformation of a deed or written instrument extends to the inadvertence or mistake of the draughtsman who writes the deed or instrument. If he fails to express the terms as agreed upon by the parties, the deed or instrument will be so corrected as to be brought into harmony with the true intention of the parties. All the authorities are agreed, says *Hoke, J.*, in *King v. Hobbs*, 139 N.C. 170, 51 S. E. 911, that a deed or written instrument will be reformed so as to express the true intent of the parties when by a mistake or inadvertence of the draughtsman a material stipulation has been omitted from the deed or instrument as written. If the deed or written instrument fails to express the true intention of the parties, it may be reformed by a judgment or decree of the Court, to the end that it shall express such intent whether the failure is due to mutual mistake of the parties, to the mistake of one, and the fraud of the other party, or to the mistake of the draughtsman.

Crawford v. Willoughby, 192 N.C. 269, 271, 134 S.E. 494, 495 (1926) (internal citations omitted).

Accordingly, our Supreme Court further articulated:

> The party asking for relief by reformation of a deed or written instrument, must allege and prove, first, that a material stipulation, as alleged, was agreed upon by the parties, to be incorporated in the deed or instrument as written, and second, that such stipulation was omitted from the deed or instrument as written, by mistake, either of both parties, or of one party, induced by the fraud of the other, or by the mistake of the draughtsman. Equity will give relief by reformation only when a mistake has been made, and the deed or written instrument because of the mistake does not express the true intent of both parties.

Id. at 271-72, 134 S.E. at 495-96.

In the case *sub judice*, there was competent record evidence presented of mistake due to the inadvertence of the draftsmen of the challenged instruments. Therefore, the trial court did not err by utilizing its equitable powers to reform the instruments in order to effectuate the original intent of the parties. Specifically, the duly recorded document entitled "Explanation Statement to Correct Obvious Minor Error(s) Made in an Instrument as Originally Recorded Re: Book 976 Page 399" put all purchasers on constructive notice that the conveyance from the Banks to the Garrens should have been the one acre tract that the Banks agreed to sell and the Garrens agreed to purchase.[1] *See Kraft v. Town of Mt. Olive*, 183 N.C. App. 415, 419, 645 S.E.2d 132, 136 (2007) ("[T]his Court has held that a purchaser will have constructive notice of all duly recorded documents that a proper examination of the title should reveal.") (citing *Stegall v. Robinson*, 81 N.C. App. 617, 619, 344 S.E.2d 803, 804 (1986)).

Additionally, at the hearing, plaintiff's default litigation specialist, Deborah Guffey, testified as follows:

> Q: Okay. Now, subsequent to that, did [plaintiff] get information regarding the fact that Mr. Banks wanted to convey a portion of this property to one of his relatives, Ms. Garren?
>
> A: Yes. . . . . They went to a branch and got approval for a loan, the Garrens did, and for the one acre.
>
> Q: And what was supposed to happen with regard to the fact that there was already a deed of trust on this property of 3.43 acres?
>
> A: We were supposed to do a partial release of that, of the one acre.
>
> . . . .
>
> Q: Was it the intention of [plaintiff] at that time to release this one acre from the effects of the deed of trust recorded in Book 701 at page 459,—
>
> . . . .

1. Irrespective of whether the instrument recorded on 8 February 1999 was made in accordance with narrow requirements of N.C. Gen. Stat. § 47-36.1 (2005), the statute simply provides one avenue for correction of the instrument. *See* N.C. Gen. Stat. § 47-36.1 ("[A]n obvious typographical or other minor error in a deed or other instrument recorded with the register of deeds may be corrected by rerecording the original instrument with the correction clearly set out on the face of the instrument and with a statement of explanation attached.") (underlining added). Thus, the instrument's recordation placed purchasers on constructive notice of its contents.

A: Yes. We were to do that partial release.

. . . .

Q: And the description of that property, is that stated in that deed book and page number as 3.43 acres?

A: Right; yes, sir.

Q: Was that in error?

A: Yes, sir. It was only supposed to be one acre.

Q: So you acknowledge that—the security was only supposed to be one acre and they [the Garrens] were supposed to only own one acre at that time?

A: Yes sir.

On direct examination, Guffey further testified as follows regarding the transaction from plaintiff to Gray:

Q: Was it just the Banks property that was supposed to be advertised and sold?

A: Yes, sir.

Q: And that was the roughly 2.6 acres?

A: Yes.

Q: And as far as you know, is that what he did?

A: Yes.

Q: And I believe there was an offer received by Mr. Gray to purchase the property . . . .

A: Yes, sir.

Q: And then a deed was prepared and a deed—and property sold to Mr. Gray?

A: Yes, sir.

Q: Was the deed in error?

A: Yes.

Q: Why was the deed in error?

A: The legal description's wrong.

Q: How is it wrong?

A: It's conveying more property than we had a right to sell.

Q: Did it convey the entirety of the 3.43 acres?

A: Yes, sir.

Q: And was it only supposed to contain the property of Mr. Banks, which was approximately 2.6 acres?

A: Yes, sir.

Consequently, the record evidence reveals the following essential facts and circumstances surrounding the intent and understanding of the parties to the subject instruments, which adequately show the mistake of the draftsman who was entrusted to prepare the instruments. *Bank of Union v. Redwine*, 171 N.C. 559, 566, 88 S.E. 878, 882 (1916) (citation omitted): (1) The Garrens agreed to purchase and the Banks agreed to sell a one-acre tract of the Banks' 3.43-acre tract of land; (2) Plaintiff agreed to release only one acre of the 3.43-acre tract of the Banks' land; (3) The Garrens therefore had notice from the deed they received from the Banks that it incorrectly conveyed the entire 3.43 acres; (4) Regarding the Garren's deed of trust to plaintiff of 15 January 1999, the Garrens knew that they could only convey the one-acre of land as collateral for the deed of trust and plaintiff knew it could receive only the one-acre tract of land as collateral; (5) Plaintiff had both actual and constructive notice that the conveyance from the substitute trustee to it of the entire tract of 3.43-acres, instead of the 2.6 acres, was in error, and the substitute trustee had constructive notice of the same; and (6) plaintiff had actual and constructive notice of the proper amount of acreage to deed to Gray, and Gray had constructive notice of the same.

Thus, the parties on both sides of the transactions of each instrument possessed mutuality regarding one of the essential terms of the transaction, namely, the amount of acreage to convey. Each instrument in the chain of title bears evidence of a facial mistake, and the record reveals no reason other than inadvertence or oversight on the part of the drafter of the instruments to explain the omission of the accurate and bargained for acreage of land. *See Bank of Union*, 171 N.C. at 566, 88 S.E. at 882 (holding that reformation of the deed was proper where the deed bore evidence of a facial mistake and that in the absence of a mistake of the draftsman of the instrument, the record revealed no other evidence to explain the same); *see also Rutledge v. Smith*, 45 N.C. 283, 285 (1853) (plaintiff had "plain equity" to have mistake corrected where omission of word "heirs" in deed of

trust was an oversight.). Consequently, the record contains competent evidence to support the trial court findings that the subject instruments were in error and the findings, in turn, support the conclusion that the trial court had the equitable authority to reform the challenged instruments in order to reflect the true intention of the parties. The relevant assignments of error are overruled.

[2] Defendant next contends the trial court erred by finding that the Garrens never received proper service of process and therefore the purported foreclosure as to the Garrens' one-acre tract of land was ineffective. Defendant contends that the trial court could not have decided the issue of whether the Garrens received proper service, because this issue was not properly before the trial court. We note that plaintiff made no allegation in the complaint that the Garrens failed to receive proper service. However, plaintiff offered evidence to the trial court regarding the failure of notice to the Garrens to which defendant did not object. Pursuant to N.C. Gen. Stat. § 1-A, Rule 15(b) (2005), the trial court could properly decide the matter. However, even if the matter was not properly before the trial court, defendant is still not entitled to any relief because, as discussed previously, we concluded that the trial court had the equitable authority to reform the instruments due to the multiple draftsmen errors in the chain of title. Additionally, we concluded that plaintiff had actual and constructive notice of the acreage to be conveyed to defendant and Gray had constructive notice of the acreage that should have been conveyed to him. Regardless of whether the foreclosure was effective or ineffective, the trial court still retained the authority to reform the instruments. The deed to defendant Gray by plaintiff was properly reformed to reflect the true intentions of the parties.

[3] In defendant Gray's final argument on appeal, he contends the trial court erred by bifurcating the trial into two parts. However, this argument was not properly preserved for appellate review. "Assignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C.R. App. P. 28(b)(6); *Wilson Ford Tractor, Inc. v. Massey-Ferguson, Inc.*, 105 N.C. App. 570, 574, 414 S.E.2d 43, 46, *aff'd*, 332 N.C. 662, 422 S.E.2d 576 (1992). As defendant has not cited any authority in support of this argument, it is deemed abandoned and we do not address it.

Affirmed.

Judges McGEE and STEPHENS concur.

STATE OF NORTH CAROLINA v. ANDERSON SHELDON HAZELWOOD

No. COA06-1667

(Filed 6 November 2007)

1. Appeal and Error— preservation of issues—plain error analysis unnecessary

The trial court did not err in a double second-degree murder and felony operation of a motor vehicle to elude arrest case by concluding plain error review was not necessary for evidence introduced by the State about an officer's testimony regarding his visits to defendant at the hospital, because: (1) defendant did not waive his right to appeal the ruling under N.C. R. App. P. 10(b)(1) when, unlike with a pretrial motion in limine, defendant raised his hearsay objection while the officer was testifying moments before defendant expected the officer to deliver an allegedly inadmissible statement to the jury; (2) the officer read defendant's statement to the jury within minutes of defendant's objection and the trial court's ruling; and (3) defendant's prior objection was sufficiently contemporaneous with the challenged testimony to be considered timely for purposes of the appellate rules.

2. Evidence— hearsay—not offered for truth of matter asserted—demonstration of malice

The trial court did not err in a double second-degree murder and felony operation of a motor vehicle to elude arrest case by overruling defendant's hearsay objection to evidence introduced by the State regarding an officer's testimony about defendant's statement describing how his passenger told him to stop the car during a high-speed chase after defendant fled a traffic stop, because: (1) although defendant contends the statement was offered for the truth of the matter asserted, he offered no explanation for why the State would introduce his statement for such a purpose; and (2) defendant's statement was proper nonhearsay evidence introduced for the limited purpose of demonstrating malice.

3. Constitutional Law— effective assistance of counsel—allegation of failure to make objection

Defendant was not denied effective assistance of counsel in a double second-degree murder and felony operation of a

motor vehicle to elude arrest case based on his attorney's alleged failure to make a timely objection to an officer's testimony that defendant contended was double hearsay, because: (1) defendant's attorney did interpose a timely objection adequate to preserve the contested hearsay issue for appellate review under N.C. R. App. P. 10(b)(1); and (2) there was no error made by defense counsel.

4. Evidence— expert testimony—exclusion—speed of vehicle

The trial court did not err in a double second-degree murder and felony operation of a motor vehicle to elude arrest case by sustaining the State's objection to certain testimony offered by one of defendant's expert witnesses concerning the speed of defendant's vehicle when it struck a tree, because: (1) defendant was prohibited from introducing opinion testimony by a witness who did not see defendant's car in motion based on the holding in *Shaw v. Sylvester*, 253 N.C. 176 (1960); and (2) although defendant asks the Court of Appeals to reconsider the rule set out in *Shaw*, the Court cannot overrule a decision of our Supreme Court.

5. Evidence— prior crimes or bad acts—erroneous instruction—lapsus linguae

The trial court did not commit plain error in a double second-degree murder and felony operation of a motor vehicle to elude arrest case by its instructions to the jury that evidence of other crimes received under N.C.G.S. § 8C-1, Rule 404(b), including defendant's 2003 conviction for felony speeding to elude arrest, may not be considered to prove the character of the defendant "but to show that defendant acted is conformity therewith" because: (1) considered in the context of the entire jury instruction, the trial court's misstatement of the law was an unintentional slip of the tongue; (2) a lapsus linguae not called to the attention of the trial court when made will not constitute prejudicial error when it is apparent from a contextual reading of the charge that the jury could not have been misled by the instruction; and (3) in light of the trial court's previous instruction regarding the only proper use of the evidence, the trial court's subsequent misstatement concerning the purposes for which the jury may have considered the evidence was immaterial.

6. Sentencing— aggravating factors—felony operation of a motor vehicle to elude arrest—unanimous verdict

The trial court did not commit plain error by its instruction to the jury on the charge of felony operation of a motor vehicle to elude arrest even though defendant contends it did not require a unanimous verdict regarding which aggravating factors were present because, while many of the enumerated aggravating factors are in fact separate crimes under various provisions of our General Statutes, they are not separate offenses, but merely alternative ways of enhancing the punishment for the crime from a misdemeanor to a Class H felony.

Appeal by Defendant from judgments entered 2 March 2006 by Judge Henry W. Hight, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 29 August 2007.

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

Sue Genrich Berry for Defendant.

McGEE, Judge.

Anderson Sheldon Hazelwood (Defendant) was convicted on 2 March 2006 of two counts of second-degree murder and one count of felony operation of a motor vehicle to elude arrest. The trial court sentenced Defendant to consecutive terms of 225-279 months in prison on each charge of second-degree murder, and to a consecutive term of eleven to fourteen months on the charge of felony operation of a motor vehicle to elude arrest. Defendant appeals.

The evidence presented at trial tended to show the following: Around 10:00 p.m. on 23 October 2004, Trooper Brian W. Jones (Trooper Jones) with the North Carolina State Highway Patrol initiated a traffic stop of Defendant's car after observing Defendant driving erratically and above the posted speed limit. Defendant initially stopped his car, but as Trooper Jones approached Defendant's car, Defendant drove off at a high rate of speed. Trooper Jones returned to his vehicle and followed Defendant as he fled the traffic stop. During an ensuing high-speed chase, Defendant lost control of his vehicle and collided with a tree. Defendant's two passengers, girlfriend Shavonda Renee Commissiong (Ms. Commissiong), and her five-year-old son Jalien Anthony Commissiong, both died in the

collision. Defendant was also injured in the crash and was taken by ambulance to Wake Medical Center.

Two days later, Trooper Jones visited Defendant in the hospital. After Trooper Jones advised Defendant of his *Miranda* rights, Defendant gave a statement to Trooper Jones. Trooper Jones testified that in the statement, Defendant said that prior to the collision, Ms. Commissiong "told [Defendant] to stop, but [Defendant] told her [he] wasn't going to go to jail tonight."

At trial, Defendant stipulated that he was guilty of two counts of involuntary manslaughter. The trial court instructed the jury on second-degree murder and involuntary manslaughter, as well as felony and misdemeanor operation of a motor vehicle to elude arrest. The jury found Defendant guilty of the greater offenses.

Defendant argues that the trial court erred by allowing the State to introduce inadmissible hearsay, and by disallowing certain expert witness testimony regarding the speed of his vehicle. Defendant also argues that he was denied effective assistance of counsel at trial; that the trial court improperly instructed the jury regarding evidence admitted under N.C. Gen. Stat. § 8C-1, Rule 404(b); and that the jury instructions did not require a unanimous verdict for conviction. We find no error.

I.

[1] Defendant first assigns as error the trial court's overruling of his hearsay objection to certain evidence introduced by the State. At trial, Trooper Jones began to testify regarding his visits to Defendant in the hospital. Defendant objected to the introduction of Defendant's statement to Trooper Jones on the grounds that the statement contained inadmissible hearsay. The trial court excused the jury, heard the parties' arguments, and overruled Defendant's objection. The jury returned and Trooper Jones resumed his testimony. Shortly thereafter, Trooper Jones recited Defendant's statement to the jury. Defendant did not renew his hearsay objection at that time.

Defendant recognizes that under the North Carolina Rules of Appellate Procedure, "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion[.]" N.C.R. App. P. 10(b)(1). Defendant admits that because he did not renew his objection when Trooper Jones actually read Defendant's statement at trial, he waived his right to appeal the trial court's hearsay ruling and, therefore, Defendant requests plain

error review. Plain error review is not necessary, however, because we find that Defendant did not waive his right to appeal the trial court's hearsay ruling under N.C.R. App. P. 10(b)(1). Our courts previously have held that "a motion *in limine* is not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial." *State v. Grooms*, 353 N.C. 50, 65, 540 S.E.2d 713, 723 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001). However, unlike with a pretrial motion *in limine*, Defendant here raised his hearsay objection while Trooper Jones was testifying, moments before Defendant expected Trooper Jones to deliver an allegedly inadmissible statement to the jury. The trial court excused the jury and engaged in a lengthy discussion with the parties. The trial court overruled Defendant's objection, the jury returned, and the trial resumed. Trooper Jones read Defendant's statement to the jury within minutes of Defendant's objection and the trial court's ruling. Under these circumstances, N.C.R. App. P. 10(b)(1) did not require Defendant to renew his objection when Trooper Jones resumed his testimony. Defendant's prior objection was sufficiently contemporaneous with the challenged testimony to be considered "timely" for purposes of the appellate rules. The State does not suggest otherwise.

[2] With Defendant's right to appeal the trial court's hearsay ruling properly preserved, we consider the merits of Defendant's claim. Under N.C. Gen. Stat. § 8C-1, Rule 801(c) (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." Defendant concedes that the portion of the statement containing Defendant's own words: "[Defendant] told [Ms. Commissiong] [he] wasn't going to go to jail tonight," was admissible as a statement of a party-opponent under N.C. Gen. Stat. § 8C-1, Rule 801(d)(A) (2005). However, Defendant argues the trial court erred by admitting, over his objection, the portion of Defendant's statement describing how Ms. Commissiong "told [Defendant] to stop" the car, due to its double-hearsay nature. *See* N.C. Gen. Stat. § 8C-1, Rule 805 (2005) ("Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule[.]"). The trial court concluded that this portion of Defendant's statement was not hearsay under Rule 801(c) because it was not offered for its truth. We review the trial court's determination *de novo*. *See State v. Thomas*, 350 N.C. 315, 339, 514 S.E.2d 486, 501, *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 388

(1999) (reviewing *de novo* trial court's determination that out-of-court statement was admissible for limited purpose of explaining the reaction of the person to whom the statement was made).

The State contends that Defendant's statement was offered not for its truth—that Ms. Commissiong wanted Defendant to stop the car—but rather, to prove that Defendant acted with malice, a requisite element of second-degree murder. Defendant's continued high-speed flight in response to Ms. Commissiong's request, the State contends, demonstrates that Defendant acted "so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief." *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982) (defining "malice" as used in homicide law). Defendant rejects this contention and asserts that Ms. Commissiong's words as contained in Defendant's statement to Trooper Jones were introduced for their truth. However, Defendant offers no explanation for why the State would introduce his statement for such a purpose, as opposed to the purpose of demonstrating malice. Ms. Commissiong's own wishes regarding Defendant's conduct were irrelevant to the State's case; rather, it was Defendant's reaction to Ms. Commissiong's request that presented an issue at trial. We conclude that Defendant's statement was proper non-hearsay evidence introduced for the limited purpose of demonstrating malice, and we affirm the trial court's overruling of Defendant's hearsay objection. *See State v. Chapman*, 359 N.C. 328, 355, 611 S.E.2d 794, 816 (2005) (out-of-court statement admissible "to explain [the] defendant's subsequent conduct"); *Thomas*, 350 N.C. at 339, 514 S.E.2d at 501 (out-of-court statement admissible "for the limited purpose of explaining why [witness] reacted . . . as he did and his subsequent conduct").

II.

[3] Defendant next asserts that he was denied effective assistance of counsel at trial, in violation of his federal and state constitutional rights. Defendant bases this claim on his attorney's failure to make a timely objection to Trooper Jones' testimony as discussed above. To establish a claim for ineffective assistance of counsel under either the United States Constitution or the North Carolina Constitution, Defendant must first demonstrate that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the [D]efendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984). *See State v. Braswell*, 312 N.C. 553, 562-63, 324

S.E.2d 241, 248 (1985) (adopting *Strickland* test). As discussed above in Part I, we find that Defendant's attorney did interpose a timely objection adequate to preserve the contested hearsay issue for appellate review under N.C.R. App. P. 10(b)(1). Therefore, with no error made by Defendant's counsel, Defendant's claim must fail.

III.

[4] Defendant next assigns error to the trial court's sustaining of the State's objection to certain testimony offered by one of Defendant's expert witnesses. Defendant's witness, John Flanagan (Mr. Flanagan), was tendered as an expert in speed analysis and accident reconstruction. During direct examination, defense counsel asked Mr. Flanagan for his determination of the speed of Defendant's vehicle when it struck the tree. The State objected to this question based on the rule set out in *Shaw v. Sylvester*, 253 N.C. 176, 116 S.E.2d 351 (1960):

> [O]ne who does not see a vehicle in motion is not permitted to give an opinion as to its speed. A witness who investigates but does not see a wreck may describe to the jury the signs, marks, and conditions he found at the scene, including damage to the vehicle involved. From these, however, he cannot give an opinion as to its speed. The jury is just as well qualified as the witness to determine what inferences the facts will permit or require.[1]

Id. at 180, 116 S.E.2d at 355. The trial court sustained the State's objection.

Defendant argues that application of the *Shaw* rule in the present case is manifestly unfair, in that the speed of Defendant's vehicle was a central issue on the question of malice, and Defendant was prohibited from introducing beneficial evidence on this question. Defendant asks that this Court reconsider the rule set out in *Shaw*. It is clear, however, that this Court may not overrule a decision of the North Carolina Supreme Court. Defendant's assignment of error is overruled.

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1. The General Assembly recently enacted N.C. Gen. Stat. § 8C-1, Rule 702(i) (Int. Supp. 2006), which overrules *Shaw* and allows "[a] witness qualified as an expert in accident reconstruction . . . [to] give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving." *Id.* This new evidentiary rule only applies to offenses committed on or after December 1, 2006. *See* 2006 N.C. Sess. Laws ch. 253, §§ 6, 33. Therefore, the new statute is inapplicable to the case before us, and the *Shaw* rule controls our decision here.

IV.

[5] Defendant next assigns as error the trial court's instructions to the jury regarding "other crimes" evidence received pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b). At trial, the State introduced evidence of Defendant's 2003 conviction for felony speeding to elude arrest. Under N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005), such evidence "is not admissible to prove the character of a person in order to show that he acted in conformity therewith." The trial court instructed the jury, stating:

> Evidence has been received in this case tending to show that the defendant committed the felony of speeding to elude arrest on November 19, 2002. This evidence was received solely for the purpose of showing that the defendant acted with malice when he operated a motor vehicle [in the current case]. If you believe this evidence, you may consider it but only for the limited purpose for which it was received. This evidence may not be considered by you to prove the character of the defendant *but to show that the defendant acted in conformity therewith.* (emphasis added).

The State concedes that the trial court misstated the law in this jury instruction.

Defendant did not object to this instruction at trial, and therefore he did not properly preserve this issue for appellate review under N.C.R. App. P. 10(b)(2). Defendant therefore asks our Court to review the jury instruction for plain error. Plain error exists if,

> "after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' . . . or where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.' "

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

Considered in the context of the entire jury instruction, it is clear that the trial court's misstatement of the law was an unintentional slip of the tongue. The trial court apparently intended to mirror the language of Rule 404(b), but used the incorrect phrase "but to show," rather than the correct phrase "in order to show." The North Carolina Supreme Court has held that "a lapsus linguae not called to the atten-

tion of the trial court when made will not constitute prejudicial error when it is apparent from a contextual reading of the charge that the jury could not have been misled by the instruction." *State v. Baker*, 338 N.C. 526, 565, 451 S.E.2d 574, 597 (1994). Here, the trial court correctly instructed the jury that the Rule 404(b) evidence "was received *solely* for the purpose of showing that the defendant acted with malice" (emphasis added). Therefore, in light of the trial court's previous instruction regarding the *only* proper use of the evidence, the trial court's subsequent misstatement concerning the purposes for which the jury *may* have considered the evidence was immaterial. When taken as a whole, the jury could not have been misled by the trial court's charge. *See State v. Davis*, 349 N.C. 1, 34-35, 506 S.E.2d 455, 473 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999) (finding no plain error where the trial court correctly instructed the jury on the required *mens rea* for first-degree murder, but also used the improper phrase "lack of diminished capacity" as opposed to the proper phrase "lack of mental capacity" when instructing the jury regarding the defendant's defense); *Baker*, 338 N.C. at 564-65, 451 S.E.2d at 597 (finding no prejudicial error where, "[a]fter correctly instructing on the State's burden of proving each element of [first-degree kidnapping] beyond a reasonable doubt, the trial court concluded as follows: 'However, if you do not so find, or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of guilty.' "). We find that the trial court's *lapsus linguae* did not amount to plain error.

V.

[6] Lastly, Defendant assigns as error the trial court's instructions to the jury on the charge of felony operation of a motor vehicle to elude arrest. Defendant contends that the trial court's instruction did not require a unanimous verdict for conviction, in violation of N.C. Const. art. I, § 24 ("No person shall be convicted of any crime but by the unanimous verdict of a jury in open court."). Defendant did not raise an objection to the jury instructions at trial, but asks this Court to review the jury charge for plain error.

North Carolina law prohibits "operat[ion of] a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties." N.C. Gen. Stat. § 20-141.5(a) (2005). Violation of this section is a Class 1 misdemeanor. *Id.* However, if a jury finds two or more aggravating factors present, violation of the section is consid-

ered a Class H felony. N.C. Gen. Stat. § 20-141.5(b) (2005). The statute lists eight possible aggravating factors, including: "[s]peeding in excess of 15 miles per hour over the legal speed limit," "[r]eckless driving," "[n]egligent driving leading to an accident causing . . . [p]ersonal injury," and "[d]riving when the person's drivers license is revoked." N.C.G.S. § 20-141.5(b)(1), (3)-(5). The trial court charged the jury as follows:

> [I]f you find from the evidence beyond a reasonable doubt that . . . the defendant operated a motor vehicle, on a highway, while attempting to elude . . . a highway patrolman, who was in the lawful performance of his duties, and the defendant knew or had reasonable grounds to know that [Trooper Jones] was a highway patrolman, *and that two or more of the following factors were present*: (1) Speeding in excess of 15 miles per hour over the legal speed limit, (2) Reckless driving, (3) Negligent driving leading to an accident causing death, (4) Driving while his driver's license is revoked, it would be your duty to return a verdict of guilty of felony operation of a motor vehicle to elude arrest. (emphasis added).

Defendant asserts that this instruction did not require the jury to reach a unanimous agreement regarding which aggravating factors were present. Each juror found at least two aggravating factors, but it is not certain whether the jurors were unanimous as to at least two of the same factors.

In *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986), the trial court instructed the jury to return a guilty verdict if it found that the defendant "knowingly possessed or knowingly transported marijuana." *Id.* at 553, 346 S.E.2d at 494. Noting that "[s]ubmission of an issue to the jury in the disjunctive is reversible error if it renders the issue ambiguous and thereby prevents the jury from reaching a unanimous verdict," *id.*, our Supreme Court held that the jury instruction was fatally defective because it allowed the jury to convict the defendant of either of two separate crimes, possessing marijuana or transporting marijuana, without reaching a unanimous decision as to which crime the defendant actually committed. *Id.* at 554, 346 S.E.2d at 494.

However, our Courts draw an important distinction between *Diaz* and cases in which the trial court's disjunctive instruction does not implicate two separate offenses:

> [A] disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense. . . . [However,] if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied.

State v. Lyons, 330 N.C. 298, 302-03, 412 S.E.2d 308, 312 (1991). The question of whether the trial court's instruction in the case before us falls into either the former or latter category has already been conclusively answered by this Court. In *State v. Funchess*, 141 N.C. App. 302, 540 S.E.2d 435 (2000), the defendant raised an identical argument with regard to N.C.G.S. § 20-141.5. Finding no error with the trial court's disjunctive jury instruction, we held that while "many of the enumerated aggravating factors are in fact separate crimes under various provisions of our General Statutes, they are not separate offenses as in *Diaz*, but are merely alternate ways of enhancing the punishment for speeding to elude arrest from a misdemeanor to a Class H felony." *Id.* at 309, 540 S.E.2d at 439. We are bound by our prior holding in *Funchess*, *see In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), and we find no error with the trial court's instruction to the jury. *See also State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990) (distinguishing *Diaz* and finding no prejudicial error where trial court instructed jury on the various types of inappropriate sexual conduct that could constitute an "indecent liberty" for purposes of the offense of taking indecent liberties with a minor).

No error.

Judges STEPHENS and SMITH concur.

A.J. LANCASTER, JR., PETITIONER v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WASTE MANAGEMENT, AND ENVIRONMENTAL MANAGEMENT COMMISSION, RESPONDENTS

No. COA07-149

(Filed 6 November 2007)

1. Collateral Estoppel and Res Judicata— date of petroleum release—final agency decision unreversed

Although respondent DEHR contends in an action seeking reimbursement from the Trust Fund for the removal of underground storage tanks (USTs) that the suspected petroleum release had not happened in 1989 or 1991, the trial court did not err by concluding that it was bound by the finding in the 2001 final agency decision under the doctrine of collateral estoppel and that the parties were bound by this finding, because: (1) collateral estoppel precludes relitigation of an issue decided previously in judicial or administration proceedings provided the party against whom the prior decision was asserted enjoyed a full and fair opportunity to litigate that issue in an earlier proceeding; (2) when a fact has been agreed upon or decided in a court of record, neither of the parties shall be allowed to call it in question and have it tried over again at any time thereafter so long as the judgment or decree stands unreversed; and (3) the 2001 final agency decision stands unreversed.

2. Environmental Law— underground storage tanks—statutory owner—innocent landowner exception

The trial court did not err by failing to find that petitioner was the statutory owner of the underground storage tanks (USTs) and, as such, was responsible for submitting a Comprehensive Site Assessment (CSA) report, nor by applying the innocent landowner exception, because: (1) only responsible parties who conduct and control the activity leading to the discharge must file a CSA; (2) the Court of Appeals was bound by the finding that the only discharges on petitioner's land occurred in 1989 and 1991 before petitioner inherited the property from his father; (3) petitioner cannot be a responsible party under 15A NCAC 2L .0115(f) or a person conducting or controlling the discharge under 15A NCAC 2L .0106(c) when the discharges occurred before he acquired the property; and (4) although respondents made much of petitioner's property being on the state's top Ten Worst UST

> Discharges list, petitioner was hardly the only party to blame for the detrimental impact of the discharge when DENR did not notify petitioner of the 1989 and 1991 contamination until 1998 in response to petitioner's application for coverage under the Trust Fund.

Appeal by respondents from judgment entered 13 October 2006 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 12 September 2007.

Simonsen Law Firm, P.C., by Lars P. Simonsen, for petitioner.

Attorney General Roy Cooper, by Assistant Attorney General Kelly L. Sandling, for respondents.

ELMORE, Judge.

The North Carolina Department of Environmental and Natural Resources (DENR), the Division of Waste Management, and the Environmental Management Commission (the EMC) (collectively, respondents) appeal a 13 November 2006 judgment filed in Nash County Superior Court. The judgment reversed a final agency decision by the EMC assessing A.J. Lancaster, Jr. (petitioner), a civil penalty and costs of $7,563.38 for failing to submit a Comprehensive Site Assessment (CSA) report as required by 15A NCAC 2L.0115(f).

Background

Petitioner inherited property from his father, A.J. Lancaster, Sr. (Lancaster, Sr.), who owned and operated underground storage tanks (USTs) on the property prior to his death in November of 1991. It appears that Lancaster, Sr., asked the Nash County Health Department to test his well water, and that the tests revealed high levels of benzene and other gasoline constituents. Nash County reported these findings to DENR,[1] which performed laboratory analysis of the groundwater sample taken by Nash County. DENR re-sampled the well in January of 1991 and again found gasoline constituents in the water. DENR notified Lancaster, Sr., by letter dated 15 February 1991, which included the following language:

> On February 14, 1991, the Raleigh Regional Office received a report of laboratory results of the sampling of your well on January 31, 1991. According to the lab report, methyl tertbutyl

1. DENR has gone through several incarnations and name changes during the course of these events. For ease of reference, we refer to all of them as DENR.

> ether was found in your water. This compound which is a common gasoline additive indicates a release of a regulated substance has occurred from the underground storage tanks on your facility.
>
> Based on the information submitted, the Division has reason to believe a regulated substance may have or is continuing to be released. Pursuant to [2N .0603], the Division is requiring you to determine if the underground storage tanks at this facility are the source of contamination. If a release is discovered, then you must immediately begin release response and corrective action as required in Section .0700.
>
> The report required under release investigation and confirmation as described in Subsection .0603 is due in this office within seven (7) days of receipt of this letter. . . . Failure to submit this report within the time limits or request an extension before the deadline is a violation of State regulations and the Division may hold you liable for a civil penalty of not more than $10,000 for each day of continued noncompliance in accordance with G.S. 143-215.6.

Lancaster, Sr., did not respond to DENR's letter—either to ensure the safety of his well water or to comply with DENR's demands.

Petitioner was appointed executor to his father's estate and, as executor, published a Notice to Creditors pursuant to Chapter 28A of our General Statutes. Respondents made no claim against the estate. DENR continued to send Annual Tank Operating fee invoices to Lancaster, Sr., which petitioner paid. In 1993, DENR sent a notice that the USTs were subject to new technical requirements and needed to be upgraded or closed. Petitioner investigated the cost of the upgrades and decided to close the tanks. He contacted DENR about this decision and DENR informed him that this was a good time to close the tanks because he would qualify for the lowest deductible under the Leaking Petroleum Underground Storage Tank Cleanup Fund (the Trust Fund) if the tanks were closed prior to 1 January 1994 and contamination was discovered. DENR did not mention the contamination found in 1989 and 1991 or the belief expressed in the 1991 letter that the USTs were leaking and causing the contamination.

Petitioner hired an environmental consultant to remove the USTs on 29-30 December 1993. Soil and groundwater samples revealed petroleum contamination, which was reported to DENR. Petitioner excavated and properly disposed of 225 cubic yards of contaminated soil from the tank area.

In response to petitioner's tank closure report, DENR sent petitioner a Notice of Regulatory Requirements (NORR) on 5 July 1994, which stated, "Information received by this office on February 1, 1994 relative to a suspected petroleum release, does confirm a release from an underground storage tank system located at A.J. Lancaster Store . . . ." The NORR informed petitioner that as the owner of the USTs, he "must comply with the release requirements of the State's rules," 15A NCAC 2N .0700, a copy of which was attached to the NORR. The letter contained summaries of several rules including 15A NCAC 2N .0706, which requires that

> [i]f certain conditions exist as described in the rule . . . the owner and operator [must] conduct a comprehensive site assessment (CSA) of the release area to determine the full horizontal and vertical extent of any soil and groundwater contamination caused by the release from its UST system. A copy of the guidelines titled, "Groundwater Section Guidelines For The Investigation and Remediation of Soils and Groundwater" addressing the requirements for submittal of the CSA can be obtained at the [Raleigh Regional Office (RRO)]. . . . A complete report of the required investigation must be submitted to the RRO no later than **October 7, 1994**.

The NORR did not specify what conditions would necessitate a CSA, nor did it specify that such conditions existed in this case. There is no evidence that petitioner requested a copy of the CSA guidelines or that he received one.

According to a Record of Communication made by a DENR staff member, petitioner contacted DENR by telephone on 10 April 1996 to "find out what would be required for this site." Petitioner was told that DENR "had no record of receiving a CSA and that one is required whenever soil contamination exceeds the concentration determined by an SSE."

The next preserved communication from DENR to petitioner is a Notice of Violation (NOV) dated 17 May 1996, which stated that the 5 July 1994 NORR "required per 15 A NCAC 2N .0706, that [petitioner] submit a Comprehensive Site Assessment (CSA) on or before October 7, 1994." According to this NOV, petitioner's 10 April 1996 telephone call followed a 20 March 1996 NOV, which requested that petitioner submit a CSA.[2] The NOV further stated that "[a]s a result of [his] failure to submit a CSA, [petitioner is] formally considered to be in con-

2. This March NOV is not in the record.

tinuous violation of 15A NCAC 2N .0706 and 15A NCAC 2L .0106 since October 7, 1994."

Petitioner submitted a handwritten CSA on 24 June 1996, which DENR rejected as incomplete and not in compliance with the reporting requirements of 15A NCAC 2L .0106 and .0111. Specifically, petitioner's handwritten CSA did not include analysis performed by a North Carolina Licensed Geologist or a qualified Professional Engineer or a seal from one of those specialists.

DENR sent a Recommendation for Enforcement Action letter to petitioner on 14 November 1997, advising petitioner that the RRO was "preparing a recommendation for enforcement action to the Director of the Division of Water Quality" because of petitioner's "failure to comply with the reporting requirements of . . . 15A . . . 2N .0706 and 2L .0106 as indicated in the" 17 May 1996 NOV. The letter continues:

> By letter dated November 20, 1996, you were given an opportunity to provide an explanation for the above referenced violations. Based on your response to that letter, it appears that at least two of the previous notifications from the Division were sent to your father (A.J. Lancaster, Sr.).[3] However, as the executor of your father's estate and current property owner, we consider both you and the Estate of A.J. Lancaster, Sr. to be responsible parties and therefore jointly and severally liable for the contamination at this site."

DENR sent another NOV on 14 November 1997, which included the following language:

> By letter dated July 24, 1997, your attorney (Lars Simonsen) indicated that you inherited the property containing the USTs from the Estate of A.J. Lancaster, Sr. After the operation of the USTs was discontinued on December 28, 1993. While it is claimed that you never individually operated the USTs, it appears that you were the executor of the estate and had a responsibility to comply with the notices that had been issued to both you and your father. Based on this information and the fact the USTs remained in use after November 8, 1984, we believe that both you (A.J. Lancaster, Jr.) and the Estate of A.J. Lancaster, Sr. are statutory owners of the USTs. Furthermore, we continue to believe

3. Photocopies of the letters and envelopes show that the envelopes were addressed to A.J. Lancaster, Sr., but that the letters were addressed to A.J. Lancaster, Jr. Petitioner's signature appears on the return receipts.

> that you and the Estate of A.J. Lancaster, Sr. Are responsible parties and are jointly and severally liable for the contamination at this site.
>
> Notwithstanding these issues, you are the landowner of record and we consider you to also have responsibility as the person in control of the release. In accordance with 15A NCAC 2L .0106, any person conducting or controlling an activity which results in a discharge to the groundwater must take immediate action to terminate and control the discharge and to mitigate any hazards resulting from the discharge. As the person in control of the release, you are responsible for conducting a site assessment (CSA) sufficient to determine the full vertical and horizontal extent of the contamination . . . .
>
> This office has sent numerous letters to you outlining the requirements and explaining what is required to comply with state regulations. However, to date, you have failed to make any reasonable efforts toward achieving compliance. *Your failure to act in a timely manner has caused the contamination to migrate off-site* and impact at least two other drinking water wells.

(Emphasis added). These NOVs continued until 2003.

The 2001 Final Agency Decision

[1] Petitioner sought reimbursement for the removal of the USTs from the Trust Fund. *See* N.C. Gen. Stat. § 143-215.94B (2005) (describing the Trust Fund). The Trust Fund will reimburse the cost of "the cleanup of environmental damage . . . in excess of twenty thousand dollars ($20,000) per occurrence" "resulting from a discharge or release of a petroleum product from a commercial underground storage tank . . . discovered on or after 1 January 1992 and reported between 1 January 1992 and 31 December 1993 inclusive." N.C. Gen. Stat. § 143-215.94B(b) (2005). The Trust Fund will reimburse the cost of cleanup in excess of $50,000.00 "[f]or discharges or releases discovered or reported between 30 June 1988 and 31 December 1991 inclusive." *Id.* Petitioner sought a $20,000.00 deductible for the removal of the USTs because the tanks were removed in December of 1993, but DENR argued that petitioner was only entitled to a $50,000.00 deductible because the discharge had been discovered in 1989 and 1991.

An administrative law judge (ALJ) concluded that "a discovered release as defined in 15A NCAC 2P.0202(b)(4) existed at the

Lancaster Store Site in both 1989 and 1991 when the on-site water supply well sample confirmed petroleum contamination in the form of benzene contamination and MTBE contamination." The ALJ's recommended decision was adopted as DENR's final agency decision on 6 March 2001 (the 2001 final agency decision). Petitioner appealed to the superior court, but before a verdict was reached, the parties entered into a settlement agreement that allowed petitioner to pay the $20,000.00 deductible rather than the $50,000.00 deductible, but did "not resolve any other issues except for the specific deductible issue."

During the trial for the case at bar, DENR argued that the release had not happened in 1989 or 1991, despite the agency's own final decision finding that fact. The superior court judge correctly stated at trial that he was bound by the finding in the 2001 final agency decision under the doctrine of collateral estoppel. "Collateral estoppel precludes relitigation of an issue decided previously in judicial or administrative proceedings provided the party against whom the prior decision was asserted enjoyed a full and fair opportunity to litigate that issue in an earlier proceeding." *Bradley v. Hidden Valley Transp., Inc.*, 148 N.C. App. 163, 166, 557 S.E.2d 610, 613 (2001) (citations and quotations omitted). "[W]hen a fact has been agreed upon or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed." *State v. Summers*, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2000) (citation and quotations omitted) (alteration in original). The 2001 final agency decision stands unreversed and therefore the parties and this Court are bound by that decision's finding that the releases on petitioner's property occurred in 1989 and 1991.

The 2006 Final Agency Decision

DENR pursued enforcement against petitioner because petitioner was in violation of "15A NCAC 2L .0115(f) from 30 August 2003 through at least 16 June 2004 by failing to submit a [CSA] for prior release or discharge from petroleum underground storage tanks formerly located at the A.J. Lancaster Store . . . ." The 20 January 2006 final agency decision (the 2006 final agency decision) made the following relevant conclusions of law:

> 13. The Petitioner violated 15A NCAC 2L .0115(f) by failing to submit a [CSA] from August 30, 2003 through at least June 16,

> 2004 in accordance with the procedures and requirements of the cited rule.
>
> 15. Petitioner would be absolved of liability for contamination occurring at the site prior to 1991 under the innocent landowner exception pursuant to 15A NCAC 2L .0101(b) since evidence presented at trial by Petitioner indicated he had no knowledge of releases occurring in 1989 and 1991.
>
> 16. Petitioner's liability as an owner of the USTs under 15A NCAC 2n .0203 exists since he inherited the tanks from his father in 1991 and the tanks held a regulated substance.
>
> 18. The assessment of civil penalties was unnecessarily harsh, given that Mr. Lancaster's claim of being an innocent landowner had some merit, that he did make efforts to comply, and that he never operated the USTs.

The final agency decision reduced the amount of petitioner's fine to $7,563.38.

Petitioner appealed the 2006 final agency decision to the superior court, which reversed. The order is brief and includes as its sole legal basis for the reversal:

> that Respondents' conclusion of law that Petitioner is not absolved of liability under the innocent landowner exception pursuant to title 15A N.C.A.C. 2L.0101(b) is an error of law. Applying the *de novo* standard, the Court finds as a fact and as a matter of law that Petitioner is absolved of liability under title 15A N.C.A.C. 2L.0101(b) on the grounds that Petitioner acquired the property by inheritance without knowledge or a reasonable basis for knowing that groundwater contamination at the Lancaster Store site had occurred.

Discussion

[2] Respondents argue that the trial court erred by failing to find that petitioner was the statutory owner of the USTs and, as such, was responsible for submitting a CSA report. They also argue that the trial court erred by applying the innocent landowner exception. We disagree.

DENR fined petitioner for violation of 15A NCAC 2L .0115(f) (2005),[4] which states, in relevant part:

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4. 15A NCAC 2L .0115(f) was recodified at 15A NCAC 2L .0400 effective 1 December 2005.

> If the risk posed by a discharge or release is determined by the Department to be high risk, *the responsible party* shall comply with the assessment and cleanup requirements of Rule .0106(c), (g) and (h) of this Subchapter and 15A NCAC 2N .0706 and .0707.

15A NCAC 2L .0115(f) (2005) (emphasis added). DENR had determined that the discharge on petitioner's property was high risk, thus triggering compliance by "the responsible party." 15A NCAC 2L .0106(c)(2) requires that "[a]ny person *conducting or controlling* an activity which has not been permitted by the Division *and which results in an increase* in the concentration of a substance in excess of the standard . . . shall . . . submit a report to the Director assessing the cause, significance and extent of the violation . . . ." 15A NCAC 2L .0106(c) (2005) (emphasis added). Rules .0106(g) and (h) of Subsection L list further required content for the site assessment—or CSA—described in Rule .0106(c). 15A NCAC 2L .0106(g)-(h) (2005). Therefore, petitioner's duty to file a CSA hinges on his being "the responsible party" for the discharge and a "person conducting or controlling an activity . . . which results in an increase" in a regulated substance. 15A NCAC 2L .0106(c) (2005).

The Authorization subsection of Subchapter 2L states, in relevant part:

> (b) These rules are applicable to all activities or actions, intentional or accidental, which contribute to the degradation of groundwater quality . . . *except an innocent landowner* who is a bona fide purchaser of property which contains a source of groundwater contamination, who purchased such property without knowledge or a reasonable basis for knowing that groundwater contamination had occurred, or a person whose interest or ownership in the property is based or derived from a security interest in the property, *shall not be considered a responsible party*.

15A NCAC 2L .0101(b) (2006) (emphasis added).

The trial court found that petitioner was an innocent landowner and thereby absolved of liability because he "acquired the property by inheritance without knowledge or a reasonable basis for knowing that groundwater contamination at the Lancaster Store site had occurred." In the 2006 final agency decision, the EMC concluded, as a matter of law, that "Petitioner would be absolved of liability for contamination occurring at the site prior to 1991 under the innocent

landowner exception pursuant to 15A NCAC 2L .0101(b) since evidence presented at trial by Petitioner indicated he had no knowledge of releases occurring in 1989 and 1991."

Although the innocent landowner exception in Rule .0101(b) does not specifically include language protecting a landowner who inherits contaminated property, the EMC itself recognized that the exception's purpose—to protect from prosecution those landowners who acquire property without prior knowledge of contamination—applies to landowners who acquire land by inheritance. Petitioner inherited the property "without knowledge or a reasonable basis for knowing that groundwater contamination had occurred." 15A NCAC 2L .0101(b) (2006). The EMC specifically did not find liability for the discharges that occurred before petitioner acquired the property.

The EMC instead concluded that petitioner's liability arose because he owned the USTs after he inherited the property from his father in 1991, and that the tanks were "in use" until their removal in 1994. The EMC concluded that this made petitioner an "owner" under 15A NCAC 2N .203, and that as an "owner," he must "comply with . . . the Comprehensive Site Assessment report requirements of 15A NCAC 2L .0115(f)." 15A NCAC 2L .0115(f), which is the basis for petitioner's fine, does not state that it applies to "owners" of USTs. It states that it applies to "responsible parties" and makes no reference to "owners" as defined in Subsection 2N. 15A NCAC 2L .0115(f) (2005). Furthermore, the CSA requirement itself arises from 2L .0106(c), which applies to persons "conducting or controlling" discharge without reference to "owners" or Subsection 2N.

The issue before us is whether petitioner violated 15A NCAC 2L .0115(f) by failing to file a CSA. We are bound by the finding in the 2001 final agency decision that the only discharges on petitioner's land occurred in 1989 and 1991. Only "responsible parties" who conduct and control the activity leading to the discharge must file a CSA. 15A NCAC 2L .0115(f), .0106(c) (2005). Petitioner cannot be a "responsible party" under 2L .0115(f) or a "person conducting or controlling" the discharge under 2L .0106(c) because the discharges occurred before he acquired the property. As such, he had no obligation to file a CSA and did not violate 2L .0115(f). Accordingly, we affirm the order of the trial court.

We further note that respondents made much of petitioner's property being on the state's "Top Ten Worst UST Discharges" list and that petitioner's lack of compliance led to this result. This is an

untenable position. DENR had knowledge of a possible discharge on this property as early as 1989 and by 1991 believed that a discharge from Lancaster, Sr.'s USTs was the cause of the contaminated groundwater on the property. DENR failed to follow up with Lancaster, Sr., regarding this belief or to notify petitioner or petitioner's neighbors that such a discharge may have occurred or may be ongoing. Petitioner was in frequent contact with DENR in 1993 and 1994 regarding the tanks prior to their removal, and DENR said nothing about the contamination. DENR did not notify petitioner of the 1989 and 1991 contamination until *1998*, in response to petitioner's application for coverage under the Trust Fund. The letter stated that the release "was discovered in September 1989 when Nash County Health Department sampled the site water supply well." Petitioner is hardly the only party to blame for the detrimental impact of the discharge.

Affirmed.

Judges McGEE and STEELMAN concur.

STATE OF NORTH CAROLINA v. STEPHEN MICHAEL SPARGO, DEFENDANT

No. COA06-1138

(Filed 6 November 2007)

1. Appeal and Error— preservation of issues— appellate argument encompassed within presentation at trial

Although defendant contends the State's argument on appeal in a multiple obtaining property by false pretenses case should not be considered since it differs from the prosecutor's argument in opposition to defendant's motion at the trial level, the Court of Appeals concluded the State's argument on appeal was fairly encompassed within the State's presentation to the trial court, and it thus addressed the merits of the State's appeal.

2. Collateral Estoppel and Res Judicata— obtaining property by false pretenses—prior dismissal of four counts of the same offense

The trial court erred by dismissing ten counts of obtaining property by false pretenses on the ground of collateral estoppel arising out of the court's prior dismissal of four counts of the

same offense, because: (1) even though the trial court found the State failed to prove defendant illegally converted the victim's money with respect to the first four checks, that finding did not necessarily mean that defendant acted legally with respect to the ten checks at issue in this case; (2) the judge's ruling in the prior case did not require a finding that permission existed for defendant to cash all checks given by the victim to him, but simply established that the State failed to prove a lack of permission as to those four checks; (3) even if the victim gave permission as to the first four, a jury could still find that she did not give permission to defendant to cash the ten checks which were not written at the same time as the four checks previously litigated; (4) a person may properly dispose of the proceeds of some checks, but then misappropriate the funds for subsequently received checks; and (5) based on the lack of joinder and the fact that the transactions at issue in this case occurred at a different time, collateral estoppel is inapplicable since the propriety of defendant's actions as to the first four checks will not be a question for the jury.

Judge WYNN concurring in the result.

Appeal by the State from order entered 26 May 2006 by Judge Timothy S. Kincaid in Gaston County Superior Court. Heard in the Court of Appeals 27 March 2007.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defenders Kristen L. Todd and Benjamin Dowling-Sendor, for defendant-appellee.

GEER, Judge.

The State has appealed from the superior court's order dismissing 10 counts of obtaining property by false pretenses on the grounds of collateral estoppel arising out of the court's prior dismissal of four counts of the same offense. According to the State, each of the 14 counts were based on checks signed by Beatrice Lawter—leaving the amount and payee vacant—and given to defendant Stephen Michael Spargo for payment of medical expenses of Ms. Lawter's son. We hold that even though the trial court determined that the State had failed to prove that defendant illegally converted Ms. Lawter's money with respect to the first four checks, that finding does not necessarily

mean that defendant acted legally with respect to the 10 checks at issue in this case. The doctrine of collateral estoppel is, therefore, inapplicable under the circumstances of this case, and the trial court erred in dismissing the charges.

Facts

In April 2005, defendant was indicted on five counts of obtaining property by false pretenses (the "April indictments"). All five April indictments alleged the same false pretense:

> [D]efendant uttered a check drawn on the account of Beatrice Lawter to an agent of Wachovia Bank and thereby obtaining said monies as if he were entitled to said funds when in fact defendant did not have permission to cash said instrument, or to convert said monies to his own personal use.

Each of the April indictments varied only as to the amount of money involved and the date of the alleged offense: the amounts ranged between $750.00 and $1,700.00, and the dates of the alleged offenses ranged between 19 November 2003 and 25 November 2003.

In October 2005, defendant was subsequently indicted on 10 additional counts of obtaining property by false pretenses (the "October indictments"). Similar to the April indictments, the October indictments alleged that defendant illegally obtained Beatrice Lawter's money. The precise language of each of the October indictments was, however, different from the April indictments:

> The false pretense consisted of the following: defendant presented a pre-signed check by Beatrice Lawter for said amount for the care of her disabled son when in fact the check was intended for medical expenses of Ms. Lawter's son and the defendant had no right to the proceeds thereof.

In the October indictments, the dates of the 10 offenses ranged between 1 December 2003 and 16 January 2004, and the amounts involved ranged from $1,657.62 to $7,700.00.

At the outset of his trial on the April indictments, defendant made a motion to join the 10 charges specified in the October indictments. Judge Timothy S. Kincaid of Gaston County Superior Court denied the motion for joinder, and the case proceeded to trial only on the five April indictments. At trial, the State presented evidence from several witnesses, including Beatrice Lawter and her son, Kevin Joe Lawter.

Following the close of the State's evidence, defendant moved to dismiss the charges. The State voluntarily dismissed one of the five counts, conceding that its evidence was insufficient. The trial court then dismissed the four remaining counts on the grounds that there was insufficient evidence showing (1) defendant lacked permission to cash the checks signed by Ms. Lawter and (2) defendant converted the funds to his own use.

During pretrial proceedings with respect to the October indictments, defendant moved to dismiss each of the 10 counts, arguing that a trial would involve relitigation of issues already decided in his favor at the prior trial. Defendant contended that, as a result, the trial was barred by double jeopardy and collateral estoppel. In an order signed 25 April 2006, Judge Kincaid granted defendant's motion.

In that order, Judge Kincaid noted that the April indictments had been tried before him, and he had granted the motion to dismiss those charges because "the State had failed to offer sufficient evidence that the defendant did unlawfully with the intent to cheat and defraud, obtain the money from Ms. Lawter, and that the State failed to prove that the defendant did not have permission of Ms. Lawter to cash the instrument or to convert the monies to some personal use . . . ." He further noted: "the Court made a specific finding in that ruling that, based on the evidence presented by the State, the Defendant did in fact have consent to cash those checks . . . ."

With respect to the 10 October indictments, Judge Kincaid found that the indictments were "the same as those in the five previous cases, with the exception of the offense date and the amounts of United States currency . . . ." He noted that the victim was the same, the indictments relied upon the same allegation that money had been obtained from a bank by way of presenting a check for cash, and the indictments alleged that defendant converted Ms. Lawter's money to his own use. Judge Kincaid pointed out, however, that the October indictments, as opposed to the April indictments, specifically alleged that the check was intended for medical expenses of Ms. Lawter's son, and defendant had no right to the proceeds from the check. Judge Kincaid then found "[t]hat the State offered evidence at the previous trial of medical appointments for Kevin Joe Lawter, the son of Beatrice E. Lawter, but did not present any evidence of any medical bills, no evidence of whether any bills were outstanding and owing, or and [sic] evidence at all as to how the money was used by the defendant . . . ."

Based on those findings, Judge Kincaid concluded "[t]hat to allow a subsequent prosecution of these ten crimes, would place the defendant twice in jeopardy for the same offense and would allow the State to relitigate the same issues that have already been decided by a final judgment of the Court, a practice which is barred by the doctrine of collateral estoppel." The State timely appealed this order.

Discussion

[1] The State's sole argument on appeal is that the trial court wrongly dismissed the 10 October indictments because the issues presented were different from the five indictments previously dismissed and thus not barred by the doctrine of collateral estoppel. As an initial matter, defendant maintains that we should not consider the State's argument on appeal because it differs from the prosecutor's argument in opposition to defendant's motion at the trial level. According to defendant, the State is attempting to "swap horses between courts in order to get a better mount," *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934). We believe the State's argument on appeal is fairly encompassed within the State's presentation to the trial court and, therefore, we will address the merits of the State's appeal.

[2] As our Supreme Court has stated, "[t]he doctrine of collateral estoppel was held to be a part of the constitutional guarantee against double jeopardy in *Ashe v. Swenson*, 397 U.S. 436, 25 L. Ed. 2d 469 (1970)." *State v. Edwards*, 310 N.C. 142, 145, 310 S.E.2d 610, 613 (1984). "Under the doctrine of collateral estoppel, an *issue* of ultimate fact, once determined by a valid and final judgment, cannot again be litigated between the same parties in any future lawsuit. Subsequent prosecution is barred only if the jury could not rationally have based its verdict on an *issue* other than the one the defendant seeks to foreclose." *Id.* The prior proceeding must have necessarily determined the factual issue; the mere possibility that the issue was resolved does not prevent relitigation of the issue. *Id.* The burden of persuasion on a collateral estoppel defense rests with the defendant. *State v. Solomon*, 117 N.C. App. 701, 704, 453 S.E.2d 201, 204, *disc. review denied*, 340 N.C. 117, 456 S.E.2d 325 (1995).

"The application of the common law doctrine of collateral estoppel to criminal cases has been codified by N.C. Gen. Stat. § 15A-954(a)(7) . . . ." *State v. Safrit*, 145 N.C. App. 541, 552, 551 S.E.2d 516, 524 (2001). N.C. Gen. Stat. § 15A-954(a)(7) (2005) requires dismissal of criminal charges when "[a]n issue of fact or law essential to a successful prosecution has been previously adjudicated in favor

of the defendant in a prior action between the parties." Collateral estoppel, therefore, requires an "identity of issues." *State v. Summers*, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2000).

Our Supreme Court has articulated a four-part test for determining whether an "identity of issues" exists:

> (1) the issues must be the same as those involved in the prior action, (2) the issues must have been raised and actually litigated in the prior action, (3) the issues must have been material and relevant to the disposition of the prior action, and (4) the determination of the issues in the prior action must have been necessary and essential to the resulting judgment.

Id. We agree with the State that defendant has failed to establish that the charges in this case meet this test.

"The crime of obtaining property by false pretenses consists of the following elements: '(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.' " *State v. Cagle*, 182 N.C. App. 71, 75, 641 S.E.2d 705, 708 (2007) (quoting *State v. Parker*, 354 N.C. 268, 284, 553 S.E.2d 885, 897 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162, 122 S. Ct. 2332 (2002)). With respect to the April indictments, Judge Kincaid determined that these elements were not met because the State had not presented sufficient evidence (1) that defendant lacked permission to cash the four checks at issue (elements one through three) and (2) that defendant converted the funds from those four checks to his own use (element four). Because of the denial of the motion for joinder, these rulings did not specifically address these two issues with respect to the 10 checks set forth in the October indictments.

The question remains, however, whether permission granted with respect to the four checks already litigated necessarily establishes that defendant had permission as to the 10 checks in this case. Judge Kincaid's ruling in the prior case did not require a finding that permission existed for defendant to cash all checks given by Ms. Lawter to him. It simply established that the State failed to prove a lack of permission as to those four checks. Even if Ms. Lawter gave permission as to the four, a jury could still find that she did not give permission to defendant to cash the 10 checks at issue in this case—none of which were written at the same time as the four checks previously litigated. For example, a person might give permission to another per-

son to take $20.00 out of her purse on a particular occasion, but that does not necessarily mean she has given that person permission to take $20.00 a month later.

In a similar manner, a person may properly dispose of the proceeds of some checks, but then misappropriate the funds for subsequently received checks. *Cf. State v. Perkins*, 181 N.C. App. 209, 221, 638 S.E.2d 591, 599 (2007) (holding that verdicts were not inconsistent when "the jury could have determined that defendant did not act in concert with respect to the afternoon entry into Ms. Clough's office, but that she did act in concert with respect to the larceny"). Thus, Judge Kincaid's determination that the State did not show an improper conversion of funds for the first four checks does not necessarily require the conclusion that defendant acted properly as to the later-written 10 checks. In short, while Judge Kincaid conclusively determined in the first trial that the evidence was insufficient to convict defendant of the four counts of obtaining property by false pretenses alleged in the April indictments, the court did not—indeed, because of the lack of joinder, could not—make such a determination concerning the 10 counts alleged in the October indictments.

Defendant argues, however, that the State's own evidence at the first trial "disproved the elements of Obtaining Property by False Pretenses for *all fifteen*" counts. (Emphasis supplied by defendant.) More specifically, defendant asserts that the testimony of Ms. Lawter and her son showed that defendant actually had "permission to fill in and cash all fifteen checks." Even assuming that the testimony can be read as applying to "all" the transactions alleged in all 15 indictments, our courts have stressed that the focus of the collateral estoppel inquiry is not on the evidence presented. As the Supreme Court stated in *Edwards*, 310 N.C. at 145, 310 S.E.2d at 613, "[t]he determinative factor is not the introduction of the same evidence [presented in the first trial], but rather whether it is absolutely necessary to defendant's conviction [in the second trial] that the second jury find against defendant on an *issue* upon which the first jury found in his favor." *See also Solomon*, 117 N.C. App. at 704-05, 453 S.E.2d at 204 ("The mere fact that the same evidence was introduced in a prior criminal trial does not make a later criminal trial subject to collateral estoppel. Rather, the determinative factor in a collateral estoppel defense is whether it is *absolutely necessary* to a defendant's conviction for the second offense that the second jury find against that defendant on an issue which was decided in his favor by the prior jury." (internal citation omitted)).

Because of the lack of joinder and the fact that the transactions at issue in this case occurred at a different time, the only issues necessarily decided in the first trial were whether defendant obtained money by false pretenses when negotiating each of the first four checks. The defense of collateral estoppel would only apply in this case if it were absolutely necessary for the jury—in rendering a verdict in this case—to decide that defendant did in fact obtain money by false pretenses with respect to the first four checks. In, however, any trial arising out of the October indictments, the propriety of defendant's actions as to those four checks will not be a question before the jury.

Accordingly, we hold that collateral estoppel has no application in this case, and the trial court erred in granting the motion to dismiss. We, therefore, reverse the order of the trial court dismissing the 10 October indictments.

Reversed.

Chief Judge MARTIN concurs.

Judge WYNN concurs in the result in a separate opinion.

WYNN, Judge concurring in the result.

I agree with the result reached by the majority opinion but write separately to discuss a conflicting rationale followed by the Ohio Court of Appeals but not yet adopted in North Carolina.

As noted by the majority, this Court has previously recognized our Supreme Court's holdings with respect to collateral estoppel in the criminal context:

> The mere fact that the same evidence was introduced in a prior criminal trial does not make a later criminal trial subject to collateral estoppel. Rather, the determinative factor in a collateral estoppel defense is whether it is absolutely necessary to a defendant's conviction for the second offense that the second jury find against that defendant on an issue which was decided in his favor by the prior jury.

State v. Solomon, 117 N.C. App. 701, 704-05, 453 S.E.2d 201, 204 (quoting *State v. Edwards*, 310 N.C. 142, 145, 310 S.E.2d 610, 613 (1984)), *disc. review denied*, 340 N.C. 117, 456 S.E.2d 325 (1995).

Our opinion in *Solomon* is controlling in this case and supports the majority's conclusion that collateral estoppel does not apply here. However, in *State v. Green*, No. 83-05-046, 1983 Ohio App. LEXIS 13969 (unpublished, Ohio Ct. App., Dec. 12, 1983), a case very similar to the present case and cited by the trial court judge, the Ohio Court of Appeals applied different reasoning and found that collateral estoppel applied to bar a later prosecution.

In *Green*, the defendant was indicted on two counts of theft for writing checks payable to himself on a decedent's account. *Id.* at *8. Count I was dismissed on the defendant's motion, and Count II went to trial, where the judge found that the State failed to prove that the defendant obtained control over the property with an intent to deprive the owner, an element that was also an element of Count I. *Id.* at *8-*9.

The *Green* court concluded that since the State failed to prove in the first trial that the defendant obtained control over the property with the intent to deprive the owner, it was precluded from trying to prove the same factual issue in a subsequent trial. *Id.* at *10-*11. Additionally, the court noted that the two counts involved the same property (money in a bank account), the same parties, and the same essential issues. *Id.* at *11.

Similarly, this case involves the same parties, same issues, same bank account, and the same conduct. At the first trial, the judge specifically found that the State failed to offer sufficient evidence to prove two elements of obtaining property by false pretenses: (1) that Defendant unlawfully obtained money and (2) that Defendant did not have permission to cash or convert the checks. The elements that the State failed to prove in the first trial are also elements of the second group of ten counts of obtaining property by false pretenses. Under the reasoning of *Green*, the State failed to prove two elements of obtaining property by false pretenses at the first trial and would therefore be estopped from trying to prove the same factual issue in a later trial. However, because *Solomon* is the controlling case in North Carolina, I must concur in the result reached by the majority.

PEERLESS INSURANCE COMPANY, A/S/O ANTHONY AND DEBRA ADAMS, PLAINTIFFS V. GENELECT SERVICES, INC., DEFENDANT

No. COA06-1369

(Filed 6 November 2007)

Negligence— maintenance of home generator—summary judgment—mere speculation

The trial court did not err by granting summary judgment in favor of defendant in a negligence case arising out of the maintenance of a home generator that allegedly caused a fire at the insured parties' home, because plaintiff fire insurer alleged negligence without more than mere speculation when: (1) between the time the inspection was made and the time the fire investigator for plaintiff investigated the fire scene, there had been two hurricanes, torrential rainfalls, fire hoses with high water pressure, firemen crawling through the window above the generator, and the fire itself; (2) any observation that the muffler was pointed down at a slight angle and covered with mulch was insufficient to submit the case to the jury since there were far too many other possible causes of the unsafe condition, and plaintiff gave no evidence to support the chosen theory that negligent maintenance occurred; and (3) defendant did not need to provide evidence that it was not responsible for causing the fire since the burden shifted to plaintiff after defendant produced evidence showing that the last maintenance inspection was normal.

Judge STROUD dissenting.

Appeal by plaintiff, Peerless Insurance Company, from the Order for Summary Judgment entered 10 August 2006 by Judge Ronald K. Payne in Buncombe County Superior Court. Heard in the Court of Appeals 26 April 2007.

Cozen O'Connor, by Albert S. Nalibotsky and Jay M. Goldstein, for plaintiff appellant.

The Van Winkle Law Firm, by Michelle Rippon, for defendant appellee.

McCULLOUGH, Judge.

Plaintiff Peerless Insurance Company (Peerless) provided fire insurance to Anthony and Debra Adams for their home located in

the Biltmore Forest section of Asheville. On 18 September 2004, following the second of two hurricanes to strike Western North Carolina, a fire damaged the Adams residence resulting in a claim in excess of $400,000 which Peerless paid. Peerless, as subrogee of the insured parties (the Adamses), filed suit against defendant alleging that defendant's maintenance of a home generator caused the fire.

Defendant filed a motion for summary judgment which was granted and from which Peerless appeals. For the reasons which follow, we uphold the superior court's order granting summary judgment in favor of defendant.

The evidence before the trial court, viewed in the light most favorable to Peerless, showed that the generator was serviced on 9 August 2004, just over a month before the fire. The service technician was deposed and testified that he completed a standard service report noting nothing unusual and indicating the unit was in good working order, including the clamp, muffler and exhaust clip. He stated that had he noted anything unusual, he would have called it to the owner's attention or repaired it.

Between 9 August 2004 and 18 September 2004, two hurricanes hit the Asheville area. The first was Hurricane Frances and was followed on 1 September by Ivan. The generator had operated each week during this period and at about 10:00 p.m. on 16 September 2004, began running more or less continuously until the Adamses' daughter noticed flames on the back of the house near the generator around 1:30 p.m. on 18 September 2004.

On 23 September 2004, plaintiff's fire investigator inspected the Adamses' residence and found the extension pipe clamped to the exhaust pipe was facing the ground and about 2 inches into mulch surrounding the generator (and not at the 45° angle the service technician had indicated was normal).

Mr. John Cavallaro, hired by Peerless, also inspected the generator on 27 September 2004, and found the same conditions present but could not find any malfunction which could have caused the fire.

Peerless also hired an engineering company which determined that the heat of the exhaust could easily have started the fire by igniting the mulch.

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). "The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent . . . ." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992) (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)).

To survive a summary judgment motion, plaintiffs must show that either (1) defendant negligently created the condition, or (2) defendant negligently failed to correct the condition after actual or constructive notice of its existence. *See France v. Winn-Dixie Supermarket, Inc.*, 70 N.C. App. 492, 320 S.E.2d 25 (1984), *disc. review denied*, 313 N.C. 329, 327 S.E.2d 889 (1985). Additionally, where there are many other reasonable explanations for the condition at issue, plaintiffs must present some factual evidence to remove their theory from the realm of mere speculation. *See Williamson v. Food Lion, Inc.*, 131 N.C. App. 365, 369, 507 S.E.2d 313, 316 (1998), *aff'd*, 350 N.C. 305, 513 S.E.2d 561 (1999).

Finally, the standard of review of an order granting summary judgment is *de novo*. *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 294, 628 S.E.2d 851, 855 (2006).

NEGLIGENCE

Plaintiff alleges negligence without more than mere speculation. Here the plaintiff's subrogee, Mr. Adams, testified that he had not checked on the generator between the date of the maintenance inspection and the date of the fire. He also stated that after the fire, firemen who had entered through the dining room window near the generator were all over.

Between the time the inspection was made and the time the fire investigator for Peerless investigated the fire scene, there had been two hurricanes, torrential rainfalls, fire hoses with high water pressure, firemen crawling through the window above the generator, and the fire itself. Thus, any observation that the muffler was pointed down at a "slight angle" and covered with mulch is insufficient to submit the case to the jury. There are far too many other possible causes of the unsafe condition, and plaintiff gave no evidence to support the chosen theory that negligent maintenance occurred.

It is well settled that a plaintiff must offer some factual evidence to show that his or her theory is more than mere speculation. *Williamson*, 131 N.C. App. at 369, 507 S.E.2d at 316; *Roumillat*, 331 N.C. at 64, 414 S.E.2d at 343.

With two hurricanes and the torrential rains and winds associated with these weather systems, the fact that Mr. Adams did not inspect the generator between the last maintenance visit and the fire, the exhaust pipe being found post-fire pointed down and close to the mulch surrounding the generator is not circumstantial evidence of defendant's negligent maintenance.

N.C.P.I.—Civ. 101.45 (1985) defines circumstantial evidence as "proof of a chain or group of facts and circumstances pointing to the existence or non-existence of certain facts." The discovery of an exhaust pipe pointed directly at the mulch is not evidence of poor maintenance any more than it is of being displaced due to the force of the storm or the actions of the firemen.

Such speculation cannot support Peerless' request for a trial. Defendant need not provide evidence that it was not responsible for causing the fire. Once defendant produced evidence which showed that the last maintenance inspection was normal, the burden shifted to plaintiff to produce specific evidence, not speculation, that defendant's actions were responsible for the fire. *See Roumillat*, 331 N.C. at 63, 414 S.E.2d at 342.

As plaintiff has not been able to forecast evidence that defendant created the conditions causing the fire, and that any theory is mere speculation, the trial court's entry of summary judgment in favor of defendant is

Affirmed.

Judge BRYANT concurs.

Judge STROUD dissents in a separate opinions.

STROUD, Judge, dissenting.

I believe that the trial court erred by granting summary judgment to the defendant, and I therefore respectfully dissent from the majority opinion.

The majority opinion correctly states that the standard of review for a grant of summary judgment is *de novo*. *See Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 294, 628 S.E.2d 851, 855, *disc. rev. denied*, 361 N.C. 426, 648 S.E.2d 209 (2006). However, in my opinion, the majority opinion has viewed the evidence in a light more favorable to the defendant and drawn inferences from the evidence in defendant's favor, instead of viewing the evidence in the light most favorable to the plaintiff and drawing inferences in favor of the plaintiff, as we are required to do when considering a motion for summary judgment. *See Ballenger v. Crowell*, 38 N.C. App. 50, 53, 247 S.E.2d 287, 290 (1978).

In addition to the facts as stated by the majority opinion, the pleadings, depositions, and other evidence filed regarding the summary judgment motion, viewed in the light most favorable to plaintiff, *Ballenger at* 53, 247 S.E.2d at 290, indicate the following facts: The Adams' home had a natural gas fueled generator to provide back-up electrical power. The Adams had a maintenance agreement with defendant to "inspect, test and adjust" the generator approximately every six months. Defendant's employee Mike Dichristofaro ("Dichristofaro") performed the regular service and inspection of the generator on 9 August 2004. During his deposition Dichristofaro did not recall the specific inspection of the Adams' generator but testified that his usual procedure included, *inter alia*, inspecting "all the way around the generator" for problems and looking at the exhaust pipe for anything unusual. Dichristofaro testified that he has never had to adjust the angle of an exhaust pipe on any generator to have it be at the proper angle of about 45 degrees, not angled directly down into the mulch or landscaping.

The Adams' home lost electrical power at about 10:00 p.m. on 16 September 2004 and the generator began running. The generator ran continuously until the afternoon of 18 September 2004, when a fire started in the area surrounding the generator. David Lowery, of Eyes on Fire Investigative Services, performed an inspection of the scene of the fire. Mr. Lowery determined that the origin of the fire was "the ignition of mulch surrounding and covering over the exhaust pipe for the natural gas generator." He testified that the extension pipe clamped to the exhaust pipe was "turned downward towards the ground" and was about two inches into the mulch at the time of his inspection on 23 September 2004.

Plaintiff also had an inspection of the generator done by John Cavallaro ("Cavallaro") to determine if any generator malfunction

had caused the fire. Cavallaro inspected the generator on 27 September 2004. He noted that the "exhaust pipe was facing downward at an angle of approximately 30 degrees with the horizontal. It was pointing at the ground which was burned from the fire." However, he did not find any indication of a generator malfunction which could have caused the fire.

Plaintiff also had Forensic Engineering Incorporated perform tests to determine the exhaust temperatures of the generator and whether the exhaust could have ignited the mulch surrounding the generator. The testing demonstrated that "operation of the generator under normal household loads and with the tailpiece within a few inches of wood mulch could readily result in mulch ignition and subsequent fire spread."

"Summary judgment is a drastic measure, and it should be used with caution, especially in a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case." *Rone v. Byrd Food Stores, Inc.*, 109 N.C. App. 666, 668, 428 S.E.2d 284, 285 (1993). We must construe all of the evidence "in the light most favorable to the non-moving party. The slightest doubt as to the facts entitles the non-moving party to a trial." *Ballenger*, 38 N.C. App. at 53, 247 S.E.2d at 290. Where there are "[c]onflicting inferences of causation arising from the evidence" the motion for summary judgment should be denied and the case submitted to the jury. *Mills, Inc. v. Terminal, Inc.*, 273 N.C. 519, 529, 160 S.E.2d 735, 743 (1968).

To show a *prima facie* case of negligence, the plaintiff must establish "defendant owed plaintiff a duty of care; defendant's conduct breached that duty; the breach was the actual and proximate cause of plaintiff's injury; and damages resulted from the injury." *Rone*, 109 N.C. App. at 669, 428 S.E.2d at 285. Defendant argues, and the majority opinion agrees, that plaintiff has not offered *any* evidence, beyond speculation, that the generator was defective prior to the fire or that defendant was responsible for the improper position of the exhaust pipe; thus defendant claims that plaintiff has failed to forecast evidence of both defendant's breach of duty and of causation which are required to survive defendant's motion for summary judgment. See *id.*

However, plaintiff has forecast circumstantial evidence to support its claim that the defendant failed to properly inspect or repair the generator or failed to notify or warn the Adams regarding the position of the exhaust pipe. Such evidence, if believed by a jury,

could establish both the breach and causation elements of negligence. Circumstantial evidence can be used to prove negligence. *Howie v. Walsh*, 168 N.C. App. 694, 609 S.E.2d 249 (2005). Negligence can be "inferred from facts and attendant circumstances, and if the facts proved establish the more reasonable probability that the defendant was guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence." *Etheridge v. Etheridge*, 222 N.C. 616, 618, 24 S.E.2d 477, 479 (1943).

Due to the service contract with the Adams, defendant had a duty of care to maintain the generator in a safe condition, including making sure that the exhaust pipe was properly positioned and that mulch was not obstructing the unit. Plaintiff has demonstrated by the depositions and exhibits submitted in opposition to the summary judgment motion that the exhaust pipe of the generator was improperly positioned and that the heat from the exhaust pipe ignited the mulch, thus creating the fire which damaged the home. Viewed in the light most favorable to plaintiff, *Ballenger* at 53, 247 S.E.2d at 290, the evidence does not indicate that the exhaust pipe was actually in the correct position when Dichristofaro inspected it as he could not recall the inspection and testified only to his "ususal procedure."

The exhaust pipe was not loose or easily moved from its position, either before or after the fire. In fact, the evidence is that the pipe was firmly secured in position by a clamp and a U-bolt. One of the inspectors after the fire had to remove the clamp and U-bolt as part of his inspection and noted that the clamp was "secured right against the back cover of the generator." This would indicate that the exhaust pipe had not been moved by rain, wind, fire hoses, or firemen.

The majority opinion discounts the actual and circumstantial evidence and any reasonable inferences from the evidence forecast by plaintiff, and instead stresses inferences in favor of the defendant, mentioning "two hurricanes and the torrential rains and winds associated with these weather systems." However, there is no evidence whatsoever that rain or wind could have changed or did change the position of the exhaust pipe, which was found firmly bolted into position. There was no evidence showing that torrential rain would result in any flow of water which might have moved the mulch around the generator. Indeed, the generator was positioned in such a way that water flow from rain would not interfere with its operation, and there was no evidence of excessive water in that area.

The majority's statement "that Mr. Adams did not inspect the generator between the last maintenance visit and the fire" almost seems to imply contributory negligence, which would certainly be an inappropriate basis for summary judgment for defendant in this case. *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 475, 562 S.E.2d 887, 896 (2002) ("The existence of contributory negligence is ordinarily a question for the jury; such an issue is rarely appropriate for summary judgment, and only where the evidence establishes a plaintiff's negligence so clearly that no other reasonable conclusion may be reached").

It is true, as defendant argues, that a jury may find it more likely that the position of the exhaust pipe was changed after the inspection by Dichristofaro and prior to the fire or that the exhaust pipe was moved after the fire by water from the fire hoses, firemen moving around the generator, or some other cause. It is possible that a jury may find that after the inspection, the mulch somehow covered the exhaust pipe in such a manner that the mulch could be ignited. However, either of these findings would necessarily be based upon inferences from the evidence in favor of defendant. A jury is permitted to make such inferences, but this Court may not make inferences in favor of defendant in considering a grant of summary judgment. *See Ballenger* at 53, 247 S.E.2d at 290. A jury could also find from the evidence that the exhaust pipe was improperly positioned prior to the fire and/or that there was mulch obstructing the exhaust pipe and that defendant's employee should have corrected the condition. As this is a question for the jury, summary judgment was improper.

For these reasons, I dissent, and would reverse the trial court's order granting summary judgment to defendant.

STATE OF NORTH CAROLINA v. RONALD EUGENE PARKER

No. COA07-247

(Filed 6 November 2007)

1. Appeal and Error— appellate rules violations—failure to provide applicable standards of review for assignments of error

Although defendant's brief failed to provide the applicable standards of review for any of his assignments of error as required by N.C. R. App. P. 28(b)(6), the Rules of Appellate pro-

cedure allow for the imposition of less drastic sanctions than dismissal and the Court of Appeals elected to chastise defense counsel with an admonishment to exercise more diligence in stating the standard of review in appellate briefs.

2. Evidence— hearsay—testimony given by witness in course of court proceedings excluded

The trial court did not err in an involuntary manslaughter case by allowing the State, over objection, to ask defendant about portions of testimony given by a previous witness even though defendant contends it was inadmissible hearsay, because: (1) the Advisory Committee's notes to N.C.G.S. § 8C-1, Rule 801 state that testimony given by a witness in the course of court proceedings is excluded from the rule since there is compliance with all the ideal conditions for testifying, and the statements at issue were in reference to an officer's testimony given during the trial; (2) the statements were not offered to prove the truth of the matter asserted, but rather to challenge the credibility of defendant's testimony when compared with the officer's testimony; (3) cross-examination of a witness as to any matter relevant to any issue, including credibility is proper; and (4) even if the trial court's ruling was error, defendant failed to show how the error was prejudicial.

3. Criminal Law— instruction—acting in concert

The trial court did not abuse its discretion in an involuntary manslaughter case by instructing the jury on acting in concert, because: (1) it is not strictly necessary that defendant share the intent or purpose to commit the particular crime actually committed, but instead the focus is on whether there was a common purpose to commit a crime; and (2) there was sufficient evidence from which a reasonable jury could conclude defendant acted in concert with another when defendant was present when the victim received thirty-three of his thirty-six wounds, and witnesses saw defendant strike the victim at least nine times.

4. Homicide— involuntary manslaughter—failure to submit requested instruction for simple assault

The trial court did not err in an involuntary manslaughter case by denying defendant's request for a jury instruction on simple assault, because our Supreme Court has already concluded that an indictment charging that defendant unlawfully, willfully, and feloniously and of malice aforethought did kill and murder a

victim was insufficient to support the submission of assault verdicts to the jury.

5. Homicide— involuntary manslaughter—instruction—plain error analysis

The trial court did not commit plain error by instructing the jury on involuntary manslaughter because: (1) defendant's contention is not supported by any argument in his brief; and (2) defendant failed to show any alleged error was fundamental or so prejudicial that justice could not be done.

Appeal by defendant from judgment entered 11 August 2006 by Judge Edwin Wilson in Davidson County Superior Court. Heard in the Court of Appeals 18 October 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Derrick C. Mertz, for the State.

Jones, Free & Knight, PLLC, by Walter L. Jones, for defendant-appellant.

JACKSON, Judge.

Ronald Eugene Parker ("defendant") appeals from judgment entered upon his conviction for involuntary manslaughter. For the reasons stated below, we hold no error.

On 6 January 2006, Carlos Claros Castro ("Castro") was arrested for the offenses of hit and run and driving while impaired. Castro was transported to the Davidson County Jail. On 7 January 2006, Michael Shell ("Officer Shell"), a detention officer with the Davidson County Sheriff's Office, was working in the jail. There were five officers working after the shift change, including Officer Shell, Sergeant Brandon Huie ("Sergeant Huie"), supervisor for the jail, and defendant, who served as shift supervisor.

Officer Shell's attention was drawn to cell P-33 around 8:30 p.m. The cell housed Castro and Sorrel ("Sorrel"). According to Sorrel, Castro had broken the head off a mop and was refusing to give it back to the cleaning crew. Officer Shell opened the cell door and instructed Sorrel to exit to cell P-34. Sergeant Huie was called to the control tower and advised of the situation. Sergeant Huie picked up a taser, said he would handle the situation, and left the control tower.

Sergeant Huie approached cell P-33 and Officer Shell turned on the intercom. Sergeant Huie positioned himself between the door and the separation wall between the two cells. Sergeant Huie called out to Castro and asked where the mop handle was. Sergeant Huie twice ordered him to give up the mop handle, but Castro did not comply. The order was given in English, which Castro may not have understood. Castro moved forward and started banging the handle around the walls and bars of the cell. Sergeant Huie threatened force, waited a few seconds, and then aimed and activated his taser at Castro's mid-chest. The blast doors opened and the taser cycled for five seconds. This cycle took Castro down to one knee.

At this point, Officer Shell called for backup across the radio but could not find anyone. Castro became agitated again and shattered the mop handle until approximately two feet of the handle remained in his hand. Sergeant Huie applied the taser again for an eight to ten second cycle. Castro again fell down to one knee. Sergeant Huie ordered Officer Shell to open the door. Sergeant Huie then stepped inside the cell briefly, then backed out and shut the door with Castro remaining in the cell. Sergeant Huie discharged a one and a half second burst of pepper spray at Castro. Sergeant Huie then ordered Officer Shell to open the door again. Sergeant Huie entered the cell with his ASP baton extended and struck Castro three times on the back of his thigh.

Sergeant Huie then wrestled with Castro. Approximately two minutes elapsed from the time Huie first struck Castro until defendant arrived with his ASP baton. Defendant entered the cell and held down Castro. Defendant proceeded to strike Castro with his ASP baton and with his hand. Officer Shell witnessed a total of at least twelve strikes; three strikes were by Sergeant Huie and nine by defendant.

Officer Shell was relieved of his duties in the control tower and headed through the jail to cell P-33. When he arrived and entered the cell, Castro was lying on the floor on his stomach, handcuffed, with his head turned to the right facing the wall. Defendant was sitting on Castro's legs while Sergeant Huie was to the side. Officer Shell noticed cyanosis, the bluing of the skin around the ears and corner of Castro's mouth, which indicated Castro's breathing and circulation had stopped. Officer Shell left the cell to retrieve the medical kit from the tower. When Officer Shell returned to the cell it appeared that no CPR or lifesaving measures had been administered to Castro. Upon defendant's order, Castro's body was removed from the cell into the

corridor where Officer Shell attempted CPR. Officer Shell continued CPR attempts until EMS arrived ten to fifteen minutes later. Castro never was resuscitated.

Based upon two autopsies, Castro died as a result of multiple blunt force injuries, four in particular to the head which caused hemorrhaging and cerebral edema, with a contribution of asphyxiation, either by compression of the neck or lungs.

On 11 August 2006, the jury found defendant guilty of involuntary manslaughter. Defendant appeals this judgment.

[1] As a preliminary matter, we note that defendant's brief failed to provide the applicable standards of review for any of his assignments of error. Rule 28(b)(6) of the Rules of Appellate Procedure provides that

> [t]he argument shall contain a concise statement of the applicable standard(s) of review for each question presented, which shall appear either at the beginning of the discussion of each question presented or under a separate heading placed before the beginning of the discussion of all the questions presented.

N.C. R. App. P. 28(b)(6) (2007). Defendant did not indicate the applicable standards of review, either at the beginning of each question presented or under a separate heading. Violation of this rule may result in dismissal. *See State v. Summers*, 177 N.C. App. 691, 700, 629 S.E.2d 902, 908-09 (declining to address one of the defendant's arguments when he failed to include a statement of the applicable standard of review), *appeal dismissed and disc. rev. denied*, 360 N.C. 653, 637 S.E.2d 192 (2006). We also note that our Rules of Appellate Procedure allow for the imposition of less drastic sanctions, *see*, *e.g.*, *Caldwell v. Branch*, 181 N.C. App. 107, 110-11, 638 S.E.2d 552, 555 (2007) (taxing printing costs), a remedy which is particularly appropriate in a criminal matter. Therefore, we elect to chastise defense counsel with an admonishment to exercise more diligence in stating the standard of review in briefs prepared for this Court.

[2] Defendant first contends on appeal that the trial court erred by allowing the State, over objection, to ask him about portions of testimony given by a previous witness. We disagree.

At trial, defendant objected to questions posed by the State regarding Officer Shell's testimony. Defendant argues that this line of questioning was inadmissible hearsay, irrelevant, and prejudicial. Specifically, the following colloquies are at issue:

Q: Did you hear Mr. Shell testify that Mr. Shell—the gentlemen halfway back—found that mop head underneath the bunk?

[DEFENSE COUNSEL]: Objection to what Mr. Shell testified to.

Q: Did you hear that testimony.

[DEFENSE COUNSEL]: Object.

THE COURT: Overruled.

Q: Did you hear that testimony, sir?

A: I cannot totally remember what Mr. Shell had said with everyone else that has answered questions during the proceedings of this.

A few moments later a similar colloquy took place:

Q: You heard Mr. Shell testify to that fact that you remained in that position seated on Mr. Castro the entire time that Mr. Shell was initially in that cell, correct, you heard testimony—did you hear him testify to that?

[DEFENSE COUNSEL]: Objection to what somebody else testified to, your Honor.

THE COURT: Overruled.

Q: Did you hear him testify to that?

A: Yes, sir, I did.

One final similar colloquy took place:

Q: You heard Mr. Shell testify in this matter that when he arrived Mr. Castro was face down, head toward the jail door, facing the wall on the left side, if you would be looking into the jail, you heard that testimony?

[DEFENSE COUNSEL]: Objection to what another witness testified to, your Honor.

THE COURT: Well, overruled.

Rule 801(c) of the North Carolina Rules of Evidence 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." N.C. Gen. Stat. § 8C-1, Rule 801(c)

(2005). The Advisory Committee's notes to Rule 801 state that "[t]estimony given by a witness in the course of court proceedings is excluded [from the Rule] since there is compliance with all the ideal conditions for testifying." N.C. Gen. Stat. § 8C-1, Rule 801 cmt. (2005). Because the statements at issue were in reference to Officer Shell's testimony given *during* the trial, they do not constitute hearsay.

Moreover, the statements were not offered to prove the truth of the matter asserted, but rather to challenge the credibility of defendant's testimony when compared with Officer Shell's testimony. "A prosecutor has the duty to vigorously present the State's case. In so doing, the prosecutor may cross-examine a witness concerning any relevant issue, including the witness' credibility." *State v. Prevatte*, 356 N.C 178, 237, 570 S.E.2d 440, 472 (2002) (citing *State v. Brock*, 305 N.C. 532, 538, 290 S.E.2d 566, 571 (1982), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003) ; N.C. Gen. Stat. § 8C-1, Rule 611(b) (2001)). Because the statements were introduced for this purpose, they were relevant. *See* N.C. Gen. Stat. § 8C-1, Rules 401 and 402 (2005). It is well-established that "[c]ross-examination of a witness as to any matter relevant to any issue, including credibility, is proper." *State v. Lee*, 335 N.C. 244, 271, 439 S.E.2d 547, 560, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994); N.C. Gen. Stat. § 8C-1, Rule 611(b) (2005). Therefore, the trial court did not err in permitting this line of questioning.

Even if we could agree that the trial court's ruling was in error, defendant would have to show that this error was prejudicial. The test for prejudicial error in matters not affecting constitutional rights is whether "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2005). "The burden of showing such prejudice under this subsection is upon the defendant." *Id.* Defendant claims he was prejudiced by the introduction of these statements but does not explain how he was prejudiced. Therefore, defendant's argument is overruled.

[3] Defendant next contends that the trial court erred by instructing the jury on the legal theory of acting in concert. We disagree.

The choice of jury instructions rests "within the trial court's discretion and will not be overturned absent a showing of abuse of discretion." *State v. Nicholson*, 355 N.C. 1, 66, 558 S.E.2d 109, 152 (citation omitted), *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002). A

trial court abuses its discretion when its ruling is "so arbitrary that it could not have been the result of a reasoned decision." *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985).

The trial court gave an instruction for acting in concert as to second degree murder, voluntary manslaughter, and involuntary manslaughter. It is well-established that if

> two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof.

State v. Barnes, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997) (alteration in original) (citations omitted), *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998). Defendant contends that the trial court improperly applied the principle of concerted action because Sergeant Huie and defendant did not have a common plan or purpose.

Defendant argues that his rationale during the "affray" was to aid an officer in need of emergency assistance. Although this may be true, "it is not strictly necessary . . . that the defendant share the intent or purpose to commit the particular crime actually committed." *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991). Instead, it is whether there was a "common purpose to commit *a* crime." *Id.* (emphasis in original).

In the instant case, there was sufficient evidence from which a reasonable jury could conclude that defendant acted in concert with Sergeant Huie. Defendant was present when the victim received thirty-three of his thirty-six wounds, and witnesses saw defendant strike the victim at least nine times. Therefore, the trial court did not abuse its discretion in instructing the jury on acting in concert.[1]

[4] By his next assignment of error, defendant contends that the trial court erred in denying his request for a jury instruction on simple assault. We disagree.

Defendant was charged in this case by a "short-form" murder indictment, which alleged that he "unlawfully, willfully and feloniously did of malice aforethought kill and murder Carlos Claros

1. Defendant's rationale at the time of the "affray" is pertinent to an instruction on self-defense, which defendant received.

Castro." In *State v. Whiteside*, 325 N.C. 389, 383 S.E.2d 911 (1989), our Supreme Court held that an indictment charging "that defendant 'unlawfully, willfully and feloniously and of malice aforethought did kill and murder the victim' [was] insufficient to support a verdict of guilty of assault, assault inflicting serious injury or assault with intent to kill." *Id.* at 403, 383 S.E.2d at 919. Because the indictment in *Whiteside* would not support an assault verdict, our Supreme Court held that "the trial judge did not err in refusing to submit potential assault verdicts to the jury." *Id.* at 403-04, 383 S.E.2d at 919. Similarly, because the indictment in the instant case is indistinguishable from the indictment at issue in *Whiteside*, we reject this argument and hold that the trial court did not err.

[5] In defendant's final assignment of error, he contends that the trial court committed plain error by instructing the jury on involuntary manslaughter. We disagree.

Defendant did not object to this instruction before the trial court and ordinarily could not assign this as error. *See* N.C. R. App. P. 10(b)(2) (2007). However, because defendant argues plain error, we may review the merits of his argument despite his failure to properly preserve this issue for appeal. *See* N.C. R. App. P. 10(c)(4) (2007).

Defendant's contention that the jury instruction for involuntary manslaughter amounted to plain error is not supported by any argument in his brief.

> The right and requirement to specifically and distinctly contend an error amounts to plain error does not obviate the requirement that a party provide argument supporting the contention that the trial court's instruction amounted to plain error, as required by subsections (a) and (b)(5) of [North Carolina] Rule [of Appellate Procedure] 28.

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). Moreover, to demonstrate that plain error has occurred, defendant must show that the error was a " '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)) (emphasis in original). Defendant provides no argument demonstrating that this occurred. Therefore, we hold no error in giving this instruction.

For the foregoing reasons, we hold that defendant received a fair trial free from prejudicial error.

No Error.

Judges TYSON and STROUD concur.

STATE OF NORTH CAROLINA v. JAMES EARL THOMAS

No. COA07-60

(Filed 6 November 2007)

1. Constitutional Law— right to representation free from conflict—denial of counsel's motion to withdraw

The trial court did not err in a first-degree rape case by denying defense counsel's motion to withdraw, because: (1) although defense counsel had represented a State's witness three years prior to defendant's trial and was no longer representing him, there was no concurrent conflict of interest; (2) defense counsel had no recollection of the specifics of the witness's case aside from the bare fact that the witness had been convicted on assault charges; and (3) the transcript revealed that defense counsel made significant inroads to undermine the witness's credibility.

2. Rape— first-degree rape—failure to instruct on lesser-included charge of attempted first-degree rape—penetration

The trial court did not commit plain error in a first-degree rape case by failing to instruct, upon its own motion, on the lesser-included charge of attempted first-degree rape, because: (1) although defendant presented evidence that the victim's genitals showed no evidence of trauma, an expert witness also testified that lack of trauma does not indicate lack of penetration and the entering of the vulva or labia is sufficient for penetration; (2) instructions on the lesser-included offenses of first-degree rape are warranted only when there is some doubt or conflict concerning the crucial element of penetration, and merely presenting evidence that no trauma occurred to the victim was not sufficient to establish a conflict of evidence as to penetration; and (3) although defendant relies on the victim's testimony that "defendant tried to make me have sex with [him]" as evidence permitting

a jury to draw a conflicting inference as to penetration, the testimony did not create doubt as to whether penetration actually occurred and was in fact consistent with penetration occurring.

3. Constitutional Law— effective assistance of counsel—failure to show prejudice from lack of request for recording—exclusions from mandatory recording

Defendant did not receive ineffective assistance of counsel in a first-degree rape case based on defense counsel's failure to request recordation of opening/closing arguments, jury selection, and rulings from the trial court on matters of law, because: (1) defendant acknowledges he cannot show prejudice as to this issue and has made the argument for preservation purposes only; (2) no request for these recordings, that are excluded from mandatory recording, was made as required by N.C.G.S. § 15A-1241(b); (3) our Supreme Court has held that a defendant cannot establish ineffective assistance of counsel for failure to request recordation of the jury selection and bench conferences where no specific allegations of error were made and no attempts were made to reconstruct the transcript; and (4) the Court of Appeals has held that a defendant cannot establish prejudice as a result of defense counsel's failure to request recordation of those items specifically exempted from the recording statute.

Appeal by defendant from judgment entered 30 August 2006 by Judge James F. Ammons, Jr. in Harnett County Superior Court. Heard in the Court of Appeals 11 September 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Chris Z. Sinha, for the State.

M. Alexander Charns for defendant-appellant.

HUNTER, Judge.

James Earl Thomas ("defendant") appeals from a judgment entered 30 August 2006 pursuant to a jury verdict finding him guilty of first degree rape in violation of N.C. Gen. Stat. § 14-27.2(a)(1) (2005). Defendant was sentenced to a minimum of 384 months' and a maximum of 470 months' imprisonment. After careful consideration, we find that defendant's trial was free from error.

The State presented evidence that tended to show that the victim, referred to as "BH" in this opinion, was spending the night at a

friend's house. BH was sleeping on the floor next to her friend, TD, when defendant, who is TD's stepfather, entered the room. BH testified that after defendant entered the room, he dragged her to the door, took off her clothes, and "put his stuff into" hers. BH told defendant to stop. The only other person in the house was TD, and BH called to her, but TD did not wake up. After defendant left, BH testified that she was bleeding from her vagina.

Approximately one month later, BH told her mother about the incident. Her mother called the police. Deputy S.M. Currin testified that BH told him that defendant "tried to make me have sex with [him]." He also stated that BH told him that defendant "was having sex with me when I didn't want to."

Dr. Vivian D. Everett examined BH and found nothing during that physical examination that would indicate that BH had been sexually abused. Dr. Everett also testified that, based on her examination of BH, a single act of intercourse could have occurred.

Defendant's expert, Dr. Christopher Chao, had reviewed BH's medical records and testified that there was no evidence of trauma or injury to BH's genitals. Dr. Chao testified that if the trauma had occurred two months earlier, there would be no evidence of that trauma, and lack of trauma did not indicate lack of penetration.

Vincent Harris ("Harris" or "witness Harris") also testified at trial. Three years before the trial, defendant's counsel had represented Harris in an unrelated matter. At the time of the trial, Harris was in jail on a charge of breaking and entering and had been indicted as an habitual felon. According to Harris, defendant told him that he had dragged BH out of the bedroom, pulled her pants down, and had sex with her. Harris also said that defendant admitted to there being blood on the floor where the incident occurred and that defendant cleaned up afterward. Defendant did not testify.

Defendant presents the following issues for this Court's review: (1) whether the trial court erred in denying defense counsel's motion to withdraw; (2) whether the trial court committed plain error by not instructing the jury on the lesser charge of attempted first degree rape; and (3) whether defendant's trial counsel was inadequate by not making certain requests, thereby depriving defendant of a full and adequate appeal of trial errors.

I.

[1] Defendant's trial attorney filed a motion to withdraw as counsel because the State intended to call as a witness against defendant one of the attorney's former clients, Harris. The attorney had represented Harris three years earlier in an unrelated matter. The trial court conducted an inquiry and made a ruling to deny this motion. Thus, defendant's argument that the denial of his counsel's motion to withdraw was made without a hearing is rejected. Defendant also argues that the ruling denied his right to counsel. We disagree.

"An accused's right to counsel in a criminal prosecution is guaranteed by the Sixth Amendment of the United States Constitution and is applicable to the states through the Fourteenth Amendment, Sections 19 and 23 of the North Carolina Constitution." *State v. Shores*, 102 N.C. App. 473, 474, 402 S.E.2d 162, 163 (1991). It thus follows that defendants in criminal cases have "a constitutional right to effective assistance of counsel." *State v. Bruton*, 344 N.C. 381, 391, 474 S.E.2d 336, 343 (1996) (citing *Strickland v. Washington*, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 692 (1984); *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985)). Included within that right is the " 'right to representation that is free from conflicts of interest.' " *Id.* (quoting *Wood v. Georgia*, 450 U.S. 261, 271, 67 L. Ed. 2d 220, 230 (1981)).

When, as in this case, a trial court is made aware of a potential conflict of interest, it must hold a hearing " ' "to determine whether there exists such a conflict of interest that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the [S]ixth Amendment." ' " *State v. Mims*, 180 N.C. App. 403, 409, 637 S.E.2d 244, 248 (2006) (citations omitted in original) (failure to hold a hearing after being made aware of it is reversible error). Here, the trial court held such a hearing. While hearings are required, "[t]he trial court must be given substantial latitude in granting or denying a motion for attorney disqualification." *Shores*, 102 N.C. App. at 475, 402 S.E.2d at 163.

In the instant case, we hold that defendant was not prevented from receiving the quality of representation guaranteed by the Sixth Amendment. Here, there was no concurrent conflict of interest. Defense counsel had represented witness Harris three years prior to defendant's trial and was no longer representing him. *See* Rev. R. Prof. Conduct N.C. St. B. 1.7(a), 2007 Ann. R. N.C. 746 (stating that "a

lawyer shall not represent a client if the representation involves a concurrent conflict of interest") (cited with approval by *Mims*, 180 N.C. App. at 411, 637 S.E.2d at 249). Moreover, defense counsel had no recollection as to specifics of witness Harris's case aside from the bare fact that witness Harris had been convicted on assault charges. Indeed, defense counsel told the trial court that she would review witness Harris's file, which she had in her office, to see if she could use any information in that file to help her current client.[1] That statement establishes that defense counsel was committed to her current client's case and would not hesitate to use any information at her disposal to aid defendant.

Although defense counsel's cross-examination as to witness Harris's past convictions may not have been as robust as it could have been,[2] the transcript reveals that defense counsel did make significant inroads to undermine witness Harris's credibility. She asked him about the fight defendant had with witness Harris in jail, in which witness Harris was knocked unconscious; how after that incident, witness Harris decided to cooperate with the police; and about what witness Harris expected to receive in terms of a deal on his own pending felony charges for informing on defendant. Accordingly, we hold that defendant's Sixth Amendment rights under the United States Constitution and his rights under Sections 19 and 23 of the North Carolina Constitution were not violated. Defendant's assignments of error as to this issue are rejected.

II.

[2] Defendant next argues that the trial erred by not instructing the jury, upon its own motion, on attempted first degree rape. We disagree.

"Instructions on the lesser included offenses of first degree rape are warranted only when there is some doubt or conflict concerning the crucial element of penetration." *State v. Wright*, 304 N.C. 349, 353,

1. As stated earlier, the trial court barred defense counsel from reviewing those files.

2. When defense counsel asked about witness Harris's prior criminal record, the following exchange took place:

> A I have not the slightest idea.
>
> Q It's a lot, isn't it?
>
> A It occurred much.
>
> [Defense Attorney]: Your Honor, that's all.

283 S.E.2d 502, 505 (1981). In *Wright*, our Supreme Court held that where there was only conflict as to how the penetration occurred (whether defendant inserted his penis or whether the victim assisted him), an instruction on attempted rape was not warranted. *Id.* at 355, 283 S.E.2d at 505-06. Similarly, in *State v. Davis*, 291 N.C. 1, 229 S.E.2d 285 (1976), our Supreme Court held that submitting the charge of second degree attempted rape would have been inappropriate because all the evidence in that case tended "to show a completed act of intercourse and the only issue [was] whether the act was with the prosecuting witness's consent or by force and against her will[.]" *Id.* at 13, 229 S.E.2d at 293.

Instructions on attempted rape have been required where there is conflicting evidence as to penetration or when, from the evidence presented, the jury may draw conflicting inferences. *State v. Johnson*, 317 N.C. 417, 436, 347 S.E.2d 7, 18 (1986), *superseded by statute as stated in*, *State v. Moore*, 335 N.C. 567, 440 S.E.2d 797 (1994). In *Johnson*, the victim testified that penetration had occurred. *Id.* On cross-examination, however, the victim "testified that on the morning she was raped, she gave to the police a written statement in which she said, regarding the assailant's first attack, that the man 'tried to push it in but couldn't' and that '[h]e tried for maybe fifteen seconds.' " *Id.* As to the second attack, the victim told the police that " 'he tried to penetrate me again' and '[h]e told me to put it in, and I said "I have." He tried to get it in but couldn't.' " *Id.*

In addition to that testimony, her treating physician testified that the victim had told him that "she 'felt pressure but not penetration' and she was uncertain whether there had been penetration or not." *Id.* Our Supreme Court held that "[t]his evidence creates a conflict as to whether penetration occurred which should have been resolved by the jury under appropriate instructions [on attempt]." *Id.* The error was reversible because, according to the *Johnson* Court, the fact that "the jury convicted defendant of first degree rape which required it to find penetration does not render the error harmless." *Id.* at 436-37, 347 S.E.2d at 18-19.

In the instant case, defendant relies on BH's testimony that "[defendant] tried to make me have sex with [him,]" as evidence permitting a jury to draw a conflicting inference as to penetration. Defendant also relies on the lack of medical evidence of penetration in making this argument. We disagree that this evidence created a conflict that would necessitate an instruction on first degree attempted rape.

The crucial element in establishing first degree rape is that there was some penetration. *Wright*, 304 N.C. at 353, 283 S.E.2d at 505. Although defendant presented evidence that BH's genitals showed no evidence of trauma, the expert witness also testified that lack of trauma does not indicate lack of penetration. Moreover, penetration does not require " 'that the vagina be entered or that the hymen be ruptured. The entering of the vulva or labia is sufficient.' " *State v. Fletcher*, 322 N.C. 415, 424, 368 S.E.2d 633, 638 (1988). The State put on evidence from BH that defendant had inserted his penis into her vagina, which was corroborated by Deputy Currin who confirmed that BH had told him that defendant inserted his penis into her vagina, as well as evidence from Harris, who testified that defendant told him that he had sex with BH. Merely presenting evidence that no trauma occurred to BH is not sufficient to establish a conflict of evidence as to penetration.

We find defendant's additional argument that BH's testimony that defendant "tried to . . . have sex" with her equally unpersuasive. At the outset, this evidence falls far short of the standard set in *Johnson* where the alleged victim told both the police and her doctor that no penetration had occurred. Moreover, the testimony does not create doubt as to whether the penetration actually occurred. The statement is consistent with penetration occurring as, according to BH's testimony, defendant did try to penetrate her and eventually was able to do so. Accordingly, defendant's arguments as to this issue are rejected.

III.

[3] Defendant next argues that he received ineffective assistance of counsel because his trial counsel did not request recordation of opening/closing arguments, jury selection, and rulings from the trial court on matters of law. Defendant acknowledges that he cannot show prejudice as to this issue and has made the argument for preservation purposes only.

"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). Deficient performance may be shown by establishing "that 'counsel's representation "fell below an objective standard of reasonableness." ' " *Id.* (citations omitted). In order " 'to establish prejudice, a "defendant must show that there is a reasonable proba-

bility 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.* (citations omitted).

N.C. Gen. Stat. § 15A-1241(a) (2005) excludes from mandatory recording: "(1) [s]election of the jury in noncapital cases; (2) [o]pening statements and final arguments of counsel to the jury; and (3) [a]rguments of counsel on questions of law." Under subsection (b) of that statute, all of the above may be recorded upon request of any party. N.C. Gen. Stat. § 15A-1241(b). In the instant case, no such request was made.

In *State v. Hardison*, 326 N.C. 646, 661-62, 392 S.E.2d 364, 373 (1990), our Supreme Court held that a defendant cannot establish ineffective assistance of counsel for failure to request recordation of the jury selection and bench conferences where no specific allegations of error were made and no attempts were made to reconstruct the transcript. Moreover, this Court has held that a defendant cannot establish prejudice as a result of defense counsel's failure to request recordation of those items specifically exempted from the recording statute. *State v. Price*, 170 N.C. App. 57, 67, 611 S.E.2d 891, 898 (2005). Thus, defendant is unable to establish ineffective assistance of counsel or any prejudice as a result of failure to record. Accordingly, his assignment of error as to this issue is rejected.

IV.

In summary, we hold that the trial court did not err in denying defense counsel's motion to withdraw. We also find that the trial court did not err when instructing the jury. Finally, defendant cannot establish ineffective assistance of counsel by trial counsel for not requesting recordation of the complete trial proceedings. Defendant's trial was free from error.

No error.

Judges WYNN and JACKSON concur.

HOSPICE & PALLIATIVE CARE CHARLOTTE REGION, PETITIONER v. N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION AND N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, LICENSURE AND CERTIFICATION SECTION, RESPONDENTS, AND LIBERTY HOME CARE II, LLC, RESPONDENT-INTERVENOR

No. COA07-302

(Filed 6 November 2007)

1. Hospitals and Other Medical Facilities— hospice—certificate of need—"No Review" letter an issuance of an exemption

Respondent DHHS did not err in a case regarding a request to open a hospice branch office in Mecklenburg County by concluding this case was governed by N.C.G.S. § 131E-188 based on the fact that the Certificate of Need (CON) Section's December 6, 2005 "No Review" determination was an exemption, because: (1) the Court of Appeals has recently held that the CON Section's issuance of a "No Review" letter was the issuance of an exemption for purposes of N.C.G.S. § 131E-188; and (2) a subsequent panel of the same court is bound by that precedent unless it has been overturned by a higher court.

2. Collateral Estoppel and Res Judicata— motion to dismiss—motion for judgment on pleadings

Respondent DHHS did not err by denying intervenor Liberty's motions to dismiss and for judgment on the pleadings based on collateral estoppel in a case requesting the opening of a hospice branch office in Mecklenburg County, because: (1) although intervenor asserts petitioner's failure to appeal the ALJ's dismissal estops it from relitigating the issues before the Court of Appeals, the statement relied upon by intervenor in the 14 December 2005 final decision is not a decision regarding the ultimate legal validity of the CON Section's 6 December 2005 "No Review" letter or the Licensure Section's 7 December 2005 license issuance; and (2) the issues of the validity of the 26 May 2005 "No Review" letter and the 6 June 2005 issuance of the license were not actually litigated and were rendered moot by the December 2005 "No Review" letter and license under review in the instant case.

3. Hospitals and Other Medical Facilities— hospice—certificate of need required

Respondent DHHS did not err by denying intervenor Liberty's motion for summary judgment even though intervenor contends the Certificate of Need (CON) law in effect at the relevant time did not require intervenor to obtain a CON for its hospice branch office in Mecklenburg County and that petitioner failed to allege, establish, or forecast any evidence that agency action substantially prejudiced petitioner's rights, because: (1) any person seeking to construct, develop, or otherwise establish a hospice must first obtain a CON from DHHS; (2) although intervenor holds a CON for its hospice located in Hoke County, its proposed hospice branch office was not located within its current service area and was a new institutional health service for which a CON is required; and (3) 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 preexisting competing health service provider as a matter of law.

Appeal by respondent-intervenor from final agency decision entered 8 December 2006 by Director Robert J. Fitzgerald for the North Carolina Department of Health and Human Services, Division of Facility Services. Heard in the Court of Appeals 18 October 2007.

Nelson Mullins Riley & Scarborough LLP, by Wallace C. Hollowell, III, and Noah H. Huffstetler, III, for petitioner-appellee.

Attorney General Roy Cooper, by Assistant Attorney General June S. Ferrell, for respondents-appellees.

Wyrick Robbins Yates & Ponton, LLP, by K. Edward Greene, Lee M. Whitman, and Sarah M. Johnson, for respondent-intervenor-appellant.

Bode, Call & Stroupe, L.L.P., by S. Todd Hemphill, Diana Evans Ricketts, and Matthew A. Fisher, for amicus curiae Community CarePartners, Inc.

Johnston, Allison & Hord, P.A., by Patrick E. Kelly and Jennifer McKay Patterson, for amicus curiae The Carolinas Center for Hospice and End of Life Care.

TYSON, Judge.

Liberty Home Care II, LLC ("Liberty") appeals from the final agency decision entered granting summary judgment in favor of Hospice & Palliative Care Charlotte Region ("Charlotte Hospice"). We affirm.

I. Background

Liberty is a hospice agency with its principal office located in Hoke County, North Carolina. Liberty was issued a Certificate of Need ("CON") in 2002 to develop its Hoke County Hospice Program. On 20 May 2005, Liberty requested a "No Review" determination from the North Carolina Department of Health and Human Services ("DHHS"), Certificate of Need Section ("CON Section") for a proposed hospice branch office in Mecklenburg County. Liberty stated that a Mecklenburg County resident was being served by its Hoke County Hospice and it desired to open a hospice branch office in Mecklenburg County.

On 26 May 2005, the CON Section issued a "No Review" determination, stating no CON approval was required for Liberty's proposal. On or about 2 June 2005, Liberty applied for a license for the Mecklenburg Hospice Branch Office. The DHHS Acute and Home Care Licensure and Certification Section ("Licensure Section") issued a license to Liberty to open the Mecklenburg County branch office effective 6 June 2005.

On 19 July 2005, Charlotte Hospice filed a petition for a contested case hearing. Liberty was permitted to intervene. Liberty continued to develop its Mecklenburg County hospice by recruiting and hiring new staff while Charlotte Hospice's petition for hearing was pending. On 2 December 2005, Liberty requested another "No Review" determination for a hospice branch office to be located in Mecklenburg County, based upon "new facts and a new admission of a hospice patient."

On 6 December 2005, the CON Section issued a "No Review" letter, stating that Liberty's proposal did not require a CON based upon current law. Liberty applied for a license for the Mecklenburg hospice branch office, requesting that upon issuance of the license, the Licensure Section cancel its 6 June 2005 license. The Licensure Section issued a license to Liberty, effective 7 December 2005, for the Mecklenburg branch office and terminated the previously issued

license. Charlotte Hospice's pending petition for a contested case hearing was dismissed as moot.

On 5 January 2006, Charlotte Hospice filed another petition for a contested case hearing and Liberty was again permitted to intervene. On 28 September 2006, an Administrative Law Judge ("ALJ") granted Charlotte Hospice's summary judgment motion, and denied Liberty's cross-motion for summary judgment, motion to dismiss, and motion for judgment on pleadings.

On 8 December 2006, a Final Agency Decision was issued which: (1) upheld summary judgment in favor of Charlotte Hospice; (2) denied Liberty's cross-motion for summary judgment; (3) denied Liberty's motion to dismiss and motion for judgment on pleadings; (4) directed Liberty to apply for and obtain a CON before developing or opening a hospice office in Mecklenburg County; (5) directed that after Liberty obtains any CON, Liberty must submit a complete licensure application to the Licensure Section before it may operate a hospice in Mecklenburg County; (6) directed the CON Section to withdraw the 6 December 2005, "No Review" determination; (7) directed the Licensure Section to declare the 7 December 2005 license issued to Liberty invalid; and (8) directed the CON Section to inform Liberty to cease and desist from operating a hospice in Mecklenburg County until it obtains a CON and License. Liberty appeals.

II. Issues

Liberty argues DHHS erred by: (1) finding that N.C. Gen. Stat. § 131E-188 governs this case; (2) denying its motion to dismiss and for judgment on the pleadings; and (3) denying its motion for summary judgment.

Charlotte Hospice cross-assigns error to DHHS's failure to adopt the ALJ's definition of "service area," as a single county pursuant to the 2005 State Medical Facilities Plan.

III. Standard of Review

The appropriate standard of review in this case depends upon the issue being reviewed. This Court has stated:

> The proper standard of review by the trial court depends upon the particular issues presented by the appeal. If appellant argues the agency's decision was based on an error of law, then *de novo* review is required. If appellant questions whether the agency's

> decision was supported by the evidence or whether it was arbitrary or capricious, then the reviewing court must apply the whole record test.
>
> The reviewing court must determine whether the evidence is substantial to justify the agency's decision. A reviewing court may not substitute its judgment for the agency's, even if a different conclusion may result under a whole record review.
>
> As to appellate review of a superior court order regarding an agency decision, the appellate court examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly. As distinguished from the any competent evidence test and a *de novo* review, the whole record test gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence.

Carillon Assisted Living, LLC v. N.C. Dep't of Health & Human Servs., 175 N.C. App. 265, 269-70, 623 S.E.2d 629, 633 (2006) (internal citations and quotations omitted).

IV. N.C. Gen. Stat. § 131E-188

[1] Liberty argues DHHS erred when it concluded this case is "governed by N.C. Gen. Stat. § 131E-188 because the C[ON] Section's December 6, 2005 ['N]o [R]eview[']determination is an 'exemption' as that term is used in the C[ON] Law." We disagree.

This Court has recently held that "the CON [S]ection's issuance of a 'No Review' letter is the issuance of an 'exemption' for purposes of section 131E-188(a)." *Hospice at Greensboro, Inc. v. N.C. Dep't of Health & Human Servs.*, 185 N.C. App. 1, 7, 647 S.E.2d 651, 655 (2007). "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

N.C. Gen. Stat. § 131E-188(b) confers jurisdiction on this Court to hear Liberty's appeal pursuant to this Court's prior holding in *Hospice at Greensboro, Inc.* 185 N.C. App. at 7, 647 S.E.2d at 655-56. This assignment of error is overruled.

V. Motion to Dismiss and for Judgment on the Pleadings

[2] Liberty argues that: (1) "[t]he issues in this case were previously decided in the first contested case and are therefore barred by the doctrine of collateral estoppel;" and (2) "[DHHS] erred by not granting [its] Motion to Dismiss pursuant to Rule 12(b)(6) and for Judgment on the Pleadings under Rule 12(c)." We disagree.

"Under collateral estoppel as traditionally applied, a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies." *Thomas M. McInnis & Associates, Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986).

In a Final Decision Order of Dismissal dated 14 December 2005, the ALJ *dismissed as moot* Charlotte Hospice's petition for a contested case hearing regarding the CON Section's 26 May 2005 "No Review" determination. The ALJ found that "Liberty is no longer relying on the [26 May 2005] ['N]o [R]eview[']' letter . . . and the . . . license issued . . . in connection with that ['N]o [R]eview[']' letter." The ALJ held that "[a]ny determination made . . . regarding the validity of the [26 May 2005] '[N]o [R]eview' letter at issue in this case is moot . . . ."

The ALJ specifically found "Liberty is permitted to operate a branch office of the Hoke Hospice in Mecklenburg County pursuant to the new ['N]o [R]eview[']' letter and new license Liberty received on December 6 and 7, 2005[]" in its order dismissing as moot Charlotte Hospice's original petition for a contested case hearing on the 26 May 2005 "No Review" letter and 6 June 2005 license. Liberty asserts that Charlotte Hospice's failure to appeal the ALJ's dismissal estops it from relitigating the issues before us. We disagree.

The statement relied upon by Liberty in the 14 December 2005 final decision is not a decision regarding the ultimate legal validity of the CON Section's 6 December 2005 "No Review" letter or the Licensure Section's 7 December 2005 license issuance. This statement is merely an acknowledgment of the fact that Liberty received a wholly new hospice license based on a new 6 December 2005 "No Review" determination. The issues of the validity of the 26 May 2005 "No Review" letter and the 6 June 2005 issuance of the license were not "actually litigated" and were rendered moot by the December

2005 "No Review" letter and license under review here. *Id.* DHHS did not err by denying Liberty's motion to dismiss and for judgment on the pleadings. This assignment of error is overruled.

VI. Summary Judgment

[3] Liberty argues DHHS erred by "den[ying] [its] motion for Summary Judgment because the CON law [in effect] at the relevant time did not require that Liberty obtain a CON for its hospice branch office in Mecklenburg County" and that "Charlotte Hospice failed to allege, establish or forecast any evidence that agency action substantially prejudiced Charlotte Hospice's rights." We disagree.

"[A]ny person seeking to construct, develop, or otherwise establish a hospice must first obtain a CON from DHHS." *Hospice at Greensboro, Inc.*, 185 N.C. App. at 10, 647 S.E.2d at 657. "[T]he 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." *Id.* at 10, 647 S.E.2d at 658. "Service area means the hospice planning area in which the hospice is located." *Id.* at 12-13, 647 S.E.2d at 659 (quotation omitted). Liberty holds a CON for its hospice located in Hoke County. Liberty's planning and service area as defined by the State Medical Facilities Plan is Hoke County.

Liberty's proposed hospice branch office in Mecklenburg County is not located within its current Hoke County service area. Liberty's proposed Mecklenburg County office is a "new institutional health service" for which it is required to obtain a CON.

"[T]he issuance of a '[n]o [r]eview' letter, which results in the establishment of 'a new institutional health service' without a prior determination of need, substantially prejudices a licensed, preexisting competing health service provider as a matter of law." *Id.* at 16, 647 S.E.2d at 661.

> [T]he 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 [Charlotte Hospice's] service area without a prior determination of need was prejudicial as a matter of law.

Id. at 16-17, 647 S.E.2d at 661-62. We hold DHHS did not err by denying Liberty's motion for summary judgment. This assignment of error is overruled. In light of the above holdings, it is unnecessary for us and we do not reach Charlotte Hospice's cross-assignment of error.

VII. Conclusion

The CON Section's issuance of a "No Review" letter is the issuance of an "exemption" under N.C. Gen. Stat. § 131E-188(a). This Court has jurisdiction to hear Liberty's appeal pursuant to N.C. Gen. Stat. § 131E-188(b). *Id.* at 7, 647 S.E.2d at 655. DHHS did not err by denying Liberty's motion to dismiss and for judgment on the pleadings. The issues in Charlotte Hospice's 5 January 2006 petition for contested case hearing were not previously litigated on the merits. *Thomas M. McInnis & Associates*, 318 N.C. at 428, 349 S.E.2d at 556.

Liberty's proposed Mecklenburg County office is not located within its current Hoke County planning and service area. The agency correctly found that Liberty must obtain a CON and license for its Mecklenburg County office. Charlotte Hospice was substantially prejudiced based on the issuance of a "No Review" letter to Liberty, which resulted in the establishment and licensure of "a new institutional health service" without a prior determination of need. *Hospice at Greensboro, Inc.*, 185 N.C. App. at 17-18, 647 S.E.2d at 661. DHHS's final agency decision is affirmed.

Affirmed.

Judges McCULLOUGH and STROUD concur.

GURPREET KAUR WRIGHT, Plaintiff v. JAMES CLARENCE MURRAY, Defendant

No. COA07-100

(Filed 6 November 2007)

Costs— attorney fees—negligence—*Washington* factors—credibility

The trial court did not abuse its discretion in a negligence case arising out of an automobile accident by ordering defendant to pay $25,000 in attorney fees under N.C.G.S. § 6-21.1 following a jury award of $7,000 to plaintiff, because: (1) the trial court's

order contains explicit findings of the majority of the factors in *Washington v. Horton*, 132 N.C. App. 347 (1999), including the lack of settlement offers prior to the filing of plaintiff's claim, offer of judgment made under N.C.G.S. § 1A-1, Rule 68, and amounts of settlement offers relative to the jury's verdict; (2) the trial court stated the order was based on a review of the entire record, the court's first-hand acquaintance with the evidence presented, the observation of the parties, the witnesses, the attorneys involved, various other attendant circumstances, the affidavits of plaintiff's attorney, and the arguments for both parties; (3) the trial court included findings as to the service performed by plaintiff's attorney during his representation of plaintiff and to the number of hours he spent on her claim, as well as his per hour charge including that the charge was customary for the area; and (4) the Court of Appeals cannot substitute its assessment of the credibility of the evidence for that of the trial judge when the record contained evidence that supported the version of events offered by both parties.

Appeal by defendant from order entered 5 September 2006 by Judge Abraham Penn Jones in Superior Court, Wake County. Heard in the Court of Appeals 11 September 2007.

E. Gregory Stott, for plaintiff-appellee.

McAngus, Goudelock & Courie, PLLC, by Mary M. Webb, for defendant-appellant.

Larcade, Heiskell & Askew, PLLC, by Christopher N. Heiskell and Roger A. Askew, for North Carolina Association of Defense Attorneys, amicus curiae.

WYNN, Judge.

In North Carolina, when a plaintiff recovers ten thousand dollars or less in a personal injury suit, the trial court may allow a reasonable fee to the plaintiff's attorney "upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit."[1]

1. N.C. Gen. Stat. § 6-21.1 (2005); *see also Poole v. Miller*, 342 N.C. 349, 353, 464 S.E.2d 409, 411 (1995) (" '[J]udgment finally obtained' means the amount ultimately entered as representing the final judgment, i.e., the jury's verdict as modified by any applicable adjustments, by the respective court in the particular controversy, not simply the amount of the jury's verdict."), *reh'g denied*, 342 N.C. 666, 467 S.E.2d 722 (1996).

Here, the defendant argues that the trial court abused its discretion by ordering $25,000 in attorney fees following the jury's award of $7,000 to the plaintiff. Because the trial court's order is supported by the requisite findings of fact and conclusions of law, we find no abuse of discretion.

On 3 August 2002, Plaintiff Gurpreet Kaur Wright and Defendant James Clarence Murray were involved in a motor vehicle accident on Ridge Road in Raleigh, North Carolina. Through her attorney, E. Gregory Stott, Ms. Wright filed a complaint in Wake County District Court on 19 November 2004 against Mr. Murray, alleging that his negligence caused the accident. Mr. Murray's insurance carrier defended him against Ms. Wright's lawsuit and through its attorneys filed an answer to the complaint on 31 January 2005, denying liability and also alleging contributory negligence by Ms. Wright in causing the accident. Mr. Murray's attorneys filed a Request for Statement of Monetary Relief Sought by Plaintiff on 7 February 2005. Due to the amount of damages requested by Ms. Wright in her original complaint, the lawsuit was transferred to Wake County Superior Court by the consent of both parties on 18 February 2005.

The parties then began discovery, including production of documents and interrogatories, and Mr. Stott filed Partial Responses to Defendant's First Request for Production of Documents for Ms. Wright on 31 May 2005, attaching some of the medical records for treatment she received for injuries sustained in the August 2002 car accident. On 6 July 2005, Mr. Stott filed a Supplemental Response to Request for Production of Documents, which again included copies of medical bills for Ms. Wright.

The parties attended a mediation session on 14 September 2005, which culminated in an offer by Mr. Murray's attorneys to settle Ms. Wright's claim for $8,000. Ms. Wright declined that offer, as well as a formal Offer of Judgment for the total sum of $8,001, to include costs, interest, and attorney's fees, made by Mr. Murray's attorneys on 16 September 2005, approximately one month before the trial was scheduled to take place.

At the 17 October 2005 session of Wake County Superior Court, a jury heard Ms. Wright's claim against Mr. Murray and returned a verdict finding Mr. Murray negligent and Ms. Wright not contributorily negligent, and awarding Ms. Wright $7,000 for her personal injuries. The trial court entered a judgment against Mr. Murray based on the jury verdict on 7 December 2005.

Following the judgment, Ms. Wright's attorney, Mr. Stott, filed a request for an assessment of court costs and of attorney fees as court costs. In an order filed 5 September 2006, the trial court found that the "judgment finally obtained" by Ms. Wright "was more favorable than [Mr. Murray's] Offer of Judgment." The trial court further found as fact that Mr. Stott had "recorded more than 139.5 hours of time in rendering [his] services to [Ms. Wright] and he charges $220.00 per hour, which is a customary charge of attorneys in this area." Those services included "telephone and personal consultations, drafting and filing court papers, preparing for hearing, numerous appearances in court, legal research, drafting court orders and other miscellaneous activities." The trial court concluded that Mr. Murray should be taxed with the costs of Ms. Wright's action against him, including fees for filing, subpoenas, expert witnesses, and depositions, in the amount of $3,188.25. Additionally, the trial court ordered Mr. Murray to pay Mr. Stott $25,000 in reasonable attorney fees and $160.50 in photocopying expenses.

Mr. Murray now appeals the order of attorney fees, arguing that (I) the trial court's findings of fact are not supported by competent evidence to sustain the award and amount of attorney fees; and (II) the trial court abused its discretion in the award and amount of attorney fees under North Carolina General Statute § 6-21.1. Because the arguments on these issues overlap, we consolidate them for discussion.

Our General Assembly set forth the law governing the outcome of this appeal in Section 6-21.1 of our General Statutes, which provides that:

> In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages is ten thousand dollars ($10,000) or less, the presiding judge may, *in his discretion*, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs.

N.C. Gen. Stat. § 6-21.1 (2005) (emphasis added). Because this section empowers our trial judges with the discretion to allow attorney fees, we review challenges to a trial judge's award of attorney fees pursuant to Section 6-21.1 under the abuse of discretion standard.

An abuse of the discretion to award attorney fees occurs when "[a] decision [is] manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998) (internal quotations omitted). Our Supreme Court has further noted:

> The obvious purpose of this statute is to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that it is not economically feasible to bring suit on his claim. In such a situation the Legislature apparently concluded that the defendant, though at fault, would have an unjustly superior bargaining power in settlement negotiations. . . . This statute, being remedial, should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope.

Hicks v. Albertson, 284 N.C. 236, 239, 200 S.E.2d 40, 42 (1973) (citation omitted).

Nevertheless, we have noted that "[t]he discretion accorded the trial court in awarding attorney fees pursuant to N.C. Gen. Stat. § 6-21.1 is not unbridled." *Washington v. Horton*, 132 N.C. App. 347, 351, 513 S.E.2d 331, 334 (1999). In exercising such discretion, a trial court must consider the entire record, including but not limited to factors such as: (1) the settlement offers made prior to the institution of the action; (2) offers of judgment made pursuant to Rule 68 and whether the "judgment finally obtained" was more favorable than such offers; (3) whether the defendant unjustly exercised "superior bargaining power"; (4) in the case of an unwarranted refusal by an insurance company, the context in which the dispute arose; (5) the timing of settlement offers; and (6) the amounts of the settlement offers compared to the jury verdict. *Id.*, 513 S.E.2d at 334-35 (citations omitted).

Moreover, when examining a trial court's decision to award attorney fees, this Court

> require[s] more than "[m]ere recitation by the trial court that it has considered all *Washington* factors." *Thorpe v. Perry-Riddick*,

> 144 N.C. App. 567, 572, 551 S.E.2d 852, 857 (2001). However, the trial court is not required to make detailed findings of fact as to each factor. *Tew v. West*, 143 N.C. App. 534, 537, 546 S.E.2d 183, 185 (2001). Instead, the trial court is required only to make the additional findings necessary to preserve its ruling on appeal. *Thorpe*, 144 N.C. App. at 573, 551 S.E.2d at 857.

House v. Stone, 163 N.C. App. 520, 523, 594 S.E.2d 130, 133 (2004).

In the instant case, the trial court's order contains explicit findings regarding the lack of settlement offers prior to the filing of Ms. Wright's claim, offer of judgment made pursuant to Rule 68, timing of the settlement offers, and amounts of the settlement offers relative to the jury's verdict. The order further finds that the "judgment finally obtained" by Ms. Wright was more favorable than Mr. Murray's final offer of judgment.[2] As such, the order had specific findings as to the majority of the *Washington* factors.

Additionally, the trial judge stated that the order was based on "a review of the entire record herein, the court's first hand acquaintance with the evidence presented, the observance of the parties, the witnesses, the attorneys involved, various other attendant circumstances, the affidavits of the plaintiff's attorney and the arguments of the attorneys for both parties[.]" Finally, the trial judge included findings as to the services performed by Mr. Stott during his representation of Ms. Wright and to the number of hours he spent on her claim, as well as his per-hour charge and that the charge is customary for the area.

Mr. Murray contends that these findings as to the *Washington* factors and as to the amount of the attorney fees awarded to Ms. Wright were not supported by competent evidence, and that the trial judge abused his discretion in awarding and determining the amount of the attorney fees. We are not persuaded.

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2. Though not an issue raised by the parties in this matter, it should be noted that Mr. Murray's final offer of judgment to Ms. Wright was $8,001, inclusive of all costs, interest, and attorney fees. Ms. Wright received $7,000 in the award from the jury, and the trial court ordered Mr. Murray to pay an additional $3,188.25 in court costs, aside from attorney fees. Thus, with those costs included—and leaving aside for the moment the question of attorney fees—Ms. Wright's "judgment finally obtained" exceeded Mr. Murray's offer to settle for $8,001. *See Poole*, 342 N.C. at 353, 464 S.E.2d at 411 (" '[J]udgment finally obtained' means the amount ultimately entered as representing the final judgment, i.e., the jury's verdict as modified by any applicable adjustments, by the respective court in the particular controversy, not simply the amount of the jury's verdict."). Under our previous precedents, then, Ms. Wright's "judgment finally obtained" exceeded the final settlement offer made by Mr. Murray.

The record before us reflects an ongoing dispute between counsel for plaintiff and counsel for defendant as to how Ms. Wright's claim against Mr. Murray proceeded from the time of the accident up until the time of the jury trial, including what occurred at the mediation session. Mr. Murray's attorneys contend that Ms. Wright did not provide them with any medical records documenting her injuries and treatment, so that they were unable to prepare a settlement offer prior to mediation; Ms. Wright's attorney, by contrast, asserts—and submits supporting documentation attached to a discovery response—that Ms. Wright's medical records were available to Mr. Wright's attorneys as early as May 2005, six months before the trial.

When a trial judge sits as "both judge and juror," as in a hearing on court costs and attorney's fees, "it is that judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) (citation omitted). Here, the trial court directly observed the attorneys throughout the course of this matter, including their demeanor and characteristics during the hearing on costs and fees. The record contains evidence that supports the versions of events offered by both Ms. Wright's and Mr. Murray's counsel. In such an instance, we cannot substitute our assessment of the credibility of the evidence for that of the trial judge. Instead, our law compels us to decline to find an abuse of discretion where the trial court, in its discretion, finds one version more credible than the other. *See In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365-66 (2000) ("If different inferences may be drawn from the evidence, the trial judge must determine which inferences shall be drawn and which shall be rejected."). Accordingly, we overrule these assignments of error.

Affirmed.

Judges ELMORE and JACKSON concur.

STATE OF NORTH CAROLINA v. ACARA DEMOND GOLDSMITH

No. COA06-1573

(Filed 6 November 2007)

1. Burglary and Unlawful Breaking or Entering— first-degree burglary—misdemeanor breaking or entering—failure to show intent to commit robbery inside home

The trial court erred by failing to dismiss the charge of first-degree burglary, and the case is remanded for entry of judgment based upon the verdict of guilty of misdemeanor breaking or entering, because: (1) the State failed to prove that defendant intended to commit a robbery inside the victim's house; (2) defendant's actions were evidence of an intent contrary to committing the robbery inside the dwelling, and instead supported an inference that defendant intended to commit the robbery outside of the home; and (3) there was sufficient evidence to sustain a verdict of misdemeanor breaking or entering when it requires only proof of the wrongful breaking or entering into any building.

2. Appeal and Error— preservation of issues—failure to object—failure to argue constitutional issues at trial

Although defendant contends the trial court violated his constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution in an attempted robbery with a dangerous weapon, first-degree burglary, and assault with a deadly weapon with intent to kill inflicting serious injury case by refusing to hear motions, arguments, or offers of proof from defense counsel regarding an outburst by a spectator during the State's closing argument, this argument was not preserved for appellate review, because: (1) defendant never objected to nor made a motion regarding the trial court's refusal; (2) defense counsel never gave a reason to address the court and failed to state the specific constitutional issues he now wishes to address on appeal; and (3) defendant did not make constitutional arguments at trial.

Appeal by defendant from judgment entered 26 May 2006 by Judge A. Moses Massey in Stokes County Superior Court. Heard in the Court of Appeals 22 August 2007.

Attorney General Roy Cooper, by Assistant Attorney General John P. Barkley, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

SMITH, Judge.

Defendant, Acara Demond Goldsmith, appeals a judgment entered upon his convictions for attempted robbery with a dangerous weapon, first degree burglary and assault with a deadly weapon with intent to kill inflicting serious injury. We find no error in part and reverse and remand in part.

Michael Smith testified that on the evening of 9 May 2003, he and defendant were riding around together, under the influence of cocaine, "and just basically decided that we were going to go rob somebody." After Smith mentioned the name Landon Bowman, Smith and defendant agreed to rob Bowman and proceeded to Bowman's home. Smith knew that Bowman was a drug dealer. Smith further testified that he and defendant arrived at Bowman's home between approximately 2:00 and 3:00 a.m. on 10 May 2003 and knocked on Bowman's door. When Bowman came to the door, defendant "grabbed him [Bowman] and pulled him out of his house." Defendant then brandished a gun in order to "intimidate" Bowman, after which defendant and Bowman began struggling over control of the gun. As a result, defendant hit Bowman several times with the gun and repeatedly told Bowman to "[g]ive him your money" or "[g]ive me the dope" or defendant would kill Bowman. Bowman's wife then arrived at the front door with a shotgun, after which Smith and defendant fled.

Bowman testified that he went to sleep at approximately 1:00 a.m. on 10 May 2003, and was awakened by banging on the door to his home. Bowman went to the door and "cracked" it open to see who it was. At first, Bowman did not see defendant, he only saw Smith. As he stood there with the door "cracked just barely open" and talking to Smith, Bowman testified that "somebody reached in and grabbed my shirt, yanked me out on the porch." Bowman testified that the next thing that happened was somebody put a gun to his head. Then, defendant hit him with the gun and stated, "[g]ive me your money or your dope or I'm going to kill you." Soon thereafter, Bowman's wife appeared with a shotgun, distracting Smith and the defendant. Bowman grabbed the gun in defendant's hand and started fighting with Smith and the defendant. During the struggle, Smith threw

Bowman over the porch rail. Bowman and defendant struggled some more, and then Smith and defendant fled. Bowman testified that he suffered a broken nose and a bite on his arm as a result of the altercation.

Defendant testified and offered alibi evidence that he was never at Bowman's house, and had, *inter alia*, his mother and sister testify that defendant was at his house at his birthday party and did not leave the home.

After a jury convicted defendant of attempted robbery with a dangerous weapon, first degree burglary and assault with a deadly weapon with intent to kill inflicting serious injury, the trial court sentenced defendant to a term of 93 to 121 months imprisonment. Defendant appeals.

[1] In defendant's first argument on appeal, he contends the trial court erred by failing to dismiss the charge of first degree burglary because the State failed to present substantial evidence showing that during defendant's breaking and entering of Bowman's dwelling, defendant had the requisite intent to commit armed robbery, as alleged in the indictment. We agree.

When ruling on a motion to dismiss, "the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996) (citing *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)).

> Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. The trial court must also resolve any contradictions in the evidence in the State's favor. The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility.

State v. Robinson, 355 N.C. 320, 336, 561 S.E.2d 245, 255-56 (internal citations and quotation marks omitted), *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002). " 'The rule for determining the sufficiency of evidence is the same whether the evidence is completely circumstantial, completely direct, or both.' " *State v. Crouse*, 169 N.C. App. 382,

389, 610 S.E.2d 454, 459 (quoting *State v. Wright*, 302 N.C. 122, 126, 273 S.E.2d 699, 703 (1981)), *disc. rev. denied*, 359 N.C. 637, 616 S.E.2d 923 (2005).

"Burglary is a felony at common law; and a burglar is defined by Lord COKE, 3rd Institute 63, to be 'one that, in the night time, breaketh and entereth into a mansion-house of another, of intent to kill some reasonable creature, or to commit some other felony *within the same*, whether his felonious intent be executed or not.' " *State v. Whit*, 49 N.C. 349, 351-52 (1857) (emphasis added); see also *United States v. Titemore*, 437 F.3d 251, 257 (2d Cir. 2006) ("The common law definition of burglary was the breaking and entering of a mansion-house, at night, with the intent to commit a felony inside.") (citing William Blackstone, 4 Commentaries *224). Therefore, in order for a defendant to be convicted of first degree burglary, the State must present substantial evidence that there was "(i) the breaking (ii) and entering (iii) in the nighttime (iv) into the dwelling house or sleeping apartment (v) of another (vi) which is actually occupied at the time of the offense (vii) with the intent to commit a felony *therein*." *State v. Singletary*, 344 N.C. 95, 101, 472 S.E.2d 895, 899 (1996) (emphasis added) (citations omitted); *see also* N.C. Gen. Stat. § 14-54(a) (felonious breaking or entering, a lesser included offense of first degree burglary, is punished as a Class H felony where there is intent to commit "felony or larceny *therein*.") (emphasis added).

In the case *sub judice*, as to the first two elements, breaking and entering, Smith testified that after Bowman opened his front door, defendant "grabbed [Bowman] and pulled him out of his house." This action constituted a constructive breaking and entering. *See State v. Edwards*, 75 N.C. App. 588, 589-90, 331 S.E.2d 183, 184 (1985) (a constructive burglarious breaking and entering may be accomplished by tricking the occupant into opening the door) (citations omitted). We further note that the evidence is uncontroverted that the charged offense was committed at night; that the dwelling did not belong to defendant; and the subject dwelling was occupied. Thus, the first through sixth elements of the charged offense were proven.

The State was next required to prove that defendant possessed "the intent to commit a felony therein." *Singletary*, 344 N.C. at 101, 472 S.E.2d at 899 (citations omitted). Felonious intent usually cannot be proven by direct evidence, but rather must be inferred from the defendant's " 'acts, conduct, and inferences fairly deducible from all the circumstances[.]' " *State v. Wright*, 127 N.C. App. 592, 597, 492

S.E.2d 365, 368 (1997) (quoting *State v. Accor and State v. Moore*, 227 N.C. 65, 73-74, 175 S.E.2d 583, 589 (1970)), *disc. rev. denied*, 347 N.C. 584, 502 S.E.2d 616 (1998). Furthermore, ". . . in burglary cases, 'when the indictment alleges an intent to commit a particular felony, the State must prove the particular felonious intent alleged.' " *State v. Silas*, 360 N.C. 377, 383, 627 S.E.2d 604, 608 (2006) (citation omitted). Therefore, because the State indicted defendant for first degree burglary based upon the felony of armed robbery, the State was required to prove defendant intended to commit armed robbery upon breaking and entering into the Bowman residence.

In the instant case, no evidence was presented that defendant intended to commit a robbery *inside* Bowman's home. Smith testified that he and defendant set out for the victim's house with the agreed upon plan to rob Bowman, whom they believed to be a drug dealer. Smith further testified that "the plan was [to] act like [defendant] was going to trade some cocaine for some marijuana." There was no discussion, however, as to what role each person would play in accomplishing the robbery. [T. p. 85] After Bowman opened the door, defendant reached in and pulled Bowman out of the house, rather than push his way into the home. Defendant's actions are evidence of an intent contrary to committing the robbery inside the dwelling, and instead support an inference that defendant intended to commit the robbery outside of the home. Because there was no evidence from which a jury could infer defendant intended to commit armed robbery inside Bowman's home, we reverse the conviction for first degree burglary.

Although there was insufficient evidence to convict defendant of first degree burglary, we conclude there was sufficient evidence to sustain a verdict of misdemeanor breaking or entering. Misdemeanor breaking and entering requires only proof of the wrongful breaking or entry into any building. N.C. Gen. Stat. §14-54(b). "[B]y finding the defendant guilty of burglary, the jury 'necessarily found facts which would support a conviction of misdemeanor breaking and entering,' where, as here, the evidence of intent to commit a felony is insufficient." *State v. Freeman*, 307 N.C. 445, 451, 298 S.E.2d 376, 380 (1983) (quoting *State v. Dawkins*, 305 N.C. 289, 291 287 S.E.2d 885, 887 (1982)); *see also State v. Cooper*, 288 N.C. 496, 500-01, 219 S.E.2d 45, 48 (1975) (the jury, having found defendant guilty of first degree burglary, necessarily found defendant guilty of breaking and entering a building). Accordingly, we remand for entry of a judgment as upon a verdict of guilty of misdemeanor breaking or entering.

We note that the Pattern Jury Instruction for first degree burglary dated May 2002 does not require the jury to find that the defendant at the time of the breaking and entering intended to commit a felony in the building that was broken and entered. We believe that the Pattern Instruction should include such a requirement.

[2] Defendant next contends that the trial court violated his constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution by refusing to hear motions, argument or offers of proof from defense counsel regarding an outburst by a spectator during the State's closing argument. However, defendant never objected to, nor made a motion regarding the trial court's refusal to allow defense counsel to be heard on the spectator's conduct. Moreover, defense counsel never gave a reason he wished to address the court on behalf of defendant regarding the spectator's actions and failed to state the specific constitutional issues he now wishes this Court to address on appeal. Defense counsel only made the following nebulous request: "I would like to appear on behalf of the defendant at some proceeding." Defendant made no constitutional arguments to the trial court, and as a result he has not preserved these constitutional issues for appellate review. *See State v. Cummings*, 353 N.C. 281, 292, 543 S.E.2d 849, 856 (2001) ("Constitutional questions that are not raised and passed upon in the trial court will not ordinarily be considered on appeal.") (citations omitted); *see also* N.C.R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

Finally, we observe that defendant has failed to make any argument in support of assignment of errors 2, 3, 4 and 5. Thus these assignments of error are deemed 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."); *State ex rel. Cooper v. NCCS Loans, Inc.*, 174 N.C. App. 630, 642, 624 S.E.2d 371, 379 (2005).

Since there was insufficient evidence of defendant's intent to commit armed robbery inside the victim's home, defendant's conviction for first degree burglary is reversed and the matter remanded for imposition of a judgment for misdemeanor breaking or entering and resentencing.

No error in part; reversed and remanded in part.

Judges McGEE and STEPHENS concur.

FAIRVIEW DEVELOPERS, INC., AND J.C.H. HOLDINGS, LLC, PLAINTIFFS v. MICKEY MILLER, DEFENDANT

No. COA07-145

(Filed 6 November 2007)

1. Vendor and Purchaser–contract to purchase property–failure to close within required time

Plaintiff developers' contractual rights in property under a contract to purchase terminated where the contract's language was plain and unambiguous that plaintiffs had thirty days to close from the end of the extended property examination period, defendant vendor did not consent to plaintiffs' request for an additional delay, and plaintiffs failed to close on the property within the time required under the contract.

2. Vendor and Purchaser–time is of the essence clause–acceptance of earnest money–no waiver

Defendant vendor neither intentionally nor implicitly waived a "time is of the essence" clause in a contract for the purchase of property by her acceptance of the payment of earnest money where defendant was entitled to release and delivery of the earnest money under the provisions of the contract after plaintiff developers failed to close on the purchase by the time specified in the contract.

Appeal by plaintiffs from order entered 4 May 2006 by Judge Susan C. Taylor in Union County Superior Court. Heard in the Court of Appeals 10 October 2007.

Goodwin & Hinson, P.A., by Matthew B. Smith, for plaintiffs-appellants.

James, McElroy & Diehl, P.A., by Richard B. Fennell and Preston O. Odom, III, for defendant-appellee.

TYSON, Judge.

Fairview Developers, Inc. ("Fairview") and J.C.H. Holdings, LLC ("J.C.H.") (collectively, "plaintiffs") appeal from order entered denying their motion for partial summary judgment and granting Mickey Miller's ("defendant") motion for summary judgment. We affirm.

I. Background

J.C.H. entered into an offer to purchase and contract with defendant on 20 February 2004. J.C.H. agreed to purchase approximately twenty-four acres of real property situated in Union County, North Carolina. An addendum to the contract granted J.C.H. the right to inspect or conduct surveys on the property within ninety days from the acceptance date of the contract ("the examination period"). The addendum to the contract also granted J.C.H. the option to extend the examination period for up to sixty additional days by paying a $2,500.00 non-refundable deposit for the first thirty day extension and a $5,000.00 non-refundable deposit for the second thirty day extension. The addendum to the contract stated, "[c]losing will occur on or before 30 days after the removal of the last contingency. . . . *Time is of the essence as to the terms of this contract.*" (Emphasis supplied).

On 20 May 2004, the last day of the initial ninety day examination period, J.C.H. assigned its contract rights to Fairview. Fairview exercised the option to extend the examination period for sixty additional days. The examination period was extended until 19 July 2004. Neither J.C.H. nor Fairview voiced or communicated to defendant any concerns or raised any issues regarding the property during the initial or extended examination periods. After executing the assignment of the contract, plaintiffs discovered they would be required to install approximately 3,000 additional feet of sewer line above what they had originally estimated to service their development.

On 19 August 2004, defendant contacted James Roese ("Roese"), member-manager of J.C.H., to discuss the closing she expected to occur the following day. Roese told defendant about the additional sewer extension and costs and informed her Fairview would need an additional thirty days to close on the property.

Defendant continuously stated that she was ready, willing, and able to close on the property immediately. Defendant did not consent to Roese's requested additional delay and repeatedly told him she had to consult with her attorney to ascertain her options if closing did not occur.

On 31 August 2004, J.C.H. released $10,000.00 earnest money to defendant by placing a check in her mailbox. Plaintiffs asserted the release of the earnest money served as notification of a release of their contingencies and proposed a closing for 30 September 2004. On 1 September 2004, defendant sent a letter to J.C.H. declaring the contract null and void. J.C.H., through counsel, informed defendant that: (1) she had accepted the $10,000.00 earnest money after the time to close had expired; (2) there was no firm closing date set in the contract; and (3) J.C.H. intended to close on the property on 30 September 2004. Defendant did not appear at the 30 September 2004 closing.

Plaintiffs instituted an action on 4 October 2004, seeking specific performance of the contract, or in the alternative, damages for breach of contract. Plaintiffs moved for partial summary judgment based upon the assertion that defendant had waived the "time is of the essence" provision in the contract. Plaintiffs' motion was denied. Defendant moved for summary judgment on all claims. The trial court granted defendant's motion for summary judgment. Plaintiffs appeal.

II. Issues

Plaintiffs argue the trial court erred by: (1) granting defendant's motion for summary judgment on all claims and (2) denying their motion for partial summary judgment on the issue of whether defendant had waived the "time is of the essence" provision in the contract.

III. Motion for Summary Judgment

[1] Plaintiffs argue the trial court erred in granting defendant's motion for summary judgment on all claims. We disagree.

A. Standard of Review

> Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.
>
> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot sur-

> mount an affirmative defense. Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist.
>
> Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial. To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (internal citations and quotations omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004). We review an order allowing summary judgment *de novo*. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). "If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

B. Contract Interpretation

Plaintiffs argue the language of the contract is ambiguous and its interpretation is a question of fact for a jury. We disagree.

North Carolina law requires a court to interpret a contract by examining its language for indications of the parties' intent at the moment of execution. *State v. Philip Morris USA Inc.*, 359 N.C. 763, 773, 618 S.E.2d 219, 225 (2005). The intention of the parties must be gathered and viewed from the four corners of the instrument. *Jones v. Realty Co.*, 226 N.C. 303, 305, 37 S.E.2d 906, 907 (1946) ("This intention is to be gathered from the entire instrument, viewing it from its four corners."). "[I]f only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein." *Woods v. Nationwide Mutual Ins. Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978).

Plaintiffs argue the language in the contract is susceptible to multiple interpretations and that the last contingencies were not removed until plaintiffs waived them and requested a closing date. Defendant argues, and we agree, that any contingency had to be asserted, waived, or removed during the initial or extended examination periods.

The contract permits plaintiffs, as buyers, to terminate the agreement if, "*prior to the expiration of the examination period*, buyer determines that the property is unsuitable for any reason" and gives written notice to the seller. (Emphasis supplied). Upon giving such notice, the parties agreed the contract, "shall terminate and Buyer will receive a full return of the Earnest Money." The contract and its addendum also unambiguously state, "[c]losing will occur on or before 30 days after the removal of the last contingency." The contingencies of the contract were listed as, "liens, encumbrances, or other conditions such as *sewer*, water, or other governmental moratoriums having an effect on said property." (Emphasis supplied).

Plaintiffs exercised the option to extend the examination period to its maximum length of sixty additional days by paying defendant a non-refundable deposit of $7,500.00. Plaintiffs had until 19 July 2004 to identify any contingency that may affect closing and to decide whether to close on the property or to terminate the contract. By plaintiffs' failure to raise or communicate any issue during the initial or extended examination periods, the contract established a firm closing date of 18 August 2004, thirty days after 19 July 2004. To assert any vendee rights under the contract, plaintiffs were required to complete the closing or terminate the contract on or before this date.

Since plaintiffs failed to close within the contract's designated time period, their contractual rights in the property terminated. The contract language is plain and unambiguous on its face and will be enforced as written as a matter of law. *Cleland v. Children's Home*, 64 N.C. App. 153, 156, 306 S.E.2d 587, 589 (1983). The trial court properly granted defendant's motion for summary judgment. This assignment of error is overruled.

C. Waiver

[2] Plaintiffs also argue defendant waived the contract's "time is of the essence clause" through her subsequent actions on and after 18 August 2004. We disagree.

This Court has stated:

> Waiver is always based upon an express or implied agreement. There must always be an intention to relinquish a right, advantage or benefit. The intention to waive may be expressed or implied from acts or conduct that naturally leads the other party to believe that the right has been intentionally given up.

Patterson v. Patterson, 137 N.C. App. 653, 667, 529 S.E.2d 484, 492, *disc. rev. denied*, 352 N.C. 591, 544 S.E.2d 783 (2000). "There can be no waiver unless it is intended by one party and so understood by the other, or unless one party has acted so as to mislead the other." *Klein v. Avemco Ins. Co.*, 289 N.C. 63, 68, 220 S.E.2d 595, 599 (1975) (internal citation omitted).

Defendant communicated with plaintiffs on 19 August 2004 and agreed to close on 20 August 2004, two days after the closing should have occurred. Defendant's waiver, if any, is limited to the two additional days she allowed for the closing to occur. Defendant did not waive the "time is of the essence" clause.

Plaintiffs argue defendant's acceptance of the earnest money and her subsequent refusal to close waived her right to terminate the contract. We disagree.

Defendant never agreed to plaintiffs' demand that closing be further extended to occur on 30 September 2004. Defendant was entitled to release and delivery of the earnest money under the terms of the contract. The contract specifically stated, "[i]n the event this offer is accepted and Buyer breaches this contract, then the earnest money shall be forfeited, but such forfeiture shall not affect any other remedies available to seller for such breach." Plaintiffs' examination period expired without any notice of objection to defendant and plaintiffs failed to timely close on the property. Defendant was entitled to the release of the earnest money deposit under the terms of the contract.

The contract contained a specific provision stating, "[t]ime is of the essence as to the terms of this contract." This clause clearly and unambiguously indicates that a definitive time to close was a vital and essential term to the contract.

It is well established that "[a] party may waive a contract right by an intentional and voluntary relinquishment." *McNally v. Allstate Ins. Co.*, 142 N.C. App. 680, 683, 544 S.E.2d 807, 809, *disc. rev. denied*, 353 N.C. 728, 552 S.E.2d 163 (2001). "Waiver by implication is not looked upon with favor by the court." *Chemical Bank v. Belk*, 41 N.C. App. 356, 366, 255 S.E.2d 421, 428, *cert. denied*, 298 N.C. 293, 259 S.E.2d 299 (1979). Here, defendant neither intentionally nor implicitly waived the "time is of the essence" clause in the contract nor agreed to extend the closing date until 30 September 2004. The trial court properly denied plaintiffs' motion for partial summary judgment. This assignment of error is overruled.

IV. Conclusion

The trial court properly granted defendant's motion for summary judgment on all claims and denied plaintiffs' motion for partial summary judgment. The language of the contract was clear and unambiguous and was properly interpreted as a matter of law. Defendant did not intentionally or implicitly waive the "time is of the essence" clause in the contract. The trial court properly found no genuine issues of material fact existed and that defendant was entitled to judgment as a matter of law on all issues. The trial court's order is affirmed.

Affirmed.

Judges McGEE and ELMORE concur.

STATE OF NORTH CAROLINA v. ROBBIE ALEXANDER JACKIE LLOYD, DEFENDANT

No. COA06-1514

(Filed 6 November 2007)

1. Evidence— prior crimes or bad acts—prior refusal to submit to breath test—DWI arrest and conviction—suspended license

The trial court did not abuse its discretion in a felonious operation of motor vehicle while fleeing to elude arrest, possession of a stolen motor vehicle, larceny of motor vehicle, and double second-degree murder case by admitting testimony regarding defendant's prior refusal to submit to a breath test and his DWI arrest and conviction because whether defendant knew that he was driving with a suspended license tended to show that he was acting recklessly, which in turn tended to show malice, which was an element of second-degree murder.

2. Motor Vehicles— instruction—consideration of previous DWI conviction—malice

The trial court did not err in a felonious operation of motor vehicle while fleeing to elude arrest, possession of a stolen motor vehicle, larceny of motor vehicle, and double second-degree murder case by its instruction as to whether the jury could consider

the fact of defendant's previous DWI conviction for the purpose of establishing malice, because: (1) contrary to defendant's contention, a review of the instructions did not reveal any ambiguity when the trial court specifically stated the DWI evidence was received solely for the purpose of showing that defendant had the knowledge that his license was suspended on 17 August 2004; and (2) defendant's reliance on the dissent in *Locklear*, 159 N.C. App. 588 (2003), was misplaced since this case is distinguishable both based on the fact that proof of malice was defendant's knowledge of his suspended license, and the prior stop took place less than a month before the stop at issue instead of occurring four years prior.

3. Motor Vehicles— instruction—refusal to submit misdemeanor death by vehicle

The trial court did not err in a double second-degree murder case by refusing defendant's request to submit the lesser-included charge of misdemeanor death by vehicle because, assuming there was error, a review of the possible verdicts submitted to the jury and the jury's ultimate verdict of guilty of second-degree murder revealed that such error was harmless.

4. Homicide— second-degree murder—motion to dismiss—sufficiency of evidence—malice

The trial court did not err by refusing to grant defendant's motion to dismiss the second-degree murder charges based on alleged insufficient evidence of malice because the evidence revealed that: (1) defendant knew his license was revoked and proceeded to drive regardless of this knowledge, indicating he acted with a mind regardless of social duty and with recklessness of consequences; (2) defendant took the car without permission indicating a mind bent on mischief; and (3) the very act of fleeing from the police constituted malice.

5. Motor Vehicles— driving while license revoked—license suspended—terms used synonymously

Although defendant contends there was a fatal variance between the indictment which stated that defendant was driving while his license was revoked and the proof offered at trial that his license was suspended, this assignment of error is dismissed because defendant conceded in his brief that the terms are used synonymously under N.C.G.S. § 20-4.01(47).

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

Although defendant challenged the indictment for possession of a stolen motor vehicle, this assignment of error is dismissed, because defendant's contentions contained no real argument as required by N.C. R. App. P. 28(b)(6).

Appeal by defendant from judgment entered 13 July 2006 by Judge R. Stuart Albright in Richmond County Superior Court. Heard in the Court of Appeals 7 June 2007.

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

Crumpler, Freedman, Parker, & Witt, by Vincent F. Rabil, for defendant.

ELMORE, Judge.

On 17 August 2004, Robbie Alexander Jackie Lloyd (defendant) stole a green Dodge van. The police received an alert, and upon observing the stolen vehicle, Deputy Dennis Smith gave chase. The van started to turn onto an exit ramp before veering back onto the highway. The van then made a right turn into a driveway. When Deputy Smith activated his blue lights and siren, however, defendant accelerated, circled through a front yard, and drove back onto the highway.

Driving approximately 85-90 miles per hour, defendant passed several cars, despite the fact that he was in a no-passing zone and there was oncoming traffic of three large trucks and a white vehicle. The white vehicle slammed on its brakes and swerved to the side of the road. Shortly thereafter, the van slammed on its brakes and flipped over, colliding with a silver station wagon that was coming over a hill. Both occupants of the silver vehicle subsequently died. Defendant's license was suspended at the time of the accident.

On 7 September 2004, defendant was indicted for operation of motor vehicle while fleeing to elude arrest, possession of a stolen motor vehicle, larceny of motor vehicle, and second degree murder of both George Henry Steele, Jr., and Carol Ries Steele. On 13 July 2006, defendant was convicted of felonious operation of motor vehicle while fleeing to elude arrest, possession of a stolen motor vehicle, larceny of motor vehicle, and second degree murder of both victims. Defendant now appeals.

[1] Defendant first argues that the trial court erred by improperly admitting testimony regarding defendant's prior refusal to submit to a breath test and his DWI arrest and conviction. We disagree.

At trial, Trooper Lee Edward Sampson, Jr., testified that on 27 March 2004 he stopped defendant and arrested him for driving while intoxicated; that defendant's license was suspended at the time of the stop and that defendant admitted to knowing it was suspended at that time; and that defendant refused to undergo a breath test despite the trooper's warning that refusal would result in further loss of driving privileges. On objection, the trial court allowed the admission of the evidence for the purpose of showing defendant's knowledge that his license was suspended and to show malice. The trial court issued the following instructions to the jury:

> Evidence has been received tending to show that on March 27, 2004 the defendant was warned that his license would be suspended if he refused to blow into an Intoxylizer; that the defendant did refuse to do so, and that on May 13, 2004 he was convicted of driving while impaired.
>
> This evidence was received solely for the purpose of showing that the defendant had the knowledge that his license was suspended on August 17, 2004, which is a necessary element of one of the crimes charged in this case.
>
> Evidence has also been received tending to show that on March 27, 2004, the defendant was driving while his license was suspended. This evidence was received solely for the purpose of showing, first, that the defendant had the knowledge that his license was suspended on August 17, 2004, which is a necessary element of one of the crimes charged in this case, and, second, that the defendant had malice, which is also a necessary element of one of the crimes charged in this case.
>
> If you believe this evidence, you may consider it, but only for the limited purpose for which it was received.

Defendant's argument is somewhat muddled and freely conflates Rules 401 through 404 of our Rules of Evidence. His first argument appears to be that the facts of his prior bad acts were not "sufficiently similar to the underlying offense" to justify the admission of the testimony and are thus irrelevant, in violation of Rule 402. N.C. Gen. Stat. § 8C-1, Rule 402 (2005). "Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case."

State v. Sloan, 316 N.C. 714, 724, 343 S.E.2d 527, 533 (1986). Whether defendant knew that he was driving with a suspended license tends to show that he was acting recklessly, which in turn tends to show malice. *State v. Jones*, 353 N.C. 159, 173, 538 S.E.2d 917, 928 (2000). Malice is an essential element of second degree murder. *State v. Bethea*, 167 N.C. App. 215, 218, 605 S.E.2d 173, 177 (2004). Thus, evidence that defendant was knowingly operating a motor vehicle without a valid license was relevant to the crime he was being tried for, and defendant's contention is without merit.

Defendant next argues that even if the evidence were relevant, it should have been excluded by Rule 404(b) as evidence which had no purpose other than to show that defendant had a propensity to drive recklessly. However, the record reveals that the evidence showing that defendant was aware of his licensure suspension was offered solely for the purpose of showing intent, a permissible purpose under Rule 404(b). N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005).

Defendant also contends that even if the evidence was relevant and offered for a permissible purpose under Rule 404(b), it should have been excluded because the danger of unfair prejudice substantially outweighed its probative value. N.C. Gen. Stat. § 8C-1, Rule 403 (2005). Because the evidence was fundamental to proving that defendant acted with malice, it was clearly highly probative. Additionally, the danger of unfair prejudice was significantly mitigated by the trial court's limiting instruction. Therefore, on the record before us, we conclude that the trial court did not abuse its discretion by admitting evidence that defendant knew that his license was suspended.

[2] Defendant also contends that the trial judge's instructions were ambiguous as to whether the jury could consider the fact of defendant's previous DWI conviction for the purpose of establishing malice. A review of the instructions reveals no such ambiguity. The trial court specifically stated that the DWI "evidence was received *solely* for the purpose of showing that the defendant had the knowledge that his license was suspended on August 17, 2004." (Emphasis added). This argument is without merit.

Moreover, defendant's attempted reliance on the dissenting opinion in *State v. Locklear*, 159 N.C. App. 588, 583 S.E.2d 726 (2003), is misplaced. In that case, the fact of the defendant's prior DWI was itself presented as evidence of malice. *Id.* at 592, 583 S.E.2d at 729. Moreover, the prior stop had occurred four years before the stop at issue in *Locklear*. *Id.* This case is clearly distinguishable, both

because the proof of malice was defendant's knowledge of his suspended license, and because the prior stop took place less than a month before the stop at issue. Defendant's argument is without merit.

[3] Defendant next contends that the trial court erred by refusing to submit the lesser charge of misdemeanor death by vehicle, which defendant requested. Even were we to find error, however, defendant cannot show prejudice.

A trial court must submit a lesser charge to the jury "if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and acquit him of the greater." *State v. Holmes*, 142 N.C. App. 614, 619, 544 S.E.2d 18, 21 (2001) (quotations and citations omitted). However, a trial court must refuse to do so "when all the evidence tends to show that defendant committed the crime charged in the bill of indictment and there is no evidence of the lesser-included offense." *Id.*

"Assuming *arguendo* it was error not to instruct on [the lesser charge], a review of the possible verdicts submitted to the jury and the jury's ultimate verdict reveals that such error was harmless." *State v. Leach*, 340 N.C. 236, 239, 456 S.E.2d 785, 787 (1995). When faced with the choice between second degree murder and involuntary manslaughter, the jury convicted defendant of second degree murder. It is clear that the additional option of misdemeanor death by vehicle would not have made a difference in defendant's trial. "Thus, even if it was error to fail to instruct the jury in this case regarding [misdemeanor death by vehicle], such error was harmless." *Id.* at 240, 456 S.E.2d at 788.

[4] Defendant next claims that the trial court erred in refusing to grant his motion to dismiss the second degree murder charges for insufficient evidence. Specifically, defendant argues that there was insufficient evidence of malice. Defendant is incorrect.

Defendant attempts to rely on *Bethea*, noting that the *Bethea* court found that there was sufficient evidence of malice, but claiming that the defendant in that case was guilty of more egregious conduct than he was in the present case. However, we need not engage in fine tuning exactly how fast a defendant must be driving, or how many stop signs or red lights he must run to provide sufficient evidence of malice. "[D]efendant knew his license was revoked and proceeded to drive regardless of this knowledge[,] indicat[ing] defendant acted

with 'a mind regardless of social duty' and with 'recklessness of consequences.' We further find the evidence tending to show defendant took the car without permission . . . indicates a mind 'bent on mischief.' " *State v. Byers*, 105 N.C. App. 377, 382, 413 S.E.2d 586, 589 (1992). Finally, the very act of fleeing from the police certainly constitutes malice. There was more than sufficient evidence to support the malice element of the charge.

[5],[6] Although defendant claims that there was a fatal variance between the indictment, which stated that defendant was driving while his license was *revoked*, and the proof offered at trial, which was that his license was *suspended*, we note that a mere seven pages earlier in his brief defendant concedes that under our statutes, the two terms are "used synonymously". N.C. Gen. Stat. § 20-4.01(47) (2005). Given the statutory language and defendant's acknowledgment of it, we need not discuss this issue further. Likewise, defendant's contentions regarding his indictment for possession of a stolen motor vehicle contain no real argument; defendant claims that he "presents this argument . . . for the Court's review to preserve the issue for further review if necessary." "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C.R. App. P. 28(b)(6) (2007). We find no error in defendant's case.

No error.

Judges STEELMAN and STROUD concur.

KATHERINE M. ROBERTSON, PLAINTIFF v. GRAHAM H. PRICE, STONE & CHRISTY, P.A., WILLIAM H. CHRISTY AND BRYANT D. WEBSTER, DEFENDANTS

No. COA07-257

(Filed 6 November 2007)

Process and Service; Statutes of Limitation and Repose—chain of summonses—issuance of alias or pluries summons without indication of relation to original summons

The trial court did not err in a negligence case arising out of the representation of plaintiff in the purchase of property by dismissing plaintiff's action based on plaintiff's failure to serve

defendants with process within the time allowed, because: (1) the issuance of an alias or pluries summons without an indication of its relation to the original summons has the double effect of initiating a new action and discontinuing the original one; (2) when it is desired that the action shall date from the issuance of the original summons, or when it is necessary for it to do so, the successive writs must show their relation to the original process in order to toll the statute of limitations; (3) plaintiff never served defendants with the 14 March 2006 summonses and defendants were not served with the application and order extending time to file complaint until 20 June 2006; (4) although plaintiff filed her complaint on 3 April 2006 within the 20-day extension of time and caused additional civil summonses to be issued against defendants, she did not refer to the original 14 March 2006 summonses on the face of the 3 April 2006 summonses, nor were the 3 April 2006 summonses designated as alias or pluries; (5) although the 12 June 2006 summonses referred to the 3 April 2006 summonses, plaintiff failed to create an unbroken chain from the first summonses to the time of actual service since the 3 April 2006 summonses were not alias or pluries and did not refer back to the 14 March 2006 summonses; and (6) plaintiff's issuance of the 3 April 2006 summonses without an indication of their relation to the original 14 March 2006 summonses had the double effect of initiating a new action and discontinuing the original one, making the new action initiated on 3 April 2006 outside of the three-year statute of limitations period.

Appeal by Plaintiff from order entered 1 December 2006 by Judge Robert D. Lewis, in Superior Court, Buncombe County. Heard in the Court of Appeals 18 September 2007.

Kelly & Rowe, P.A., by James Gary Rowe, for plaintiff-appellant.

Long, Parker, Warren & Jones, P.A., by W. Scott Jones, for defendants-appellees.

WYNN, Judge.

When a defendant is not served with process within the time allowed, the action may be continued by suing out an alias or pluries summons within 90 days where there is "an unbroken chain from the

first summons to the time of actual service."[1] Here, because the plaintiff failed to serve the defendants with process within the time allowed and did not create an unbroken chain of summonses referring back to the original summonses, we affirm.

On 2 February 2003, Plaintiff Katherine Robertson entered into an Offer to Purchase and Contract with Graham H. Price for the purchase of real property located in Black Mountain, North Carolina. One of the terms of the contract granted Ms. Robertson a right-of-way to 2.42 acres of land which was part of the total land purchase. Ms. Robertson employed Defendants, Stone and Christy, P.A., William A. Christy, and Bryant D. Webster, to examine the title and represent her in the purchase of the property.

After closing on the purchase of the property on 14 March 2003, Ms. Robertson discovered that the right-of-way specified in the contract had not been conveyed to her. She filed suit against the seller, Graham H. Price, and against Defendants for negligence arising out of their representation of Ms. Robertson in the purchase of the Black Mountain property. Ms. Robertson's claim against Graham H. Price was dismissed and is not the subject of this appeal. Because Defendants' alleged negligence occurred on or before 14 March 2003, the statute of limitations on Ms. Robertson's claims barred any action commenced after 14 March 2006. *See* N.C. Gen. Stat. § 1-52 (2005).

On 14 March 2006, Ms. Robertson filed an application requesting "permission to file a complaint within twenty (20) days" of the order. On that same day, the Clerk of Court granted the order of extension, and issued a "Civil Summons to be Served with Order Extending Time to File Complaint" to each of the three Defendants.

On 3 April 2006, Ms. Robertson filed a complaint and caused Civil Summonses to be issued against Defendants. The record indicates that Ms. Robertson did not serve Defendants with either the "Civil Summons to be Served with Order Extending Time to File Complaint" issued on 14 March or the Civil Summonses issued on 3 April 2006. Moreover, none of the 3 April summonses stated that they were alias or pluries summonses, nor did they refer back to the 14 March summonses.

On 12 June 2006, Ms. Robertson caused additional summonses to be issued against Defendants. The summons issued against Stone &

1. *Childress v. Forsyth Cty. Hosp. Auth., Inc.*, 70 N.C. App. 281, 283, 319 S.E.2d 329, 331 (1984); N.C. Gen. Stat. § 1A-1, Rule 4(d)(2) (2005).

Christy, P.A. was designated as an alias and pluries summons and referred to 3 April 2006 as the "Date Last Summons Issued." The summons issued against William A. Christy also referred to 3 April 2006 as the "Date Last Summons Issued." The summons issued against Bryant D. Webster did not refer to the 3 April 2006 summons. On 20 June 2006, Defendants were served with copies of the 12 June 2006 summonses and Ms. Robertson's complaint. Attached to Ms. Robertson's complaint were the application and order extending time to file complaint filed 14 March 2006.

On 29 June 2006, Defendants filed a motion to dismiss for failure to state a claim upon which relief can be granted and lack of jurisdiction. The trial court conducted a hearing on 1 November 2006 and entered an Order granting Defendants' motion to dismiss on 1 December 2006.

Ms. Robertson now appeals, arguing that the trial court erred by dismissing her action. We disagree.

It is well settled that the "summons, not the complaint, constitutes the exercise of the power of the State to bring the defendant before the court." *Childress v. Forsyth Cty. Hosp. Auth., Inc.*, 70 N.C. App. 281, 285, 319 S.E.2d 329, 332 (1984) (citation omitted), *disc. review denied*, 312 N.C. 796, 325 S.E.2d 484 (1985). "The purpose of a summons is to give notice to a person to appear at a certain place and time to answer a complaint against him." *Latham v. Cherry*, 111 N.C. App. 871, 874, 433 S.E.2d 478, 481 (1993), *cert. denied*, 335 N.C. 556, 441 S.E.2d 116 (1994). "In order for a summons to serve as proper notification, it must be issued and served in the manner prescribed by statute." *Id.*

Rule 3(a) of our North Carolina Rules of Civil Procedure provides that an action may be commenced by the issuance of a summons when "[a] person makes an application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days." N.C. Gen. Stat. § 1A-1, Rule 3(a) (2005). Rule 3 then provides that "[t]he summons and the court's order [extending time] shall be served in accordance with the provisions of Rule 4." *Id.* Rule 4(c) of our North Carolina Rules of Civil Procedure requires personal or substituted service of a summons "within 60 days after the date of the issuance of the summons." *Id.* at Rule 4(c). However, Rule 4(d) allows for an extension of time for service in a civil action where a plaintiff obtains "an endorsement upon the original summons" or "sue[s] out an alias or pluries summons returnable in the same man-

ner as the original process . . . within 90 days after the date of issue of the last preceding summons in the chain of summonses." *Id.* at Rule 4(d)(2).

The statute's reference to a "chain of summonses" has been interpreted as "an implicit requirement that an alias or pluries summons contain a reference in its body to indicate its alleged relation to the original." *Integon Gen. Ins. Co. v. Martin*, 127 N.C. App. 440, 441, 490 S.E.2d 242, 244 (1997) (internal citation omitted). The issuance of an alias or pluries summons without an indication of its relation to the original summons "has the double effect of initiating a new action and discontinuing the original one." *Id.* Our Supreme Court has held that an improperly issued alias or pluries summons may still be sufficient as an original summons. *Webb v. Seaboard Air Line R.R. Co.*, 268 N.C. 552, 554, 151 S.E.2d 19, 20 (1966) (citation omitted). "But when it is desired that the action shall date from the date of issuance of the original summons, or when it is necessary for it to do so, in order to toll the statute of limitations, the successive writs must show their relation to the original process." *Id.*

Here, Defendants' alleged negligence occurred on or before 14 March 2003. Therefore, the statute of limitations on Ms. Robertson's claims barred any action commenced after 14 March 2006. *See* N.C. Gen. Stat. § 1-52. Ms. Robertson properly initiated her action against Defendants on 14 March 2006, by causing three "Civil Summons to be Served with Order Extending Time to File Complaint" to be issued and obtaining an "Application and Order Extending Time To File Complaint." N.C. Gen. Stat. § 1A-1, Rule 3(a). However, Ms. Robertson never served Defendants with the 14 March 2006 summonses and Defendants were not served with the Application and Order Extending Time to File Complaint until 20 June 2006.

Ms. Robertson filed her complaint on 3 April 2006, within the 20-day extension of time, and caused additional Civil Summonses to be issued against Defendants. However, Ms. Robertson did not refer to the original 14 March 2006 summonses on the face of the 3 April 2006 summonses, nor were the 3 April 2006 summonses designated as alias or pluries.

On 12 June 2006, Ms. Robertson caused additional summonses to be issued against Defendants. One of the three summonses was designated as alias and pluries, and two of the three 12 June 2006 summonses referred to 3 April 2006 as the "date the last summons issued." Defendants were served with the 12 June 2006 summonses,

Ms. Robertson's complaint, and the order extending time to file complaint on 20 June 2006.

Although the 12 June 2006 summonses referred to the 3 April 2006 summonses, because the 3 April 2006 summonses were not alias or pluries and did not refer back to the 14 March 2006 summonses, Ms. Robertson failed to create "an unbroken chain from the first summons to the time of actual service." *Childress*, 70 N.C. App. at 283, 319 S.E.2d at 331. Ms. Robertson's issuance of the 3 April 2006 summonses without an indication of their relation to the original 14 March 2006 summonses had "the double effect of initiating a new action and discontinuing the original one." *Integon*, 127 N.C. App. at 441, 490 S.E.2d at 244; *see also Latham*, 111 N.C. App. at 874, 433 S.E.2d at 481 (holding that defective service of process discontinued plaintiff's original action where plaintiff failed to serve the Rule 3(a) summons and order extending time to file a complaint). The new action initiated on 3 April 2006 was outside of the three-year statute of limitations period. Accordingly, Defendants were not served with appropriate process within the statute of limitations. We affirm.

Affirmed.

Judges HUNTER and JACKSON concur.

STATE OF NORTH CAROLINA v. CRAIG CLIFFORD WISSINK

No. COA04-1081-2

(Filed 6 November 2007)

Sentencing— aggravating factor—committed offense while on probation—*Blakely* error—harmless beyond reasonable doubt

Assuming that defendant did not stipulate to the fact that he was on probation at the time of the offense at issue in the present case and that *Blakely* error did occur, any error was harmless beyond a reasonable doubt, because: (1) during defendant's interview with officers which was introduced in evidence, defendant admitted that he was on probation on the date of the offense; (2) both the State and defense counsel signed the prior record level worksheet indicating that defendant was on probation at the time

of the offense, and the parties agreed at trial that defendant had one prior record level point based on defendant being on probation at the time of the offense; and (3) there was overwhelming and uncontroverted evidence that defendant committed the offense of discharging a firearm into occupied property while he was on probation for another offense.

Appeal by Defendant from judgments entered 1 April 2004 by Judge Knox V. Jenkins in Superior Court, Cumberland County. Heard in the Court of Appeals 11 May 2005, and opinion filed 16 August 2005, finding sentencing error and remanding for resentencing. On remand to this Court by opinion of the North Carolina Supreme Court filed 28 June 2007 reversing in part and remanding for reconsideration in light of *State v. Hurt*, 361 N.C. 325, 643 S.E.2d 915 (2007), and *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006).

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

M. Alexander Charns for Defendant.

McGEE, Judge.

This case comes before us on remand from the North Carolina Supreme Court for reconsideration in light of its decisions in *State v. Hurt*, 361 N.C. 325, 643 S.E.2d 915 (2007), and *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). Assuming that Craig Clifford Wissink (Defendant) did not stipulate to the fact that he was on probation at the time of the offense at issue in the present case, and that *Blakely* error did occur, we hold that any error was harmless beyond a reasonable doubt.

Defendant pleaded not guilty to charges of first-degree murder, conspiracy to commit robbery with a dangerous weapon, attempted robbery with a dangerous weapon, discharging a firearm into occupied property, and felonious larceny of a motor vehicle. Prior to trial, the State dismissed the charge of conspiracy to commit robbery with a dangerous weapon. A jury found Defendant guilty of first-degree murder, attempted robbery with a firearm, discharging a firearm into occupied property, and misdemeanor larceny of a motor vehicle. The trial court arrested judgment on the charge of attempted robbery with a firearm because it merged with the first-degree murder charge.

The trial court found that Defendant committed the offense of discharging a firearm into occupied property while Defendant was on probation. As a result, Defendant's prior record level points increased from eight to nine, and his prior record level increased from III to IV. N.C. Gen. Stat. § 15A-1340.14(b)(7) (2003) (if a defendant commits an offense while on probation, the defendant is assigned one point); N.C. Gen. Stat. § 15A-1340.14(c)(4) (2003) (a defendant with nine prior record points has a prior record Level IV). The trial court sentenced Defendant to life imprisonment without parole for the first-degree murder charge, thirty-seven to fifty-four months for the charge of discharging a firearm into occupied property, and sixty days for the charge of misdemeanor larceny of a motor vehicle.

Defendant appealed the convictions and sentences. In *State v. Wissink*, 172 N.C. App. 829, 617 S.E.2d 319 (2005), our Court found no error in Defendant's convictions but remanded the case for resentencing. Our Supreme Court allowed the State's petition for writ of supersedeas and petition for discretionary review on 19 December 2006. *State v. Wissink*, 361 N.C. 180, 640 S.E.2d 392 (2006). In *State v. Wissink*, 361 N.C. 418, 645 S.E.2d 761 (2007) (per curiam), our Supreme Court reversed our decision to remand the case for resentencing and remanded the case to this Court for reconsideration in light of *Hurt* and *Blackwell*. *Id.* at 419, 645 S.E.2d at 761. Our Supreme Court also stated that "[t]he Court of Appeals opinion remains undisturbed in all other respects." *Id.*

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 *Hurt*, our Supreme Court held that "a judge may not find an aggravating factor on the basis of a defendant's admission unless that defendant personally or through counsel admits the necessary facts or admits that the aggravating factor is applicable." *Hurt*, 361 N.C. at 330, 643 S.E.2d at 918. This holding seems to suggest that when defense counsel admits the facts necessary for an aggravating factor, such a finding by a trial court does not constitute *Blakely* error.

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).

In the present case, the following colloquy occurred at trial:

> [THE STATE]: . . . the prior record level . . . worksheet . . . shows that . . . [D]efendant . . . has two—eight points plus a one point, that . . . he was on probation at the time of this offense, which gives him nine record level points, and he's a level IV for the . . . sentencing, Your Honor.
>
> My understanding, Your Honor, is that would probably only . . . apply to discharging a weapon into occupied property, a class E Felony. The misdemeanor he'd be a level II, if the Court—
>
> THE COURT: All right.
>
> [DEFENSE COUNSEL]: I think that's correct, Your Honor.

The State argues that, as a result of defense counsel's statements, Defendant stipulated to the fact that he was on probation at the time he committed the offense of discharging a firearm into occupied property. However, we need not decide whether, pursuant to *Hurt*, Defendant stipulated to that fact. Even assuming that defense coun-

sel's statement did not amount to a stipulation, and that *Blakely* error occurred, any error was harmless beyond a reasonable doubt.

During Defendant's interview with Lieutenant Sam Pennica and Sergeant Ray Wood, which was introduced into evidence, Defendant admitted that he was on probation on 27 September 2000, the date of the offense at issue in the present case. Moreover, in section I of Defendant's prior record level worksheet, Defendant was given eight points for prior convictions. Defendant also was given one point because he committed the offense at issue in the present case "(a) while on supervised or unsupervised probation, parole, or post-release supervision; or (b) while serving a sentence of imprisonment; or (c) while on escape." In section II of Defendant's prior record level worksheet, Defendant was assigned a prior record level of IV because he had a total of nine points from section I. Section III, entitled "Stipulation," states as follows:

> The [State] and defense counsel . . . stipulate to the accuracy of the information set out in Sections I. and IV. of this form, including the classification and points assigned to any out-of-state convictions, and agree with . . . [D]efendant's prior record level or prior conviction level as set out in Section II.

Both the State and defense counsel signed the prior record level worksheet. Additionally, as we set forth above, the State said at trial that Defendant had one prior record level point because Defendant was on probation at the time of the offense, and defense counsel stated: "I think that's correct, Your Honor."

Defendant does not contest this evidence. Rather, Defendant argues the trial court erred by not submitting this factual issue to a jury. However, based upon the evidence recited above, we hold there was overwhelming and uncontroverted evidence that Defendant committed the offense of discharging a firearm into occupied property while he was on probation for another offense. Therefore, even if *Blakely* error occurred, any *Blakely* error was harmless beyond a reasonable doubt.

Except as herein modified, the opinion filed by this Court on 16 August 2005 remains in full force and effect.

No prejudicial error.

Judges CALABRIA and ELMORE concur.

STATE OF NORTH CAROLINA v. KENNETH RICHARD JOHNSON, DEFENDANT

No. COA06-1551

(Filed 6 November 2007)

1. Constitutional Law— right against double jeopardy— habitual DWI—prior rejection of same argument

Although defendant contends he has already been punished for the predicate offenses for his habitual DWI charge and that his habitual DWI conviction therefore violated the constitutional prohibition against double jeopardy, defendant conceded that the Court of Appeals has already rejected this argument.

2. Motor Vehicles— habitual DWI—harsher punishment for subsequent offenses

The trial court did not commit plain error or lack jurisdiction to sentence defendant as a felon in a habitual DWI case even though the trial court relied on the same predicate offenses in his habitual DWI conviction as a Guilford County court relied on in sentencing him for a different habitual DWI charge, because rather than being punished three times for each of the two misdemeanor driving while impaired convictions, defendant was punished only one time for his most recent offense, although more severely.

3. Evidence— opinion testimony—sobriety

The trial court did not err in a habitual DWI case by allowing an officer to present opinion evidence regarding defendant's sobriety, because: (1) a lay person may give his opinion as to whether a person is intoxicated so long as that opinion is based on the witness's personal observation; and (2) there was no dispute that the officer personally observed defendant and that he based his opinion on those observations.

4. Constitutional Law— right to remain silent—plain error analysis

The trial court did not commit plain error in a habitual DWI case by allowing an officer to testify as to whether defendant asked any questions about why he was being arrested even though defendant contends it was an improper comment on defendant's constitutional right to remain silent, because considering the plethora of evidence against defendant, it cannot be said that a different result would have occurred absent this questioning or that defendant was denied a fair trial.

5. Motor Vehicles— driving while impaired—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the DWI charge based on insufficient evidence, because: (1) defendant presented no real argument; and (2) defendant was pulled over with open containers of alcohol in the passenger compartment of his vehicle, officers observed him in a visibly impaired condition, there was a strong odor of alcohol in the car, defendant refused to take an Intoxilyzer test, and defendant passed out shortly thereafter.

6. Constitutional Law— right to jury trial—requesting numerical division—plain error analysis—alleged coercion of verdict

The trial court did not commit plain error in a habitual DWI case by asking the jury for a numerical division even though defendant contends it effectively coerced a verdict, because a totality of the circumstances review revealed that: (1) an inquiry as to a division without asking which votes were for conviction or acquittal is not inherently coercive or a violation of defendant's right to a jury trial; and (2) the court did not convey the impression that it was irritated with the jury for not reaching a verdict, it did not intimate that it would hold the jury until it reached a verdict, and it did not tell the jury that a retrial would burden the court system.

Appeal by defendant from judgments entered 6 July 2006 by Judge Steve A. Balog in Alamance County Superior Court. Heard in the Court of Appeals 7 June 2007.

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

Daniel F. Read, for defendant.

ELMORE, Judge.

On 7 May 2004, Officer Brian Becmer of the Burlington Police Department observed a speeding truck. He pursued the vehicle with his blue lights flashing, eventually accelerating to between seventy and eighty miles per hour before finally catching it. When the truck stopped, Officer Becmer observed "a lot of movement inside the vehicle," which was occupied by two people.

Upon approaching the truck, Officer Becmer observed an open container of beer and smelled a strong odor of alcohol. The driver, Kenneth Richard Johnson (defendant), had bloodshot, glassy eyes, and when Officer Becmer requested his license, defendant replied that he did not have one because it was suspended. Defendant claimed to have had two beers. Officer Becmer arrested defendant for Driving While Intoxicated (DWI) and Driving While License Revoked (DWLR). When Officer Becmer searched defendant's car, he discovered an open bottle of brandy, two unopened beer cans, two empty beer cans, and one open can of beer.

Defendant was unsteady as he walked to the police car, and fell asleep once inside it. Officer Becmer read defendant his Intoxilyzer rights, which defendant signed. Defendant "passed out or fell asleep" approximately three minutes later. When the officers woke him up, defendant refused to submit to the Intoxilyzer test.

Defendant was indicted for DWLR and habitual DWI. He was convicted of the DWLR charge, but following a hung jury, the trial judge declared a mistrial as to his habitual DWI charge. On retrial, defendant was found guilty of the habitual DWI. It is from this judgment that he now appeals.

[1] Defendant first contends that he has already been punished for the predicate offenses to his habitual DWI charge, and that his habitual DWI conviction therefore violates the constitutional prohibition against double jeopardy. As defendant concedes, this Court has previously rejected this argument in *State v. Vardiman*, 146 N.C. App. 381, 552 S.E.2d 697 (2001). We decline his request to revisit this issue; defendant's first argument is without merit.

[2] Defendant next claims that the trial court committed plain error and lacked jurisdiction in sentencing him as a felon because the trial court relied on the same predicate offenses in his habitual DWI conviction as a Guilford County court relied on in sentencing him for a different habitual DWI charge.[1] Defendant argues that this situation results "in him being punished twice for the same offenses." We disagree.

As the State notes, this issue is also foreclosed by our decision in *Vardiman*. In that case, "[t]wo of [the] defendant's misdemeanor driving while impaired convictions that were used in [his] first habitual impaired driving conviction were used again in [his] second habit-

1. That case is also currently before this Court (COA06-1552).

ual impaired driving conviction." *Id.* at 387, 552 S.E.2d at 701. As we stated in that case, "[r]ather than being punished three times for each of the two misdemeanor driving while impaired convictions, as defendant argues, defendant was punished only one time for his most recent offense, though more severely." *Id.* Defendant's argument is without merit.

[3] Defendant next claims that allowing Officer Becmer to present opinion evidence regarding defendant's sobriety was error. Defendant is incorrect. " '[A] lay person may give his opinion as to whether a person is intoxicated so long as that opinion is based on the witness's personal observation.' " *State v. Streckfuss*, 171 N.C. App. 81, 89, 614 S.E.2d 323, 328 (2005) (quoting *State v. Rich*, 351 N.C. 386, 398, 527 S.E.2d 299, 306 (2000)) (alteration in original). There is no dispute that Officer Becmer personally observed defendant and that he based his opinion on those observations. Defendant's contention has no merit.

[4] Defendant next argues that the trial court erred in allowing Officer Becmer to testify as to whether defendant asked any questions about why he was being arrested. Defendant contends that this testimony served to allow the State to comment on defendant's constitutional right to remain silent. We disagree.

Initially, we note that the State correctly argues that defendant failed to object to this line of questioning and therefore did not preserve this issue for appeal. "In criminal cases, a question which was not preserved by objection noted at trial . . . may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(c)(4) (2007). "Under this standard of review, a defendant has the burden of showing: (i) that a different result probably would have been reached but for the error; or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Watkins*, 181 N.C. App. 502, 507, 640 S.E.2d 409, 413 (2007) (quotations and citations omitted). Considering the plethora of evidence against defendant, we cannot hold that this line of questioning led to a different result or denied defendant a fair trial. Accordingly, we find no merit in defendant's argument.

[5] Defendant next contends that the trial court's denial of his motion to dismiss the DWI charge for insufficient evidence was error. We emphatically disagree. Defendant presents no real argument;

indeed, there appears to be no argument to make. Defendant was pulled over with open containers of alcohol in the passenger compartment of his vehicle, officers observed him in a visibly impaired condition, there was a strong odor of alcohol in the car, defendant refused to take an Intoxilyzer test, and defendant passed out shortly thereafter. In no way did the State present insufficient evidence to take this case to a jury.

[6] Finally, defendant argues that the trial court committed plain error in asking the jury for a numerical division. Defendant suggests that this "placed undue pressure on the jurors who were in the minority and effectively coerced a verdict." We disagree.

Our Supreme Court has addressed this issue:

> In determining whether the trial court coerced a verdict by the jury, this Court must consider the totality of the circumstances. An inquiry as to a division, without asking which votes were for conviction or acquittal, is not inherently coercive. Without more, it is not a violation of the defendant's right to a jury trial. Some of the factors to be considered include whether the trial court conveyed the impression that it was irritated with the jury for not reaching a verdict, whether the trial court intimated that it would hold the jury until it reached a verdict, and whether the trial court told the jury that a retrial would burden the court system.

State v. Nobles, 350 N.C. 483, 510, 515 S.E.2d 885, 901-02 (1999) (quotations and citations omitted). In this case, as in *Nobles*, "[t]he record demonstrates that the trial court did none of these things." *Id.* at 510, 515 S.E.2d at 902. Accordingly, the trial court did not err.

Having conducted a thorough review of the record and briefs, we can discern no error in defendant's trial.

No error.

Judges STEELMAN and STROUD concur.

STATE OF NORTH CAROLINA v. THEODORE PITTMAN, JR., DEFENDANT

No. COA04-417-2

(Filed 6 November 2007)

Sentencing— aggravating factor—victim very young—*Blakely* error—failure to submit to jury harmless beyond reasonable doubt

The trial court's finding in an attempted first-degree murder, first-degree kidnapping, and felony conspiracy case of the aggravating factor that the victim was very young without submitting the factor to a jury for a determination beyond a reasonable doubt constituted harmless error beyond a reasonable doubt, because: (1) it was undisputed that the victim was only six weeks old; and (2) there could be no serious doubt that a rational jury would have found this aggravating factor beyond a reasonable doubt.

Upon remand from the North Carolina Supreme Court, appeal by defendant from judgment entered 29 October 2003 by Judge Quentin T. Sumner in Nash County Superior Court. Originally heard in the Court of Appeals 10 January 2005.

Attorney General Roy Cooper, by Assistant Attorney General W. Wallace Finlator, Jr., for the State.

Marilyn G. Ozer for defendant-appellant.

GEER, Judge.

This case comes before us on remand from the North Carolina Supreme Court so that we may reexamine the issue of sentencing in light of the Supreme Court's recent decisions in *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, —— U.S. ——, 167 L. Ed. 2d 1114, 127 S. Ct. 2281 (2007), and *State v. Hurt*, 361 N.C. 325, 643 S.E.2d 915 (2007). The sole issue before us on remand is whether the trial court's finding (during defendant's sentencing) of an aggravating factor, without submitting the factor to a jury for a determination beyond a reasonable doubt, constitutes harmless error beyond a reasonable doubt. We hold that it does.

Discussion

On 13 January 2003, defendant was indicted on one count of attempted first degree murder, one count of first degree kidnapping, and one count of felony conspiracy. The State's evidence tended to show that in November 2002, defendant took his six-week-old daughter from her mother, without the mother's knowledge, and abandoned the infant in an unheated, collapsing shed out in the country. Although two days passed before the baby was found, during which time the temperature dropped into the 30s, the baby survived. A jury found defendant guilty on all three counts of the indictment.

During sentencing, the trial judge found as an aggravating factor that the victim was very young and found as mitigating factors that defendant had been honorably discharged from the armed services, had supported his family, and had a support system in the community. The judge determined that the aggravating factor outweighed the mitigating factors and sentenced defendant in the aggravated range to consecutive sentences of 196 to 245 months on the attempted murder conviction, 92 to 120 months on the first degree kidnapping conviction, and 80 to 105 months on the conspiracy conviction.

Defendant timely appealed and, while this case was pending on appeal, filed two motions for appropriate relief based on *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004). This Court affirmed defendant's convictions, but remanded for resentencing based on *Blakely*. *See State v. Pittman*, 174 N.C. App. 745, 754-55, 622 S.E.2d 135, 142 (2005). The North Carolina Supreme Court allowed the State's petition for discretionary review and remanded to this Court for reconsideration of that portion of our opinion ordering resentencing.

The United States Supreme Court has held that aggravating factors other than prior convictions that increase a defendant's sentence "beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455, 120 S. Ct. 2348, 2362-63 (2000). Further, "the 'statutory maximum' . . . 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." *Blakely*, 542 U.S. at 303, 159 L. Ed. 2d at 413, 124 S. Ct. at 2537 (emphasis omitted). "Thus, while a trial court may impose an aggravated sentence on the basis of admissions made by a defendant, error occurs when a judge aggra-

vates a criminal sentence on the basis of findings made by the judge that are in addition to or in lieu of findings made by a jury." *Hurt*, 361 N.C. at 329, 643 S.E.2d at 917.

Nevertheless, a trial court's reliance in sentencing on an aggravating factor not submitted to the jury does not automatically require resentencing. *See Blackwell*, 361 N.C. at 51-52, 638 S.E.2d at 459. Instead, "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.

Here, the sole aggravating factor found by the trial court was that the victim was very young. Since it is undisputed that the victim was only six weeks old, there can be no serious doubt that a rational jury would have found this aggravating factor beyond a reasonable doubt. Therefore, pursuant to *Blackwell*, we hold that any error under *Blakely* was harmless beyond a reasonable doubt and uphold the trial court's sentence.

No error.

Chief Judge MARTIN and Judge CALABRIA concur.

STACY WEAVER, AS ADMINISTRATOR OF THE ESTATE OF FRANKIE M. VAMPER, PLAINTIFF
v. SAINT JOSEPH OF THE PINES, INC., DEFENDANT

No. COA06-1524

(Filed 20 November 2007)

1. Pleadings— non-pleading materials—stipulation of parties to treat as pleadings—summary judgment

Review was as if the court had granted summary judgment for defendant rather than granting motions under Rule 12(b)(6) and Rule 12(c), where the parties had stipulated that the court could treat non-pleading materials as pleadings. Matters outside the complaint are not germane to Rule 12(b)(6) and Rule 12(c), and the mandatory language of these Rules is unambiguous and leaves no room for variance in practice.

2. Compromise and Settlement— release—action on debt—language encompassing other actions

The unambiguous language of a release which arose from a dispute over payment for care at defendant's nursing and assisted living facility constituted a release of plaintiff's claims in this action for negligence. It is immaterial that neither the release nor the mediation settlement agreement specifically mentions this negligence and wrongful death claim; the language of the release encompasses the alleged injury.

3. Compromise and Settlement— release—incompetency of party—ratification

A release was enforceable despite the purported incompetency of the now-deceased plaintiff because the evidence presented by the parties establishes ratification.

4. Compromise and Settlement— release—mutual mistake

There was no genuine dispute of fact as to whether a release was the result of mutual mistake where the release arose from a dispute about payment for nursing home care but contained language which encompassed the alleged injury suffered by the deceased. Nothing in plaintiff's affidavit states that the deceased was mistaken in her understanding as to the content or legal effect of the release.

5. Compromise and Settlement— release—consideration

A release agreement was supported by valid consideration where it stated that it was in consideration of the compromise of

disputed claims. Payments were made and claims were released and discharged.

6. Compromise and Settlement— release—not unconscionable

There was no evidence that a release was unconscionable. The mere fact that the deceased and her sons did not choose to have legal representation to explain the legal consequences of the release does not render it procedurally unconscionable, and the release on its face showed that plaintiffs obtained a significant financial concession from defendant.

Appeal by plaintiff from order entered 9 August 2006 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 6 June 2007.

Bain, Buzzard & McRae, LLP, by Robert A. Buzzard, for plaintiff-appellant.

Van Camp, Meacham & Newman, PLLC, by Thomas M. Van Camp, for defendant-appellee.

GEER, Judge.

Plaintiff Stacy Weaver, the administrator of the estate of Frankie M. Vamper, appeals from an order dismissing plaintiff's complaint against defendant Saint Joseph of the Pines, Inc. ("SJP") and also granting judgment on the pleadings in favor of SJP. Although the parties present this case for review under Rules 12(b)(6) and 12(c) of the North Carolina Rules of Civil Procedure, the parties and the trial court relied upon matters outside the pleadings, and, consequently, the Rules of Civil Procedure require that we decide this appeal pursuant to Rule 56.

Based upon our review of the affidavits and exhibits submitted by the parties, we hold that no genuine issue of material fact exists regarding whether a general release signed by Ms. Frankie M. Vamper bars the claims in this lawsuit. Because, as a matter of law, the release precludes this action, and plaintiff has failed to present evidence that the release is unenforceable, we hold that the trial court properly entered judgment in favor of SJP.

Facts

On 17 May 2006, plaintiff filed a negligence and wrongful death action against SJP, a corporation that owns and runs assisted-living

and nursing-care facilities. According to the complaint, on 20 May 2003, SJP's employees transported Ms. Vamper in a van to receive dialysis treatment. While the employees were loading Ms. Vamper into the van, a piece of the mechanical wheelchair lift broke and landed on Ms. Vamper's leg. Plaintiff asserts in the complaint that Ms. Vamper suffered serious injuries from this incident, ultimately resulting in the amputation of her leg and further serving as a proximate cause of her death, nearly three years later, on 18 March 2006.

On 5 June 2006, SJP filed an answer; a motion to dismiss pursuant to N.C.R. Civ. P. 12(b)(1), 12(b)(2), and 12(b)(6); and a motion for judgment on the pleadings pursuant to N.C.R. Civ. P. 12(c). In support of these motions, SJP attached various documents relating to a previous lawsuit that SJP had filed in August 2004 against Frankie Mae Vamper, Theron Junior Vamper, Sr., and Joseph Vamper.

These documents reflect that, in the prior lawsuit, SJP was attempting to recover a debt of $29,174.54 owed by Ms. Vamper and her family for care and treatment services rendered to Ms. Vamper at SJP's facility. When the Vampers failed to answer the August 2004 complaint, the Clerk of Superior Court in Moore County entered default against them on 22 November 2004. SJP subsequently filed a motion for default judgment in the amount of the debt.

In June 2005, however, the parties held a mediation conference, as a result of which they entered into a "Settlement Agreement and Mutual Release" ("Release"), one of the documents that SJP attached to its answer in this case. Under the terms of the Release, the Vampers agreed to pay SJP a sum of $6,000.00, in 24 monthly payments of $250.00, as "full and final settlement of the pending lawsuits." SJP, in return, agreed to dismiss with prejudice its claims against the Vampers.

Most pertinent to this case, the Release contained the following provision:

> 4. [THE VAMPERS] do for themselves, their heirs, successors and assigns, hereby RELEASE, ACQUIT, and FOREVER DISCHARGE ST. JOSEPH OF THE PINES, INC., ["SJP"] its successors and assigns, agents, servants, employees, and corporate, personal, and litigation attorneys, of and from any and all claims, actions or causes of action, demands, damages, costs, judgments, expenses, liabilities, attorneys' fees, and legal costs, whether known or unknown, whether in law or in equity, whether in tort

> or in contract, of any kind or character, which they now have, or might otherwise have, against the [sic] SJP, arising out of or related to the care and treatment of Frankie Mae Vamper, all to the end that all claims or matters that are, or might be in controversy between the Vampers and SJP are forever put to rest, relating to the matters and things alleged in the pending lawsuits, it being the clear intention to forever discharge and release all past and present claims against SJP from all consequences resulting or potentially to result from the matters and things set forth in the pending lawsuits or the care and treatment of Frankie Mae Vamper while a resident at the SJP facility.

The final page of the Release shows the notarized signatures of Frankie Mae Vamper, Theron Junior Vamper, Sr., and Joseph E. Vamper.

In this case, after SJP submitted the Release to the trial court in conjunction with its answer and Rule 12 motions, plaintiff gave notice of his intent to take the deposition of SJP's counsel, Thomas M. Van Camp. Apparently, Thomas Van Camp also represented SJP in the mediation of the debt claims and was instrumental in preparing the Release. Plaintiff also filed a motion to continue the hearing on SJP's Rule 12 motions, asserting that "depositions and other discovery [are] necessary in order for Plaintiff to respond to Defendant's motion to dismiss."

Five days later, SJP filed an objection to plaintiff's motion to continue and a motion for protective order barring plaintiff from taking the deposition of Thomas Van Camp. SJP asserted:

> It would be appropriate to address whether a deposition of defendant's counsel of record should be allowed only after the pending Motion to Dismiss and Motion for Judgment on the Pleadings have been ruled upon. If, and only if, the Court determines that the language contained in the Settlement Agreement and Mutual Release is ambiguous, will it be necessary to address the appropriateness of taking the deposition of defendant's counsel of record.

SJP then filed an affidavit of Deborah T. Scherer, SJP accounts receivable manager. As attachments to the Scherer affidavit, SJP included a computer-generated "payment history" for the Frankie M. Vamper account and a copy of the obituary of Frankie M. Vamper. Plaintiff then filed a "Reply to Affirmative Defense," attaching an affi-

davit from Joseph Vamper, Ms. Vamper's son, a "Memorandum of Mediated Settlement," and a copy of the Release.

Following a hearing on 6 July 2006, Judge James M. Webb orally granted SJP's motion for protective order, stating "the protective order prohibits the taking of the deposition of Mr. Thomas M. Van Camp, defendant's counsel of record, until such time as the defendant's motion to dismiss and motion for judgment on the pleadings have been heard and ruled upon by the Court." The trial court then ordered that "defendant's motion to dismiss and motion for judgment on the pleadings [be] continued for hearing" until 31 July 2006.

In a joint letter, dated 17 July 2006 and filed with the trial court on 31 July 2006, the parties explained to the judge that they had entered into the following agreement and "stipulations":

> After discussing this matter . . . we have agreed that the Court can rule upon defendant's Motion for Judgment on the Pleadings and/or Motion to Dismiss without further argument by the parties. The documents that are currently on file, and which the parties stipulate shall be regarded by the court as pleadings in connection with ruling on the motions include: 1) the Complaint and any attachments; 2) the Answer and any attachments; 3) [plaintiff]'s Reply with attachments; and 4) the Scherer affidavit. Both parties further stipulate that the motions shall not be converted into motions for summary judgment.

On 9 August 2006, the trial court entered a written order granting SJP's motion to dismiss pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) and granting judgment on the pleadings to defendant pursuant to Rule 12(c). Plaintiff gave timely notice of appeal to this Court.

Conversion of Rule 12(b)(6) and Rule 12(c) Motions into Summary Judgment Motion

[1] As an initial matter, we must confront the awkward procedural posture of this case, a circumstance stemming from the parties' "stipulations" to the trial court. Here, the court acknowledged that the parties "stipulated in writing that the Court shall consider as pleadings in ruling upon the defendant's motions (1) the Complaint and any attachments; (2) the Answer and any attachments; (3) the [plaintiff's] Reply with attachments; and (4) the Scherer affidavit . . . ." The court further acknowledged that the parties "stipulat[ed] that the defend-

ant's motions shall not be converted into a motion for summary judgment" and that the letter containing these stipulations "has been made part of the court file . . . ."

Following these acknowledgments, the court proceeded to grant SJP's Rule 12(b)(6) and Rule 12(c) motions.[1] It is, therefore, apparent that the court, pursuant to the parties' joint "stipulations," treated the various non-pleading materials as pleadings and decided not to convert defendant's motions into one for summary judgment under Rule 56. This approach—although invited by the parties—cannot be reconciled with the Rules of Civil Procedure.

We first note that a Rule 12(c) motion may be filed only "[a]fter the pleadings are closed but within such time as not to delay the trial . . . ." N.C.R. Civ. P. 12(c). Thus, contrary to what was done here, a Rule 12(c) motion cannot be filed simultaneously with an answer. Indeed, this Court has recognized that "while a motion under Rule 12(b)(6) must be made *prior to or contemporaneously with* the filing of the responsive pleading," a distinguishing feature of a Rule 12(c) motion is that it "is properly made *after* the pleadings are closed . . . ." *Robertson v. Boyd*, 88 N.C. App. 437, 440, 363 S.E.2d 672, 675 (1988). *See also Yancey v. Watkins*, 12 N.C. App. 140, 141, 182 S.E.2d 605, 606 (1971) (holding Rule 12(c) motion premature where: "At the time defendants moved for judgment on the pleadings, the pleadings were not closed. Defendants had not filed answer. Plaintiff had not had opportunity to file a reply . . . ."); 1 G. Gray Wilson, *North Carolina Civil Procedure* § 12-13, at 237 (2d ed. 1995) ("Unlike other Rule 12 defenses, a motion for judgment on the pleadings cannot be asserted until 'after the pleadings are closed.' ").

With respect to SJP's Rule 12(b)(6) motion, "[t]he only purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading against which it is directed." *White v. White*, 296 N.C. 661, 667, 252 S.E.2d 698, 702 (1979). As a general proposition, therefore, matters outside the complaint are not germane to a Rule 12(b)(6) motion. Indeed, as N.C.R. Civ. P. 12(b) makes clear, a Rule 12(b)(6) motion is converted to one for summary judgment if "matters outside the pleading are presented to and not excluded by the court":

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1. Although the trial court disposed of this case pursuant to Rules 12(b)(1), 12(b)(2), 12(b)(6), and 12(c), neither party has referenced Rules 12(b)(1) and 12(b)(2) as bases for the order, and we fail to see how Rules 12(b)(1) and 12(b)(2) are pertinent to the order of the trial court. Accordingly, we address only the propriety of the trial court's decision under Rules 12(b)(6) and 12(c).

> If, on a motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, *the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56*, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(Emphasis added.) This rule applies equally to Rule 12(c) motions. *See* N.C.R. Civ. P. 12(c) ("If, 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 and disposed of as provided in Rule 56 . . . .").

The mandatory language of these Rules is unambiguous and leaves no room for variance in practice. *See Minor v. Minor*, 70 N.C. App. 76, 78, 318 S.E.2d 865, 867 (holding with respect to Rule 12(c) motions that "[n]o evidence is to be heard, and the trial judge is not to consider statements of fact in the briefs of the parties or the testimony of allegations by the parties in different proceedings"), *disc. review denied*, 312 N.C. 495, 322 S.E.2d 558 (1984).

If, however, documents are attached to and incorporated within a complaint, they become part of the complaint. They may, therefore, be considered in connection with a Rule 12(b)(6) or 12(c) motion without converting it into a motion for summary judgment. *See Eastway Wrecker Serv., Inc. v. City of Charlotte*, 165 N.C. App. 639, 642, 599 S.E.2d 410, 412 (2004) ("Since the exhibits to the complaint were expressly incorporated by reference in the complaint, they were properly considered in connection with the motion to dismiss as part of the pleadings."), *disc. review denied*, 359 N.C. 410, 612 S.E.2d 318, *aff'd per curiam*, 360 N.C. 167, 622 S.E.2d 495 (2005). Further, this Court has held "that when ruling on a Rule 12(b)(6) motion, a court may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001).

Here, both parties presented to the trial court and the court considered numerous "matters outside the pleading," including the attachments to SJP's answer; plaintiff's reply to SJP's answer with attachments; and the Scherer affidavit filed by SJP. None of these documents were attached to the complaint or were the subject of plaintiff's complaint. Accordingly, under Rule 12(b)(6) and 12(c), if

the court considered those documents in reaching its decision—as the order below indicates—SJP's motion could not be disposed of under Rule 12(b)(6) or Rule 12(c), but rather was converted into a motion for summary judgment under Rule 56.

The parties attempted to circumvent this principle by filing a letter with the court "stipulat[ing] that the motions shall not be converted into motions for summary judgment" based on a further stipulation that the various documents supplied to the court should be deemed "pleadings." While parties may agree to streamline procedures such as by asking a trial court to rule based on stipulated facts, we do not understand precisely how the parties expected the trial court to proceed in this case.

The parties apparently intended for the trial court to consider the attachments to SJP's answer and the Scherer affidavit—none of which materials are relevant under Rule 12(b)(6) or Rule 12(c). *See, e.g.*, *Peace River Elec. Coop., Inc. v. Ward Transformer Co.*, 116 N.C. App. 493, 510, 449 S.E.2d 202, 214 (1994) ("[A] party raising a motion under Rule 12(c) simultaneously admits the truth of all well-pleaded factual allegations in the opposing party's pleading and the untruth of its own allegations insofar as the latter controvert or conflict with the former."), *disc. review denied*, 339 N.C. 739, 454 S.E.2d 655 (1995); *Robertson*, 88 N.C. App. at 440, 363 S.E.2d at 675 ("Both a motion for judgment on the pleadings and a motion to dismiss for failure to state a claim upon which relief can be granted should be granted *when a complaint fails to allege facts sufficient to state a cause of action or pleads facts which deny the right to any relief*." (emphasis added)).

Indeed, this Court has specifically held that a document attached to the moving party's pleading may not be considered in connection with a Rule 12(c) motion unless the non-moving party has made admissions regarding the document. Thus, in *George Shinn Sports, Inc. v. Bahakel Sports, Inc.*, 99 N.C. App. 481, 486, 393 S.E.2d 580, 583 (1990), *disc. review denied*, 328 N.C. 571, 403 S.E.2d 511 (1991), this Court, in addressing a plaintiff's motion for judgment on the pleadings, held that a memo attached to the plaintiff's reply to defendant's counterclaim "must be disregarded" when it was "not the subject of any admission" by the non-moving defendant. Thus, under Rule 12(b)(6) and Rule 12(c), there is no basis for considering SJP's materials despite the stipulation.

Further, the parties also intended that the trial court consider plaintiff's "reply" to SJP's answer. Yet, since the "reply" did not ad-

dress a counterclaim or contributory negligence and the court had not ordered a reply, it was not authorized under N.C.R. Civ. P. 7(a) (specifying the permissible pleadings in a civil case and providing that "[n]o other pleading shall be allowed except that the court may order a reply to an answer or a third-party answer"). Even if, however, we deemed the "reply" to be part of the complaint, we still would not be complying with the parties' stipulation since they did not intend for the trial court to consider plaintiff's "reply" in isolation from SJP's materials.

We cannot devise a means of giving full effect to the parties' stipulation without also doing insult to the Rules of Civil Procedure and the applicable standards of review. *See Cline v. Seagle*, 27 N.C. App. 200, 201, 218 S.E.2d 480, 481 (1975) (holding that even when parties consent to resolving a case on a motion for judgment on the pleadings, "judgment on the pleadings [becomes] inappropriate in spite of the consent by the attorneys" because "[t]he pleadings raise contradicting assertions"). We will, therefore, review this case as if the trial court had granted summary judgment to SJP. *See Helms v. Holland*, 124 N.C. App. 629, 633, 478 S.E.2d 513, 516 (1996) ("Because matters outside the pleadings were considered by the court in reaching its decision on the judgment on the pleadings, the motion will be treated as if it were a motion for summary judgment."). We note that based upon our review of the record, we do not believe that the discovery sought by plaintiff—and deferred—was material to the issues resulting in judgment for SJP.

SJP's Entitlement to Judgment

[2] "Summary judgment is appropriate only when there is no genuine issue of material fact to be resolved, thereby entitling the movant to judgment as a matter of law." *Northington v. Michelotti*, 121 N.C. App. 180, 182, 464 S.E.2d 711, 713 (1995). The party moving for summary judgment has the burden of establishing the lack of any triable issues. *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Once the moving party meets its burden, then the non-moving party must "produce a forecast of evidence demonstrating that [it] will be able to make out at least a prima facie case at trial." *Id.*

In the trial court, SJP supported its motions by arguing that plaintiff's lawsuit is barred by the language of the Release. Plaintiff has responded that the underlying tort claims are not barred, as a matter of law, because the language of the Release establishes that the par-

ties never intended to preclude plaintiff's current claims. In particular, plaintiff asserts that the Release's repeated mention of the "pending lawsuits" (i.e., the debt collection matter) and the absence of any reference to "negligence" or "personal injury" claims, indicates that Ms. Vamper's tort claims "were not within the contemplation of the parties, and is strong evidence that Mrs. Vamper did not intend to discharge, abandon, or relinquish her embryonic claim at the time she signed the releases."

We acknowledge that the apparent purpose of the parties' stipulation regarding the inapplicability of Rule 56 was intended to defer the need for a ruling on whether plaintiff could take a deposition of SJP's counsel regarding the intent of the parties in this Release. We agree, however, with SJP that the unambiguous language of the Release constitutes a release of plaintiff's claims in this action and, therefore, parol evidence regarding the parties' intent is immaterial. *See First Citizens Bank & Trust Co. v. 4325 Park Rd. Assocs.*, 133 N.C. App. 153, 156, 515 S.E.2d 51, 54 ("Parol evidence as to the parties' intent and other extrinsic matters will not be considered if the language of the contract is not susceptible to differing interpretations."), *disc. review denied*, 350 N.C. 829, 539 S.E.2d 284 (1999).

Since releases are contractual in nature, we apply the principles governing interpretation of contracts when construing a release. *Chemimetals Processing, Inc. v. Schrimsher*, 140 N.C. App. 135, 138, 535 S.E.2d 594, 596 (2000). Under North Carolina law, "[w]hen the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court[,] and the court cannot look beyond the terms of the contract to determine the intentions of the parties." *Piedmont Bank & Trust Co. v. Stevenson*, 79 N.C. App. 236, 240, 339 S.E.2d 49, 52 (internal citations omitted), *aff'd per curiam*, 317 N.C. 330, 344 S.E.2d 788 (1986). Thus, "[i]t must be presumed 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." *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946) (internal citations omitted).

Contrary to plaintiff's assertion, we see no basis to construe the Release as being limited in its coverage to only the then-pending debt collection matter. Frankie Vamper and her family released defendant "from any and all claims, actions or causes of action, . . ., liabilities, . . . whether known or unknown, whether in law or in equity, whether in tort or in contract, of any kind or character, which they now have, or might otherwise have, against the [sic] SJP, arising

out of or related to the care and treatment of Frankie Mae Vamper, all to the end that all claims or matters that are, or might be in controversy between the Vampers and SJP are forever put to rest . . . ." Further, the Release announces the "clear intention" of the parties "to forever discharge and release all past and present claims against SJP from all consequences resulting or potentially to result from the matters and things set forth in the pending lawsuits *or the care and treatment of Frankie Mae Vamper while a resident at [defendant's] facility*." (Emphasis added.)

Because the alleged incident giving rise to plaintiff's claims related to "the care and treatment of Frankie Mae Vamper" prior to the signing of the Release, we hold that the plain text of the Release unambiguously relieves defendant from any liability related to that incident. *See Sims v. Gernandt*, 341 N.C. 162, 165, 459 S.E.2d 258, 260 (1995) ("The document clearly and unambiguously informs the reader that it is a release by the signatory of 'any responsibility [of defendant] whatsoever, of any kind for my 85 Honda-Civic.' Any responsibility of defendant to plaintiff was already in existence at the time plaintiff signed the document and was therefore released by that document.").[2]

It is immaterial that neither the Release nor the Mediation Settlement Agreement specifically mentions the claim at issue in this case or that the possible existence of this claim never arose during the mediation. As our Supreme Court has held: " '[t]he language in a release may be broad enough to cover all demands and rights to demand or possible causes of action, a complete discharge of liability from one to another, *whether or not the various demands or claims have been discussed or mentioned, and whether or not the possible claims are all known.*' " *Merrimon v. Postal Telegraph-Cable Co.*, 207 N.C. 101, 105-06, 176 S.E. 246, 248 (1934) (quoting *Houston v. Trower*, 297 F. 558, 561 (8th Cir. 1924)) (emphasis added). *See also Fin. Servs. of Raleigh, Inc. v. Barefoot*, 163 N.C. App. 387, 394-95, 594 S.E.2d 37, 42-43 (2004) (after noting "[o]ur courts have . . . long recognized that parties may release existing but unknown claims," court held that "when the parties stated that they were releasing 'all claims

2. Plaintiff's reliance on *Travis v. Knob Creek, Inc.*, 321 N.C. 279, 362 S.E.2d 277 (1987), is misplaced. In *Travis*, the plaintiff's claim for wrongful discharge arose when he was fired, long *after* he had signed a release. Here, the cause of action arose when Ms. Vamper was injured in 2003, while the Release was signed in 2005. The appeal does not, therefore, involve the question presented in *Travis*: whether a release encompassed future claims. *Id.* at 283, 362 S.E.2d at 279.

of any kind,' we must construe the release to mean precisely that: an intent to release all claims of any kind in existence").

In short, the language of the Release encompasses the alleged injury sustained by Ms. Vamper in May 2003 and ordinarily would preclude this lawsuit. Plaintiff, however, further contends that material issues of fact exist as to the enforceability of the Release, including: (1) whether Frankie Vamper was incompetent at the time she signed the Release; (2) whether the Release resulted from a mutual mistake of the parties; (3) whether the Release was supported by valid consideration; and (4) whether the Release represents an unconscionable bargain. We address each in turn.

[3] Regarding Ms. Vamper's incompetency, plaintiff refers to the affidavit of Joseph Vamper, Ms. Vamper's son. That affidavit states that the deceased Ms. Vamper "suffered from various physical, emotional and mental illnesses which impaired her cognitive abilities and competence" and "was not competent to enter into any form of legal agreement in that she did not have the mental faculties to understand the nature of her actions or to conduct her affairs."

Our Supreme Court has held that "[a]n agreement entered into by a person who is mentally incompetent, but who has not been formally so adjudicated, is voidable and not void." *Walker v. McLaurin*, 227 N.C. 53, 55, 40 S.E.2d 455, 457 (1946). *See also Hedgepeth v. Home Sav. & Loan Ass'n*, 87 N.C. App. 610, 611, 361 S.E.2d 888, 889 (1987) ("It is well established in our state that a contract executed by an incompetent prior to being so adjudicated, is voidable and not void *ab initio*."). In accordance with this principle, "[w]here an incompetent person purports to enter into a contract, after his death his heirs may ratify the agreement or they may disaffirm it." *Walker*, 227 N.C. at 55, 40 S.E.2d at 457. *See also* 5 Samuel Williston, *A Treatise on the Law of Contracts* § 10:5, at 253-54 (Richard A. Lord ed., 4th ed. 1993) ("It has been held that the representative of an insane person may ratify a bargain made by him after death or that he may disaffirm it. The same is generally true of his heirs.").

In *Walker*, the defendants presented evidence that their deceased father "did not have sufficient mental capacity" to enter into a valid lease and option-to-purchase agreement with the plaintiff. 227 N.C. at 55, 40 S.E.2d at 457. Even though the defendants' father died during the lease term, there was evidence showing that his heirs continued to accept rent payments under the agreement after the father's death. *Id.* The Court held that the defendants "had the right to disaffirm the

agreement immediately upon [their father's] death," but if "they elected to accept rents according to the terms of the lease until its expiration, such conduct would constitute a ratification of the contract." *Id.*

The rule in *Walker* necessarily applies here. Although plaintiff's evidence, in the form of Joseph Vamper's affidavit, may set forth evidence that Ms. Vamper was incompetent at the time of the signing of the Release, defendant has presented undisputed evidence of ratification of the Release. The Scherer affidavit, in conjunction with the attached "payment history" and obituary, show that even after Ms. Vamper's death, her heirs or other representatives continued to make monthly payments of $250.00 to SJP, thereby affirming the validity of the agreement. *See Ridings v. Ridings*, 55 N.C. App. 630, 632, 286 S.E.2d 614, 616 (plaintiff ratified transaction procured by undue influence once influence terminated by "acknowledg[ing] the validity of the agreement" by continuing to make payment under the agreement and conveying title to a car pursuant to the agreement), *disc. review denied*, 305 N.C. 586, 292 S.E.2d 571 (1982); *Bobby Floars Toyota, Inc. v. Smith*, 48 N.C. App. 580, 584, 269 S.E.2d 320, 322-23 (1980) (defendant ratified contract entered into when he was a minor by continuing to make payments under contract after becoming age 18). Since the evidence presented by the parties establishes ratification, we hold that Ms. Vamper's purported incompetency does not render the Release unenforceable.

[4] Next, plaintiff contends a genuine factual dispute exists as to whether the Release was the result of a mutual mistake of the parties. According to plaintiff, a mistake is evident in the fact that the parties never had any overt communications about whether the Release would bar plaintiff's current claims. On this issue, the Joseph Vamper affidavit tends to show that "the mediation related solely to payment for [Ms. Vamper's] stay and care at Saint Joseph of the Pines" and that "at the mediation of the collection matters . . . there was no intention, discussion, mention, negotiation or other communication of any kind of any claim, actions, facts or releases regarding the incident which is the subject of the above-captioned action for personal injury." (Emphasis added). Plaintiff thus suggests that, if the Release's plain language acts as a bar to plaintiff's current claims, then evidence that the contracting parties actually intended the Release to mean something different constitutes evidence of mutual mistake.

A release may be avoided upon evidence that it was executed as a result of a mutual mistake. *Best v. Ford Motor Co.*, 148 N.C. App. 42,

45, 557 S.E.2d 163, 165 (2001), *aff'd per curiam*, 355 N.C. 486, 562 S.E.2d 419 (2002). " 'Mutual mistake is a mistake common to all the parties to a written instrument . . . which usually relates to a mistake concerning its contents or its legal effect.' " *Van Keuren v. Little*, 165 N.C. App. 244, 247, 598 S.E.2d 168, 170 (quoting *Best*, 148 N.C. App. at 46-47, 557 S.E.2d at 166), *disc. review denied*, 359 N.C. 197, 608 S.E.2d 328 (2004). This Court has held that in order "[t]o raise a genuine issue of material fact, plaintiff must allege specific facts upon which [he] intends to rely in establishing mutual mistake." *Best*, 148 N.C. App. at 47, 557 S.E.2d at 166-67.

In *Best*, the plaintiff submitted an affidavit stating that she never intended to release certain entities and that if the release was construed to apply to those entities, it was the result of a mutual mistake. *Id.*, 557 S.E.2d at 166. Apart from expressions of her intent, the plaintiff, in opposition to summary judgment, submitted no other evidence of mutual mistake, such as "any conversation contemporaneous with the signing of the Release that would indicate mutual mistake of fact." *Id.* at 48, 557 S.E.2d at 166. This Court held that this evidence was "insufficient to produce a forecast of evidence demonstrating specific facts to show that plaintiff could establish a prima facie case at trial" and thus the trial court properly granted summary judgment based on the release. *Id.* at 49, 557 S.E.2d at 167.

Similarly, in *Van Keuren*, this Court also held that the plaintiff's affidavit failed to establish a prima facie case of mutual mistake when it stated only that it was the plaintiff's "belief" that the parties, in preparing the settlement documents, had forgotten about the potential uninsured claim and that the plaintiff, when accepting the settlement, still intended to pursue an uninsured claim. 165 N.C. App. at 248, 598 S.E.2d at 171. This Court concluded: "These conclusory statements fail to show specific facts of mutual mistake, lack[] particularity and [are] insufficient to withstand a motion for summary judgment." *Id.* (internal quotation marks omitted).

The evidence presented in this case does not rise even to the level found insufficient in *Best* and *Van Keuren*. In support of the mutual mistake argument, the Joseph Vamper affidavit simply states that the focus of the mediation was to resolve the debt collection matter and that the mediation did not specifically address plaintiff's current claims. The affidavit adds that the Memorandum of Mediated Settlement was entered into at the end of the mediation and "illustrat[ed] the agreement reached at mediation." The attached Memorandum of Mediated Settlement agreement, however, specifies

that "[p]arties will sign settlement agreement & releases . . . ." The affidavit then concludes by stating that the Release was not discussed with Ms. Vamper by Joseph Vamper or anyone else.

Nothing in the Joseph Vamper affidavit states that Ms. Vamper was mistaken in her understanding as to the content or legal effect of the Release that was also referenced generally in the Memorandum of Mediated Settlement. Indeed, in contrast to *Van Keuren* or *Best*, there is nothing in the Joseph Vamper affidavit specifically denying that the Release embodies the intent of the parties at the time of signing. In fact, the Joseph Vamper affidavit is completely devoid of any assertion that either party in this case intended the Release to have a different meaning than its plain meaning. Plaintiff, therefore, has fallen well short of meeting his burden of "stat[ing] *with particularity* the circumstances constituting mistake . . . ." *Best*, 148 N.C. App. at 47, 557 S.E.2d at 166 (emphasis added).

[5] Plaintiff's remaining contentions are addressed by the Release itself. We find it readily apparent that the Release agreement was supported by valid consideration. The Release states that "*in consideration of the compromise of disputed claims*, the parties hereto do covenant and agree as follows . . . ." (Emphasis added.) Defendant agreed to forego a $29,174.54 claim against the Vampers and also to "forever discharge and release all past and present claims against the Vampers from all consequences resulting or potentially to result from the matters and things set forth in the pending lawsuits." In return, the Vampers agreed to pay defendant $6,000.00 and also to "forever discharge and release all past and present claims against SJP . . . ." Thus, the Release was supported by valid consideration. *See George Shinn Sports*, 99 N.C. App. at 488, 393 S.E.2d at 584 (holding that party's contention that issue of fact existed regarding whether letter agreement was supported by consideration was meritless when "[t]he face of the document reveals mutual promises and benefits accruing to the parties").

[6] Finally, we see no evidence that the Release was an unconscionable contract. For a court to conclude that a contract is unconscionable, the court must determine "that the agreement is both substantively and procedurally unconscionable." *King v. King*, 114 N.C. App. 454, 458, 442 S.E.2d 154, 157 (1994). The question of unconscionability is determined as of the date the contract was executed. *Id.* Procedural unconscionability involves " 'bargaining naughtiness' " in the formation of the contract, such as "fraud, coercion, undue influence, misrepresentation, [or] inadequate disclosure." *Id.* (quot-

ing *Rite Color Chemical Co. v. Velvet Textile Co.*, 105 N.C. App. 14, 20, 411 S.E.2d 645, 648 (1992)). Substantive unconscionability involves an "inequality of the bargain" that is " 'so manifest as to shock the judgment of a person of common sense, and . . . the terms . . . so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other.' " *Id.* (quoting *Brenner v. Little Red Sch. House, Ltd.*, 302 N.C. 207, 213, 274 S.E.2d 206, 210 (1981)).

In this case, plaintiff has presented no evidence of procedural unconscionability at the time of the execution of the contract. The mere fact that Ms. Vamper and her sons did not choose to have legal representation to explain the legal consequences of the Release does not render the Release procedurally unconscionable. As this Court recently reiterated: "Long ago, our Supreme Court stated, 'the law will not relieve one who can read and write from liability upon a written contract, upon the ground that he did not understand the purport of the writing, or that he has made an improvident contract, when he could inform himself and has not done so.' " *Raper v. Oliver House, LLC*, 180 N.C. App. 414, 421, 637 S.E.2d 551, 555 (2006) (quoting *Leonard v. Southern Power Co.*, 155 N.C. 10, 14, 70 S.E. 1061, 1063 (1911)).

With respect to substantive unconscionability, the Release, on its face, shows that the Vamper family obtained a significant financial concession from defendant as a result of the mediated settlement—defendant agreed to accept roughly $23,000.00 less than the debt originally claimed to be owed by the Vampers. In exchange for this concession, the Vamper family agreed to relinquish all existing claims, known or unknown, relating to the care and treatment of Frankie Vamper. Plaintiff has not shown that this bargain was so manifestly unequal as to shock the conscience or that no reasonable person would offer or accept the terms of the Release. Plaintiff has, therefore, failed to demonstrate that the Release is unconscionable.

In summary, we conclude that the plain language of the Release bars this lawsuit. Further, plaintiff has failed to present evidence raising an issue of fact as to the enforceability of the Release. As a result, we hold that defendant was properly entitled to judgment as a matter of law, and the order below should be affirmed.

Affirmed.

Judges CALABRIA and JACKSON concur.

BLONDALE HUGHES, PLAINTIFF v. EPIFANIO RIVERA-ORTIZ, M.D., AND CALLAWAY ASSOCIATES, LLP, D/B/A PROMED OF NORTH CAROLINA, PLLC, DEFENDANTS

No. COA06-1582

(Filed 20 November 2007)

1. Medical Malpractice— denial of motion for new trial—contradictory evidence

The trial court did not abuse its discretion in a medical malpractice case by denying plaintiff's N.C.G.S. § 1A-1, Rule 59 motion for a new trial even though plaintiff contends the jury verdict of one dollar in nominal damages was a result of a compromise, because: (1) in light of the fact that defendant doctor was called to testify by plaintiff and was examined at length by defense counsel, it could not be said that the evidence was uncontradicted; (2) some of the evidence presented by plaintiff was contradictory and in part unfavorable to her position with regard to damages; (3) a psychiatrist who treated plaintiff and a clinician who counseled plaintiff both acknowledged that plaintiff's alleged emotional and psychological problems could be attributed to events in her life that predated the alleged assault by defendant; and (4) the evidence was conflicting as to what, if any, damages plaintiff was entitled to from the negligent actions of defendant.

2. Appeal and Error— preservation of issues—cross-assignment of error—denial of motion for summary judgment—final judgment on merits

Although defendant employer cross-assigned error based on plaintiff's alleged failure to submit any admissible evidence at summary judgment to prove misconduct by defendant doctor or to establish vicarious liability by defendant employer, this cross-assignment of error is dismissed because the denial of a motion for summary judgment is not reviewable on appeal from a final judgment on the merits.

3. Medical Malpractice— erroneous denial of motion for directed verdict—ratification

The trial court erred in a medical malpractice case by denying defendant employer's motion for directed verdict on the issue of whether it ratified defendant doctor's conduct in having sexual contact with plaintiff patient, because: (1) plaintiff waived review of this issue since even if the doctor was acting within the scope

of his employment, the trial court granted the employer's motion for directed verdict on the issue of respondeat superior, and plaintiff did not assign error to this ruling; (2) evidence is sufficient to submit the question of ratification to the jury only where defendant retained the negligent actor in defendant's employ, declined to intervene upon notification that sexual harassment had occurred, and ultimately fired the complaining party; (3) in this case the only factor on which plaintiff presented evidence was that the doctor was still in the employ of the employer, and this evidence standing alone was insufficient to find ratification; (4) there was no indication that the employer had knowledge before November 2004 of all material facts and circumstances relative to the wrongful act that occurred in September 2002; (5) it cannot be said that employer failed to intervene when the doctor was suspended for the remainder of the 2002 calendar year; and (6) plaintiff's expert witness testified that if the doctor's account of the incident were true, he would not have violated the standard of care.

Judge WYNN dissenting.

Appeal by plaintiff from judgment entered 31 October 2005 and from an order entered 30 November 2005 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 August 2007.

Ferguson, Stein, Gresham & Sumter, P.A., by S. Luke Largess, for plaintiff-appellant.

Parker Poe Adams & Bernstein, LLP, by Harvey L. Cosper, Jr., Lori R. Keeton, and Leigh A. Kite, for defendant-appellee Epifanio Rivera-Ortiz, M.D.

Shumaker, Loop & Kendrick, LLP, by Scott M. Stevenson and S. Frederick Winiker, III, for defendant-appellee Callaway Associates, LLP, d/b/a Pro-Med Mobile Services, LLC.

HUNTER, Judge.

Blondale Hughes ("plaintiff") filed a medical malpractice action on 23 January 2004, alleging that Dr. Epifanio Rivera-Ortiz ("Rivera-Ortiz") was negligent on 12 September 2002 in his care and treatment and that such negligence was imputed to Callaway[1] Associates, LLP

1. Defendant-Callaway's brief uses the spelling "Calloway" rather than "Callaway." All other documents use "Callaway," and we do the same.

d/b/a Promed of North Carolina PLLC ("Callaway").[2] The jury found Rivera-Ortiz negligent, and found that Callaway had ratified his actions. The jury awarded one (1) dollar in nominal damages. Plaintiff moved for a new trial under North Carolina Rule of Civil Procedure 59 (hereafter "Rule 59"), and the trial court denied that motion. Plaintiff appeals the denial of her Rule 59 motion, and Callaway appeals the denial of their motion for a directed verdict. After careful consideration, we affirm the trial court's denial of plaintiff's Rule 59 motion and its denial of Callaway's summary judgment motion, but we reverse the trial court's ruling on Callaway's motion for directed verdict.

Plaintiff went to Callaway in order to receive a physical examination. Rivera-Ortiz was plaintiff's attending physician. At the time of her physical examination by Rivera-Ortiz, plaintiff was seeking the examination in order to obtain employment with Federal Express. After arriving at Callaway, plaintiff underwent a drug screening and was taken to a room to wait for Rivera-Ortiz. She was told to wait for the doctor's arrival, disrobe down to her underwear, and to put on a hospital gown. After several minutes, Rivera-Ortiz entered the room and introduced himself as the physician who would be conducting her physical examination.

Both plaintiff and Rivera-Ortiz agree that sexual conduct occurred during and after the examination, but the parties disagree over who initiated the acts. Plaintiff testified that Rivera-Ortiz instigated the sexual encounter by asking questions about her marital status and then placing his finger in her vagina. Rivera-Ortiz, however, denied those allegations and said that it was plaintiff who commenced the sexual contact by grabbing his crotch, massaging his genitals, and unzipping his pants.

Plaintiff alleged that as a result of Rivera-Ortiz and Callaway's negligence, she suffered severe emotional distress. Plaintiff testified that she has undergone psychotherapy and group therapy as a result of the incident. Racquel Ward, one of plaintiff's counselors, and Dr. Nilima Shukla, plaintiff's psychiatrist, testified that plaintiff had experienced physical, mental, and sexual abuse in the past, and that many of the stressors present in plaintiff's life predated the alleged assault by Rivera-Ortiz.

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2. Rivera-Ortiz and Callaway will be referred together as "defendants" where appropriate.

During deliberations, the jury expressed to the trial judge confusion over the definition of "negligence." The trial court re-read portions of Dr. Patrick Guiteras's testimony regarding the appropriate standard of care for medical doctors. Specifically, the trial court read the portions of the testimony where Dr. Guiteras stated that if Rivera-Ortiz's account of the interactions were true, that he did not violate the standard of care.

After the jury resumed deliberations, the trial judge assessed where the jury was in deliberations:

> The problem is they just cannot agree. The note I've gotten says that ten of the twelve jurors feel they are deadlocked or hung, which is the word[s] they used. I don't think it is [a] question that they don't understand the law, but just that they can't agree on what the issue is.

After the foreperson indicated that he thought the jury was deadlocked, the trial court re-read the standard instruction on a juror's duty not to hesitate to reexamine his or her views. Only two jurors, by a show of hands, thought they could reach a unanimous verdict. Eight indicated that they thought the jury was deadlocked. The trial court asked the jury to return to deliberations.

After deliberating for approximately one and a half hours more, the jury found that Rivera-Ortiz was negligent and that Callaway had ratified his conduct. The jury awarded plaintiff one (1) dollar in damages. The trial court denied plaintiff's motion for a new trial.

Plaintiff presents the following issue for this Court's review: Whether the trial court abused its discretion in denying plaintiff's motion for a new trial. Callaway presents one additional issue for this Court's review: Whether the trial court erred in denying their motion for directed verdict on the issue of ratification. We address each issue in turn.

I.

The trial court's discretionary ruling under Rule 59 in either granting or denying a motion for a new trial may be reversed on appeal " 'only in those exceptional cases where an abuse of discretion is clearly shown.' " *Anderson v. Hollifield*, 345 N.C. 480, 483, 480 S.E.2d 661, 663 (1997) (citation omitted). Appellate review of the order "is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 482, 290

S.E.2d 599, 602 (1982). " 'If the award of damages to the plaintiff is "grossly inadequate," so as to indicate that the jury was actuated by bias or prejudice, or that the verdict was a compromise, the court must set aside the verdict in its entirety and award a new trial on all issues.' " *Robertson v. Stanley*, 285 N.C. 561, 569, 206 S.E.2d 190, 195-96 (1974) (quoting 58 Am. Jur. 2d, New Trial, § 27 (1971)). The party seeking to establish the abuse of discretion, in this case the plaintiff, bears that burden. *Worthington*, 305 N.C. at 484-85, 290 S.E.2d at 604.

[1] Plaintiff argues that the trial court erred in denying her motion for a new trial on the ground that the jury verdict was a result of a compromise. We disagree.

Plaintiff relies upon our Supreme Court's decision in *Robertson* to argue that she is entitled to a new trial. In that case, the plaintiff and his father brought suit to recover damages for injuries suffered when the plaintiff was struck by the defendant's vehicle. *Robertson*, 285 N.C. at 564, 206 S.E.2d at 192. The jury found that the plaintiff and his father were damaged by the negligence of the defendant, and that neither was contributorily negligent. *Id.* at 566, 206 S.E.2d at 193. The jury awarded damages to the father for medical expenses incurred. *Id.* at 564, 206 S.E.2d at 192. The jury in *Robertson*, despite plaintiff's uncontroverted evidence of permanent scarring and pain and suffering, awarded the plaintiff nothing on his claim for these damages. *Id.* at 566, 206 S.E.2d at 193. Pursuant to Rule 59, plaintiff moved for a new trial. The trial court denied the motion and entered judgment on the verdict from which plaintiff appealed. On appeal, the Supreme Court stated:

> Under such circumstances, with the evidence of pain and suffering *clear*, *convincing and uncontradicted*, it is quite apparent that the verdict is not only inconsistent but also that it was not rendered in accordance with the law. Such verdict indicates that the jury arbitrarily ignored plaintiff's proof of pain and suffering. If the minor plaintiff was entitled to a verdict against defendant by reason of personal injuries suffered as a result of defendant's negligence, then he was entitled to all damages that the law provides in such case.

Id. at 566, 206 S.E.2d at 193-94 (emphasis added and original emphasis omitted). Thus, the issue before this Court is whether the evidence of pain and suffering was clear, convincing, and uncontradicted. The dissent, however, would conclude that plaintiff has "proved by the

'greater weight of the evidence' that she suffered actual damages" and would therefore grant plaintiff a new trial. Such is not the standard in reviewing a trial court's denial of a Rule 59 motion. Instead, in order to find an abuse of discretion in this context, the evidence as to damages must be *clear, convincing and uncontradicted. Id.* Moreover, "an appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Worthington*, 305 N.C. at 487, 290 S.E.2d at 605; *see also Setzer v. Dunlap*, 23 N.C. App. 362, 363, 208 S.E.2d 710, 711 (1974) (a trial judge's discretionary order will not be overruled except " 'in extreme circumstances, not at all likely to arise; and it is therefore practically unlimited' ") (citations omitted). Such is not the case here.

As to whether the evidence was uncontradicted, plaintiff argues that because defendants put forth no evidence at trial, it is uncontradicted as a matter of law. The *Robertson* Court found the evidence to be uncontradicted because the defendant in that case offered no evidence. *Id.* at 564, 206 S.E.2d at 193. In this case, however, in light of the fact that Rivera-Ortiz was called to testify by plaintiff and was examined at length by counsel for defendants, it could not be said that the evidence was uncontradicted.[3] Moreover, some of the evidence presented by plaintiff was contradictory and in part unfavorable to her position with regards to damages.

Plaintiff alleged that she suffered emotional distress as a result of an alleged assault by Rivera-Ortiz that rendered her unable to work. Plaintiff testified at trial that after the assault, she was unable to care for her children or work. However, plaintiff's own counselor testified that she had encouraged plaintiff to find work as early as late 2003. Jenny Kirwin, a clinical social worker who counseled plaintiff, testified that one of her main focuses during her treatment of plaintiff in late 2003 and early 2004 was getting her back to work. In fact, obtaining employment came up in all of Kirwin's sessions with plaintiff, and plaintiff herself agreed that she needed to get back to work. By the time of the trial, however, plaintiff had not yet gone back to work.

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3. It is without question that the issue of negligence was bitterly disputed. Rivera-Ortiz denied that he instigated any sexual contact and claimed that plaintiff was the aggressor. Plaintiff, on the other hand, testified that Rivera-Ortiz initiated sexual contact and that she ended the situation. That, however, goes to negligence, and the jury has already found Rivera-Ortiz negligent. Accordingly, we do not consider that evidence to determine whether the evidence presented by plaintiff as to her pain and suffering was clear, convincing, and uncontroverted such that she would be entitled to a new trial.

Plaintiff also testified that all of her symptoms of emotional distress began after the alleged assault by Rivera-Ortiz. Dr. Shukla, a psychiatrist who saw plaintiff following the incident at Callaway, testified that she rarely brought up the incident after the first visit. Dr. Shukla testified that if the "symptoms started following that trauma, then you would expect that person to be talking about it and usually making some connections." The jury also heard testimony from Dr. Shukla that plaintiff had only discussed the assault in three of her first seventeen visits, but after this was brought to her attention, she discussed the assault in every subsequent visit with Dr. Shukla.

Moreover, Dr. Shukla and Racquel Ward, a clinician who counseled plaintiff, both acknowledged that plaintiff's alleged emotional and psychological problems could be attributed to events in her life that predated the alleged assault by Rivera-Ortiz. Plaintiff testified that she had been the victim of domestic violence for many years by Jasper Mackey ("Mackey"), the father of three of her children. She also testified that she witnessed Mackey murder his father while she was standing ten to twelve feet away. Dr. Shukla testified that plaintiff told her that she had been abused physically, mentally, and sexually in the past. Dr. Shukla stated that plaintiff's post-traumatic stress disorder could have been caused by these past events.

Clearly, this testimony reveals that the evidence was very much in conflict as to what, if any, damages plaintiff was entitled to from the negligent actions of Rivera-Ortiz. Where the evidence of damages is conflicting, the jury is "free to believe or disbelieve plaintiff's evidence." *McFarland v. Cromer*, 117 N.C. App. 678, 682, 453 S.E.2d 527, 529 (1995) (citing *Smith v. Beasley*, 298 N.C. 798, 801, 259 S.E.2d 907, 909 (1979)). Accordingly, we find that the trial court did not abuse its discretion in denying plaintiff's Rule 59 motion for a new trial.

II.

[2] Callaway argues that plaintiff failed to submit any admissible evidence at summary judgment to prove misconduct by Rivera-Ortiz or to establish vicarious liability by Callaway. The denial of a motion for summary judgment, however, is not reviewable on appeal from a final judgment on the merits. *Chaney v. Young*, 122 N.C. App. 260, 262, 468 S.E.2d 837, 838 (1996) (citing *Duke University v. Stainback*, 84 N.C. App. 75, 77, 351 S.E.2d 806, 807, *affirmed*, 320 N.C. 337, 357 S.E.2d 690 (1987)).

> The rationale for nonreviewability after a trial on the merits is that the purpose of these preliminary motions—to bring litigation

> to an early decision on the merits when no material facts are in dispute—can no longer be served after there has been a trial. To grant review of these denials "would allow a verdict reached after a presentation of all the evidence to be overcome by a limited forecast of the evidence."

Stainback, 84 N.C. App. at 77, 351 S.E.2d at 807 (quoting *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985)). Callaway's cross-assignments of error as to this issue are therefore dismissed.

III.

[3] We review the denial of a motion for a directed verdict to determine

> "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 . . . *the question is whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor, or to present a question for the jury.*"

Arndt v. First Union Nat'l Bank, 170 N.C. App. 518, 522, 613 S.E.2d 274, 277-78 (2005) (quoting *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991)). In the instant case, Callaway argues that the trial court erred in denying their motion for directed verdict on the issue of whether they ratified Rivera-Ortiz's conduct. We agree.

At the outset, we note that plaintiff makes no argument as to the issue of ratification before this Court. Indeed, plaintiff concedes that the actions of Rivera-Ortiz were not ratified but instead argues that "the undisputed fact[s establish] that [Rivera-Ortiz's acts were] committed 'during the execution of the employee's duties.' " Employers, under certain circumstances, may be held liable for acts of employees when they are committed within the course of employment. *See B. B. Walker Co. v. Burns International Security Services*, 108 N.C. App. 562, 565, 424 S.E.2d 172, 174, *disc. review denied*, 333 N.C. 536, 429 S.E.2d 552 (1993) (liability under *respondeat superior* may arise when an employer: (1) expressly authorizes the act; (2) the act was committed within the scope of employment; or (3) the employer ratified the act). In this case, even if Rivera-Ortiz was acting within the scope of his employment, the trial court granted Callaway's motion for directed verdict on the issue of *respondeat superior*, and plaintiff

did not assign error to that ruling. Accordingly, plaintiff has waived review of this issue. N.C.R. App. P. 10(a) ("the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal").

Liability may be imposed on employers when they ratify the negligent acts of an employee. *B. B. Walker*, 108 N.C. App. at 565, 424 S.E.2d at 174.

> In order to show that the wrongful act of an employee has been ratified by his employer, it must be shown that the employer had knowledge of all material facts and circumstances relative to the wrongful act, and that the employer, by words or conduct, shows an intention to ratify the act.

Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 492, 340 S.E.2d 116, 122 (1986) (citing *Equipment Co. v. Anders*, 265 N.C. 393, 144 S.E.2d 252 (1965)). A plaintiff may still establish ratification if the employer "had 'knowledge of facts which would lead a person of ordinary prudence to investigate further.' " *Guthrie v. Conroy*, 152 N.C. App. 15, 27, 567 S.E.2d 403, 412 (2002) (quoting *Denning-Boyles v. WCES, Inc.*, 123 N.C. App. 409, 415, 473 S.E.2d 38, 42 (1996)).

In *Hogan*, this Court held that where there is evidence that an employer has been informed that an employee has been sexually harassing others in the work place, there is sufficient evidence to submit the issue of ratification to the jury. *Hogan*, 79 N.C. App. at 492-93, 340 S.E.2d at 122; *see also Conroy*, 152 N.C. App. at 27, 567 S.E.2d at 412 (finding ratification where the victim-employee reported at least six incidents of harassing behavior and her employer did nothing). Under *Hogan*, evidence is sufficient to submit the question of ratification to the jury where the defendant: (1) retained the negligent actor in the defendant's employ; (2) declined to intervene upon notification that sexual harassment had occurred; and (3) ultimately fired the complaining party. *Hogan*, 79 N.C. App. at 493, 340 S.E.2d at 122. We do not find such circumstances here.

In this case, the only factor on which plaintiff presented evidence under *Hogan* was that Rivera-Ortiz was still in the employ of Callaway. This, standing alone, cannot be sufficient to find a ratification. Were we to hold otherwise, employers would be forced to choose between terminating every employee against whom a complaint is filed when the alleged negligent act occurred even arguably within the course of the employee's work or to risk ratifying the

employee's conduct. Moreover, there is no indication that Callaway "had knowledge of all material facts and circumstances relative to the wrongful act[.]" *Hogan*, 79 N.C. App. at 492, 340 S.E.2d at 122.

As to Callaway's knowledge, plaintiff's attorney asked Rivera-Ortiz whether he told any of his co-workers on 12 September 2002 about what happened between plaintiff and him. Rivera-Ortiz responded that, "[n]o. I did not discuss what happened with her." Plaintiff's counsel also asked if Rivera-Ortiz had told Dr. Callaway, Rivera-Ortiz's supervisor, about the incident between plaintiff and him. Rivera-Otiz responded that he did not tell Dr. Callaway or anyone else anything until 27 September 2002, when the police began an investigation of Rivera-Ortiz. Even then, he provided Callaway with no details of the incident. It was only in November 2004, during a deposition, that Rivera-Ortiz provided his version of the events in front of Callaway's counsel. Thus, Callaway had no notice of any material facts before November 2004.

In September 2002, Dr. Callaway told Rivera-Ortiz that he had serious concerns as to the police investigation and as to the medical board complaint. Rivera-Ortiz responded that he " 'did nothing wrong.' " Dr. Callaway told Rivera-Ortiz that he believed him " 'but this [matter] has to be cleared for you to continue working.' " Rivera-Ortiz was suspended from employment pending the conclusion of the investigation and did not work for the rest of 2002.

Rivera-Ortiz denied to the police and the medical board that any sexual contact occurred between him and plaintiff. Plaintiff, however, argues that Callaway became aware of Rivera-Ortiz's conduct when he gave a deposition in November 2004 and that because they took no disciplinary action they ratified his conduct. As we have already stated: Rivera-Ortiz was suspended for the remainder of the 2002 calendar year. To say that Callaway failed to intervene is an untenable argument.

Plaintiff would have this Court hold that an employer is capable of ratifying conduct based on testimony given during a deposition, occurring two years after an incident that the employee had previously disputed, by not then firing the employee. We are unwilling to enlarge the concept of ratification to such an extent. This is especially true here, where plaintiff's expert witness testified that if Rivera-Ortiz's account of the incident were true, he would not have violated the standard of care. Accordingly, we find that the trial court erred in denying Callaway's motion for directed verdict on the issue

of ratification and therefore remand with instructions to vacate the judgment against Callaway.

IV.

In summary, we hold that the trial court did not err in denying plaintiff's motion for a new trial. We also hold that Callaway's motion for a directed verdict should have been granted and remand with instructions to vacate the judgment as to Callaway.

Affirmed in part; reversed and remanded in part.

Judge BRYANT concurs.

Judge WYNN dissents in a separate opinion.

WYNN, Judge, dissenting.

I concur with that portion of the majority opinion that reverses the trial court's denial of Callaway's motion for directed verdict and remands with instructions to vacate the judgment against Callaway. However, because I find that the jury's finding of Dr. Rivera-Ortiz as negligent is inconsistent with their award of only one dollar in nominal damages to Ms. Hughes, I would likewise reverse the trial court's denial of Ms. Hughes's Rule 59 motion for a new trial. I therefore respectfully dissent in part.

As noted by the majority, the question of Dr. Rivera-Ortiz's negligence is not before us on appeal; the jury returned a verdict finding him negligent, and that verdict remains undisturbed. Our sole question is to determine whether Ms. Hughes is entitled to a new trial under North Carolina Rule of Civil Procedure 59(a)(6), which allows a new trial to be granted on the grounds of "[m]anifest disregard by the jury of the instructions of the court" or "[e]xcessive or inadequate damages appearing to have been given under the influence of passion or prejudice." N.C. Gen. Stat. § 1A-1, Rule 59(a)(5), (6) (2005). Thus, the only facts relevant to our inquiry are those that pertain to Ms. Hughes's alleged damages as a result of Dr. Rivera-Ortiz's negligence, as found by the jury.

Our state Supreme Court has indicated that a court "must set aside [a] verdict in its entirety and award a new trial on all issues" when an award of damages to a plaintiff is "grossly inadequate, so as to indicate that the jury was actuated by bias or prejudice, or

that the verdict was a compromise[.]" *Robertson v. Stanley*, 285 N.C. 561, 569, 206 S.E.2d 190, 195-96 (1974) (quotation and citation omitted). Moreover:

> Under such circumstances, with the evidence of pain and suffering clear, convincing and uncontradicted, it is quite apparent that the verdict is not only inconsistent but also that it was *not rendered in accordance with the law*. Such verdict indicates that the jury arbitrarily ignored plaintiff's proof of pain and suffering. If the . . . plaintiff was entitled to a verdict against defendant by reason of personal injuries suffered as a result of defendant's negligence, then he was entitled to *all* damages that the law provides in such case.

Id. at 566, 206 S.E.2d at 193-94 (emphasis in original).

When instructing the jury in the instant case, the trial court informed them that, if they found that Dr. Rivera-Ortiz had injured Ms. Hughes through his negligence, Ms. Hughes was "entitled to recover nominal damages even without proof of actual damages[]" and would also be entitled to actual damages if she "prove[d] by the greater weight of the evidence the amount of actual damages proximately caused by the negligence" of Dr. Rivera-Ortiz. These instructions were a correct statement of the law; after a careful review of the record and transcript before us, I conclude that the jury's award of only one dollar in nominal damages to Ms. Hughes was rendered contrary to the trial court's instructions and the law.

In its judgment, the jury responded, "Yes," to the question, "Was the plaintiff Blondale Hughes injured by the negligence of the defendant Dr. Epifanio Rivera-Ortiz?" This verdict indicates that the jury believed Ms. Hughes's version of the events of 12 September 2002, rather than the story told by Dr. Rivera-Ortiz. As recounted by Ms. Hughes at trial, Dr. Rivera-Ortiz began her physical examination by checking her eyes, ears, mouth, and breathing, and discussed the veins on her leg. Dr. Rivera-Ortiz then asked Ms. Hughes where her husband was; she answered that she was not married and that her children's father was in prison. He responded, "Well, where do you get sex from?" and she answered, "I don't get sex." Dr. Rivera-Ortiz replied, "Wouldn't you like for somebody to come and give you sex and then leave?" and Ms. Hughes told him, "No, why would I want that. I want somebody who is going to be with me and take care of me. Why would I just want somebody to give me sex."

Ms. Hughes testified that at that point, Dr. Rivera-Ortiz asked her to bend down, and she then "felt his finger inside of [her] and he said, 'Ohhh.' " She went on to state:

> By then I pushed myself up. He didn't move his finger and I vaguely moved it for him when I pulled my body up from him. When I pulled my body up from him, I turned around and first I looked and his thing was just dangling right out of his pants. He grabbed me and pushed me back toward him and rubbed it in the middle of my hip. And then I said, "Please stop." I said, "Stop. Don't do that." I said, "Stop." So, by then he finally stopped. He stopped and then that is when he grabbed his note pad and said, "Write your number down and we can finish this."

Ms. Hughes wrote her number on the pad "because [she] didn't care because [she] wanted him out of there." She then got dressed and left the clinic, passing Dr. Rivera-Ortiz on her way out, when "he looked at me and smiled it was like he didn't care what [she was] [sic] going to do about what he did. He didn't have no remorse about what he did."

Ms. Hughes also told the jury that she had never seen a psychologist or psychiatrist prior to the 12 September 2002 incident with Dr. Rivera-Ortiz, yet had undergone extensive counseling since that time. Two of her counselors testified to the treatment she received, including several medications. Evidence was offered that Ms. Hughes was physically fit prior to the incident and actively seeking employment; indeed, her reason for the visit to Dr. Rivera-Ortiz was to have a physical for a job for which she was applying. Although Ms. Hughes also discussed her prior criminal convictions and exposure to domestic violence with her children's father, those events took place more than five years prior to the September 2002 incident. Ms. Hughes testified to her inability to get a job that required a physical because of her fear of visiting a doctor, as well as panic attacks, her inability to care for her children, and her medical expenses.

Given that the jury found Ms. Hughes's evidence persuasive on the question of negligence, and that Dr. Rivera-Ortiz put on no evidence of his own at trial, I find that Ms. Hughes proved by the "greater weight of the evidence" that she suffered actual damages due to Dr. Rivera-Ortiz's negligence, including medical expenses related to her counseling and medication, and lost wages. As such, the jury acted contrary to the trial court's instructions in awarding Ms. Hughes only one dollar in nominal damages. Although the *Robinson* court noted

the presence of "clear, convincing and uncontradicted" evidence as to pain and suffering *in that case*, I do not believe that language is a controlling precedent as to the standard to be applied in ruling on a Rule 59 motion. Thus, I conclude that the trial court abused its discretion by denying Ms. Hughes's Rule 59 motion for a partial new trial on damages. I would therefore reverse.

ALLIED ENVIRONMENTAL SERVICES, PLLC AND DEANS OIL COMPANY, INC. PETITIONERS-APPELLANTS v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL AND NATURAL RESOURCES, DIVISION OF WASTE MANAGEMENT RESPONDENT-APPELLEE

No. COA06-1148

(Filed 20 November 2007)

Administrative Law— petition—corporations—not required to be represented by attorney

There is no general rule in the administrative code requiring corporations to be represented by counsel at administrative hearings, and the trial court erred by affirming an administrative law judge's decision to dismiss for lack of subject matter jurisdiction because the petition was signed by a non-attorney agent of petitioner.

Judge STROUD concurring.

Appeal by petitioners from order entered 22 May 2006 by Judge Thomas D. Haigwood in Pitt County Superior Court. Heard in the Court of Appeals 28 March 2007.

Simonsen Law Firm, P.C., by Lars P. Simonsen, for petitioners-appellants.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly Duffley, for respondent-appellee.

CALABRIA, Judge.

Allied Environmental Services, PLLC ("Allied Environmental"), and Deans Oil Company, Inc. ("Deans Oil Company") (collectively "appellants") appeal from an order entered 22 May 2006. We reverse the trial court and remand for further proceedings.

Deans Oil Company is the owner of a property located on Highway 121 North in Farmville, Pitt County, known as the Hustle Mart No. 3 ("the site"). Petroleum contamination originating from previously removed underground storage tanks was discovered at the site in June of 1996. Deans Oil Company hired Allied Environmental to clean up the contaminated land. Following the cleanup, appellants applied for and received reimbursement in the amount of $33,410.15 from the North Carolina Commercial Leaking Underground Storage Tank Cleanup Fund ("Trust Fund").

The Leaking Petroleum Underground Storage Tank Cleanup Act was enacted by the General Assembly 30 June 1988 to provide reimbursement to landowners as well as owners and operators of underground storage tanks containing petroleum for costs associated with cleaning up petroleum discharges from the underground tanks. N.C. Gen. Stat. § 143-215.94A (2005), *et seq*. On 3 May 2004, the North Carolina Department of Environmental and Natural Resources, Division of Waste Management ("appellee"), sent a letter notifying the appellants that appellee was retracting the eligibility for reimbursement from the Trust Fund for cleanup costs and demanded repayment from Deans Oil Company to the Trust Fund for all the costs received from appellee as a reimbursement. In a letter dated 10 June 2004, Allied Environmental as agent and Deans Oil Company, requested a contested case hearing to appeal the retraction of eligibility. The request was made within sixty days of receiving notice of the retraction as required by N.C. Gen. Stat. § 150B-23(f) (2003).

On 16 July 2004, appellee filed a motion to dismiss the contested case petition on the grounds that the Office of Administrative Hearings ("OAH") lacked subject matter jurisdiction over the dispute alleging Allied Environmental was not a proper party pursuant to the Statute to represent Deans Oil Company. On 15 October 2004, appellants, through legal counsel, filed and served a motion to amend the contested case petition. Administrative Law Judge Fred G. Morrison, Jr. ("Judge Morrison") entered a final decision dismissing the claim on 30 December 2004 ("Final Order"). On 21 January 2005, appellants petitioned for judicial review in Pitt County Superior Court. On 22 May 2006 Judge Thomas D. Haigwood affirmed Judge Morrison's Final Order. From that order, appellants appeal.

On appeal appellants argue the trial court erred by affirming the administrative law judge's order dismissing the appellants' petition for a contested case hearing on the grounds that the petition was not signed by a proper party. We agree.

The issue of "whether a [] court has subject matter jurisdiction is a question of law, which is reviewable on appeal *de novo*." *Ales v. T.A. Loving Co.*, 163 N.C. App. 350, 352, 593 S.E.2d 453, 455 (2004). The North Carolina Administrative Code establishes that an "owner or operator or landowner who has been denied eligibility for reimbursement from the appropriate fund" has the statutory right to petition for a contested case in the Office of Administrative Hearings. 15A N.C.A.C. 2P.0407(b) (2007); N.C. Gen. Stat. § 143-215.94E (e2) (2005). The code states that the petition must be in accordance with N.C. Gen. Stat. § 150B-23 (2005), which states: "[a] petition shall be signed by a party or a representative of the party. . . ." 15A N.C.A.C. 2P.0407(b) (2007).

Here, the petition was signed by Brian Gray ("Gray"), president of Allied Environmental, as agent for Deans Oil Company. Thus, the issue before this Court is whether the term "representative" is limited to attorneys or whether it is broad enough to include non-attorney agents.

Appellee contends Gray could not act as agent for Deans Oil Company in signing the petition because Deans Oil Company is a corporation and corporations can only be represented by an attorney. *Lexis-Nexis v. Travishan Corp.*, 155 N.C. App. 205, 573 S.E.2d 547 (2002). In *Lexis-Nexis*, we determined that a corporation must be represented by counsel and cannot appear *pro se*. In that case, we stated three exceptions apply to the general rule: 1) an employee of a corporate entity may prepare legal documents; 2) a corporation may appear *pro se* in small claims court; and 3) a corporation may make an appearance through a corporate officer in order to avoid default. *Id.* at 208-09, 573 S.E.2d at 549. Since none of those exceptions apply in this case, it appears that Gray could not represent Deans Oil Company in any legal proceedings.

However, *Lexis-Nexis* dealt with representation in the context of North Carolina's general courts of justice, not in the context of administrative hearings. We have previously recognized that administrative hearings are separate and distinct from judicial proceedings. *Ocean Hill Joint Venture v. N.C. Dept. of E.H.N.R.*, 333 N.C. 318, 426 S.E.2d 274 (1993). As such, we determine that the rule articulated in *Lexis-Nexis* is wholly inapplicable to most appeals arising before the OAH.

While some administrative appeals, such as Property Tax Commission appeals, specifically require licensed attorneys to represent

corporations, *see* 17 N.C.A.C. 11.0217 (2007), there is no general rule in the administrative code requiring corporations to be represented by counsel at administrative hearings. In fact, the applicable rule states: "[a] party need not be represented by an attorney." 26 N.C.A.C. 3.0120(e) (2007). This rule makes no distinction between individuals and corporations and inherently contemplates that corporations may be represented by non-attorneys.

Additionally, it is clear to us that the term "representative" as used in N.C. Gen. Stat. § 150B-23 is not coterminous with the term "attorney." Black's Law Dictionary defines "representative" as "[o]ne who stands for or acts on behalf of another . . . ." Black's Law Dictionary 1304 (7th ed. 1999). The legislature, in drafting N.C. Gen. Stat. § 150B-23, could have chosen the word "attorney," but instead chose "representative," a word whose plain meaning is broader than "attorney."

Other sections of the administrative code shed light on the legislature's choice of the word "representative" as well.

> In the event that any party or attorney at law *or other representative* of a party engages in behavior that obstructs the orderly conduct of proceedings or would constitute contempt if done in the General Court of Justice, the administrative law judge presiding may enter a show cause order returnable in Superior Court for contempt proceedings. . . .

26 N.C.A.C. 3.0114(b) (2007) (emphasis supplied). Likewise, 26 N.C.A.C. 3.0118 (2007) speaks of a "representative or attorney of a party" in defining certain terms. These sections indicate that the legislature intended for parties to be represented before the OAH by attorneys and non-attorney representatives. If the General Assembly's intent is otherwise, it retains the ability to amend the statute accordingly.

Since we determined that the trial court erred in affirming the administrative law judge's decision to dismiss the appeal for lack of subject matter jurisdiction, we need not address appellants' remaining argument that the court erred in affirming the administrative law judge's decision to deny appellants' motion to amend their petition. The judgment of the trial court is reversed and the case remanded for additional proceedings consistent with this opinion.

Reversed.

Judge McCULLOUGH concurs.

Judge STROUD concurs with a separate opinion.

STROUD, Judge, concurring.

I would also reverse the order of the superior court affirming the Final Order of Dismissal, but on different grounds, because I believe the majority, perhaps inadvertently, permits the unauthorized practice of law by a corporation, in violation of N.C. Gen. Stat. § 84-5 (2005).

The majority opinion defines the issue as "whether the term 'representative' is limited to attorneys or whether it is broad enough to include non-attorney agents." I believe the issue is whether the North Carolina Administrative Code (N.C.A.C.) can create an exception to N.C. Gen. Stat. § 84-5 and N.C. Gen. Stat. § 84-2.1, which expressly forbid a corporation from filing a petition with an administrative tribunal on behalf of any other corporation. Because I conclude that the N.C.A.C. cannot create such an exception, I concur in the result only. I would reverse the order of the superior court affirming the dismissal of the petition on the grounds that the petition was not signed by a proper party, but on the basis that even though the petition was defective, respondent needed to move to strike the petition in order to prevail, which it did not do.

Pursuant to N.C. Gen. Stat. § 143-215.94E(e2) (2005), only the owner[1] or operator[2] has the right to appeal the denial of a claim for reimbursement under the Leaking Petroleum Underground Storage Tank Cleanup Fund ("Trust Fund") Act (N.C. Gen. Stat. § 143-215.94A-94N). The Trust Fund Act further provides that such an appeal is governed by "Article 3 of Chapter 150B of the General Statutes," N.C. Gen. Stat. § 143-215.94E(e2), thereby making such an appeal a petition for a "contested case," N.C. Gen. Stat. § 150B-23(a) (2005). As correctly noted by the majority opinion, a petition for a contested case must be signed by "a party or a representative of the party." *Id.*

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1. N.C. Gen. Stat. § 143-215.94A(8) defines "operator" as "any person in control of, or having responsibility for, the operation of an underground storage tank."

2. N.C. Gen. Stat. § 143-215.94A(9) defines "owner" as:

> In the case of an underground storage tank in use on 8 November 1984, or brought into use after that date, any person who owns an underground storage tank used for the storage, use, or dispensing of petroleum products; and [i]n the case of an underground storage tank in use before 8 November 1984, but no longer in use on or after that date, any person who owned such tank immediately before the discontinuation of its use.

The majority relies on secondary legal sources and on various provisions in the North Carolina Administrative Code which refer to a "representative," to define the meaning of "representative" in N.C. Gen. Stat. § 150B-23(a). From that definition, the majority reasons that Allied Environmental Services ("Allied"), acting as an "agent" for Deans Oil Company ("Deans Oil"), could file a petition as the "representative" of Deans Oil, thereby rendering Allied a proper party to sign the petition in the case *sub judice*.

Deans Oil is the owner of the site in question, and respondent concedes that Deans Oil, as owner of the site, was a proper party to file the petition for a contested case. Allied is a separate entity from Deans Oil, identified as a PLLC (professional limited liability company), with no standing as the owner or operator under the Trust Fund Act. I note at the outset that the record does not contain any contract or agreement between Deans Oil and Allied. The record does contain a letter from Brian E. Gray, President, Allied Environmental Services, PLLC, on Allied letterhead, to the Office of Administrative Hearings, in which Allied requests a contested hearing, reading in its entirety:

> Allied Environmental Services, PLLC as agent and Deans Oil Company are requesting a hearing for the appeal of eligibility retraction status for the above referenced site. Both parties wish to be present and heard at the hearing. Please schedule the hearing enough in advance so that both parties can attend.

The letter does not state that Allied is acting as a "representative" for Deans Oil.[3] The letter includes the words "as agent" but does not say for whom Allied is an agent. It states that "both parties" are requesting a hearing, not that only Deans Oil is requesting a hearing, through its representative. In spite of these potential deficiencies, I agree with the majority in construing the letter as Allied filing a petition for a contested case hearing as representative of Deans Oil.

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3. I note that Allied may have had its own right as a "provider of service" to receive reimbursement (although not standing to bring the claim) pursuant to 15A N.C.A.C. 2P.0405(a), which provides that "[r]eimbursement for cleanup costs shall be made only to an owner or operator or landowner of a petroleum underground storage tank, or jointly to an owner or operator or landowner and a provider of service." However, pursuant to 15A N.C.A.C. 2P.0405(c), "[j]oint reimbursement of cleanup costs shall be made to an owner or operator or landowner and a provider of service *only upon receipt of a written agreement acknowledged by both parties*. Any reimbursement check shall be sent directly to the owner or operator or landowner." (Emphasis added.) The record does not contain any such agreement between Deans Oil and Allied.

"It shall be unlawful for any corporation to *practice law* or appear as an attorney." N.C. Gen. Stat. § 84-5 (2005) (emphasis added.) Under N.C. Gen. Stat. § 84-2.1 (2005), the term "practice law" is defined to include "performing any legal service for any other person, firm, or corporation, with or without compensation, specifically including . . . the *preparation and filing of petitions for use in any court, including administrative tribunals* and other judicial or quasi-judicial bodies." (Emphasis added.) Clearly, the preparation and filing of a petition before an administrative tribunal on behalf of another is the practice of law.

Despite the differences between administrative tribunals and courts for purposes of a statute of limitations in *Ocean Hill Joint Venture v. N. C. Dept of E.H.N.R.*, 333 N.C. 318, 426 S.E.2d 274 (1993) (holding that the one-year statute of limitations under N.C. Gen. Stat. § 1-54(2) does not apply to administrative assessment of civil penalties pursuant to N.C. Gen. Stat. § 113A-64(a) because the statute of limitations applies only to an "action or proceeding" in the general court of justice), noted in the majority opinion, the definition of practic[ing] law specifically includes filing petitions before administrative tribunals and quasi-judicial bodies. The difference between the case *sub judice* and *Ocean Hill Joint Venture* is that N.C. Gen. Stat. § 84-2.1 specifically applies to "administrative tribunals and other . . . quasi-judicial bodies," whereas N.C. Gen. Stat. § 1-54(2) (2005) specifically applies only to an "action or proceeding" before the general court of justice.

In addition, the majority opinion states that the rule established by *Lexis-Nexis v. Travishan Corp.*, 155 N.C. App. 205, 573 S.E.2d 547 (2002) does not apply in the context of administrative hearings. In *Lexis-Nexis*, this Court reversed a trial court order denying a motion to strike an answer and counterclaim when the corporate defendant was represented by its president and sole shareholder, not by a licensed attorney, in filing the answer and counterclaim. *Id.* Applying N.C. Gen. Stat. § 84-5, this Court held that a corporation must be represented by a licensed attorney and cannot appear *pro se*, noting three exceptions which had already been recognized by our appellate courts: (1) an employee of a corporation may prepare legal documents in furtherance of the corporation's own business; (2) an employee of a corporation may appear on behalf of the corporation in small claims court; and (3) a corporation may make an appearance in court through a corporate officer to avoid default. *Id.* at 208, 573 S.E.2d at 549. Only in those three instances may an employee or officer of a corporation, acting on behalf of the corporation, engage in

the practice of law in North Carolina. I note that those exceptions all involve an employee or officer acting on behalf of his own corporation, and none of them involve, as in the case *sub judice*, one corporation acting on behalf of another.

Lexis-Nexis did not include an exception allowing a corporation to "prepar[e] and fil[e] petitions for use in any . . . administrative tribunals" on behalf of another corporation because that is specifically prohibited by N.C. Gen. Stat. § 84-2.1 and N.C. Gen. Stat. § 84-5. I do not believe § 84-5 and *Lexis-Nexis* even allow an employee of a corporation to file a petition with an administrative tribunal on behalf of the corporation which employs him, let alone as an employee of one corporation acting on behalf of another corporation. *See Duke Power Co. v. Daniels*, 86 N.C. App. 469, 472, 358 S.E.2d 87, 89 (1987) ("[T]he main purpose of [N.C. Gen. Stat. § 84-5] is to prohibit corporations from performing legal services for *others*. (Emphasis in original.)). Additionally, North Carolina has a strong public policy preference in favor of personal, as opposed to corporate, representation. *Gardner v. N. C. State Bar*, 316 N.C. 285, 293, 341 S.E.2d 517, 522 (1986) (holding that representation of an insured by an attorney employed by the insurer violates N.C. Gen. Stat. § 84-5).

The majority opinion, perhaps inadvertently, creates a fourth exception to N.C. Gen. Stat. § 84-5 in addition to the *Lexis-Nexis* rule, and permits corporations to practice law on behalf of other corporations before administrative tribunals. The majority opinion cites 26 N.C.A.C. 3.0120(e), which states that "[a] party need not be represented by an attorney" for the proposition that since a party to an administrative contested hearing is not *required* to be represented by an attorney, that corporations may be represented by a "non-attorney representative." The majority misinterprets the rule as saying that "a corporation may be represented by a non-attorney representative," including another corporation, in an administrative proceeding. But N.C. Gen. Stat. § 84-2.1 provides that representation before an administrative tribunal is the practice of law, expressly prohibited to corporations by § 84-5. The majority has thus permitted a rule in the administrative code to overrule a statute enacted by our legislature. I see no basis for holding that a rule in the administrative code, which is clearly intended to permit parties who are otherwise permitted by law to appear *pro se*, to appear *pro se*, permits the unauthorized practice of law by a corporation.

I find no precedent for a corporation being permitted to file a petition on behalf of another corporation in a contested adminis-

trative hearing, and conclude that this practice violates N.C. Gen. Stat. § 84-5. However, I do concur in the result, because I believe respondent did not take the proper procedural step to prevail in this case. I would therefore affirm the order of the superior court for the reason that follows.

The original, albeit defective, petition which was filed in this case by Allied on behalf of Deans Oil is not a nullity, and therefore not ripe for dismissal. "A pleading which is a nullity has absolutely no legal force or effect, and may be treated by the opposing party as if it had not been filed." *Theil v. Detering*, 68 N.C. App. 754, 756, 315 S.E.2d 789, 791, *disc. review denied*, 312 N.C. 89, 321 S.E.2d 908 (1984). However, this Court has held that a complaint filed by an attorney who was not licensed to practice law in North Carolina, in violation of N.C. Gen. Stat. § 84-4.1, was not a nullity and the complaint was effective to toll the statute of limitations, where the plaintiff later retained counsel who was licensed in the State of North Carolina. *Id.* The petition by Allied was filed, and respondent did not file a motion to strike the petition, which would have been necessary to avoid its effect. *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 568, 299 S.E.2d 629, 632 (1983); *Lexis-Nexis v. Travishan Corp.*, 155 N.C. App. 205, 573 S.E.2d 547 (2002).

For the foregoing reasons, I respectfully concur in the result only, reversing the order of the superior court which affirmed the dismissal of the petition for a contested case hearing by the administrative law judge. I acknowledge that my concurrence is based on technical procedural grounds, but I believe that is the result which is compelled by *Thiel v. Detering* and *N.C.N.B. v. Virginia Carolina Builders*.

STATE OF NORTH CAROLINA v. SANDY MARSH, AKA AHMED ABDUL RAHAMAN

No. COA07-305

(Filed 20 November 2007)

1. Identification of Defendants— photographic—motion to suppress—sufficiency of findings and conclusions

The trial court's findings and conclusions, although cursory, were adequate to support its order denying defendant's motion to suppress an officer's photographic identification of defendant as the operator of a stolen truck.

2. Identification of Defendants— in-court and out-of-court— motion to suppress—presentation of one photograph

The trial court did not err in a felonious possession of stolen goods case by denying defendant's motion to suppress an officer's in-court and out-of-court identifications of defendant as being tainted by impermissibly suggestive pretrial procedures, because: (1) the officer testified that he had an opportunity to see defendant between the time he pulled defendant over and the time defendant fled the scene, and he further testified the lights on his patrol car allowed him to see defendant's face; and (2) although defendant contends that presenting a witness with a single photograph of a suspect is inherently suggestive, improper, and widely condemned by our courts, the circumstances in the instant case are distinguishable when the officer testified that he recognized defendant at the crime scene and subsequently asked another detective to retrieve a DMV photo of a man with the last name of Rahaman, the photo provided to the officer was at the officer's request based upon his own observations and recollection, and the fact that the officer requested only one photo to confirm defendant's identity indicated that his observation of defendant was accurate.

3. Possession of Stolen Property— felonious possession of stolen goods—misdemeanor possession of stolen goods

The trial court erred by sentencing defendant for felonious possession of stolen goods regarding the Scott property when the jury's verdict only supported a misdemeanor possession of stolen property judgment, and the charge is remanded to the trial court for entry of judgment on the charge of misdemeanor possession of stolen goods, because: (1) when the charge is based on the goods having been stolen pursuant to a breaking and entering, a court cannot properly accept a guilty verdict on the charge when defendant has been acquitted of the breaking and entering charge; and (2) although the State contends it presented evidence at trial that the property stolen was worth more than $1,000, the critical factor is that the jury was not charged on this element and therefore could not have found that the goods were worth more than $1,000.

4. Possession of Stolen Property— motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of possession of stolen goods as to the Scott

property, because: (1) with regard to the element of knowing or having reasonable grounds to believe the property to have been stolen, our courts have held that defendant's guilty knowledge can be either actual or implied; (2) the well-settled rule in North Carolina is that evidence of flight of an accused may be admitted as some evidence of guilt; and (3) the State presented evidence that defendant was in possession of a stolen vehicle in which the tools were tall enough to obscure part of the rear cab window and were visible by casual passers-by, the vehicle and tools were reported stolen just a few hours before an officer made the stop of the truck which defendant was in, and defendant exited the vehicle and fled the scene immediately after the officer pulled over the truck.

5. Possession of Stolen Property— possession of stolen vehicle—improperly charging jury on offense completely different from charge contained in indictment

The trial court erred by entering judgment on the possession of stolen property charges relating to the truck, because: (1) possession of stolen property under N.C.G.S. § 14-71.1 and possession of a stolen vehicle under N.C.G.S. § 20-106 are separate and distinct statutory offenses; (2) the court's charge to the jury was for the offense of possession of a stolen vehicle under N.C.G.S. § 20-106, and the trial court lessened the State's burden of proof by not requiring it to prove the truck had a value over $1,000 which elevated the charge from a misdemeanor to a felony; (3) the trial court only instructed the jury on two elements concerning the possession of stolen goods charge relating to the truck; and (4) although the State contends the reference to N.C.G.S. § 20-106 on the judgment was a mere clerical error, the judgment imposed by the trial court is incorrect and must be arrested when the trial court charges the jury on an offense that is completely different from the charge contained in the indictment.

6. Sentencing— habitual felon status—underlying felony convictions vacated

Since the two underlying felony convictions have been vacated and arrested, the judgment sentencing defendant for habitual felon status must also be vacated.

Appeal by defendant from judgment entered 19 October 2006 by Judge James Floyd Ammons, Jr. in Lee County Superior Court. Heard in the Court of Appeals 11 October 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General V. Lori Fuller, for the State.

William D. Spence, for defendant-appellant.

STEELMAN, Judge.

When the jury found defendant not guilty of felonious breaking or entering and this was the only basis for a conviction of felonious possession of stolen goods, defendant must be re-sentenced for a misdemeanor. Where the defendant is convicted of a charge different from that charged in the indictment, judgment must be arrested.

I. Factual Background

On the morning of 10 March 2005 Patrol Officer Joseph Sellers (Sellers) observed a red Toyota truck matching the description of a truck belonging to Cyrus Brown (Brown) which had been reported stolen earlier that morning. Sellers stopped the truck. Defendant got out of the passenger side of the truck. Defendant explained to Sellers that he had to use the restroom, and Sellers ordered him to get back into the truck. At that point, defendant ran away, jumping over a fence, and disappeared into a wooded area. Sellers testified that defendant looked familiar to him but could not recall where he had seen defendant. The next day, Sellers recalled that he had assisted another officer in making a traffic stop of defendant. Sellers asked that officer for a copy of the traffic citation arising out of the stop, and then asked a detective to produce a Department of Motor Vehicle ("DMV") photo matching the name of the man shown on the traffic citation. Sellers was able to confirm that the man in the photo, Mr. Rahaman, was the suspect he had stopped in the stolen truck.

The bed of the truck contained a case of Little Debbie Cakes, a table saw, a weed eater, and other tools, which had been reported missing by Perry Scott (Scott) from his garage on 10 March 2005.

Defendant was charged with felonious larceny of the truck, misdemeanor larceny of a tool box containing tools belonging to Brown, and felonious possession of stolen property, i.e., the truck. Defendant was also charged with felonious breaking and entering of Scott's garage, felonious larceny of items from the garage, and possession of stolen goods pursuant to the breaking and entering by defendant.

The charges were joined for trial at the 16 October 2006 session of criminal superior court. The jury found defendant guilty of posses-

sion of the stolen truck and possession of stolen goods (the property from Scott's building). Defendant was found not guilty of felonious breaking and entering of the Scott building and felonious larceny from the Scott building. Defendant subsequently pled guilty to being an habitual felon and was sentenced to 151 to 191 months imprisonment. Defendant appeals.

II. Motion to Suppress Identification

[1] In his first argument, defendant contends that the trial court erred in failing to make sufficient findings of fact and conclusions of law in its order denying defendant's motion to suppress Sellers' identification of defendant as the operator of the truck. We disagree.

N.C. Gen. Stat. § 15A-977 requires that in ruling on a motion to suppress, "[t]he judge must set forth in the record his findings of facts and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2005).

In the instant case, the trial court made the following finding:

> Court had an opportunity to see and observe the witnesses to determine what credibility and weight to give each witness. Court finds that the identification of the defendant through the photograph was not impermissible, was not suggestive, and that any doubts that the defense counsel has raised go to the credibility and the weight, not the admissibility.

We hold that while the findings are indeed cursory, they are, under the circumstances of this case, adequate to support the trial court's order denying defendant's motion to suppress. This argument is without merit.

[2] In his second argument, defendant contends that the court erred in denying defendant's motion to suppress Sellers' in-court and out-of-court identifications of defendant as being tainted by impermissibly suggestive pre-trial procedures. We disagree.

Our courts have established a two-step process for determining whether an identification procedure was so suggestive as to create a substantial likelihood of irreparable misidentification:

> First, the Court must determine whether the identification procedures were impermissibly suggestive. Second, if the procedures were impermissibly suggestive, the Court must then determine whether the procedures created a substantial likelihood of irreparable misidentification.

State v. Fowler, 353 N.C. 599, 617, 548 S.E.2d 684 (2001) (internal citations omitted). "In reviewing a trial judge's ruling on a suppression motion, we determine only whether the trial court's findings of fact are supported by competent evidence, and whether these findings of fact support the court's conclusions of law." *State v. Pulliam*, 139 N.C. App. 437, 439-40, 533 S.E.2d 280, 282 (2000) (citation omitted).

Sellers testified that he had an opportunity to see defendant between the time he pulled defendant over and the time defendant fled the scene. He further testified that the lights on his patrol car clearly allowed him to see defendant's face. Although defendant contends that presenting a witness with a single photograph of a suspect is inherently suggestive, improper, and "widely condemned" by our courts, *State v. Yancey*, 291 N.C. 656, 661, 231 S.E.2d 637, 640 (1977), the circumstances in the instant case are distinguishable. Sellers testified that he recognized defendant at the crime scene and subsequently asked another detective to retrieve a DMV photo of a man with the last name of Rahaman. The photo provided to Sellers was at Sellers' request, based upon his own observations and recollection. The fact that Sellers requested only one photo to confirm defendant's identity indicates that his observation of defendant was accurate. The use of a single photo in this context is not impermissibly suggestive but rather is an example of efficient detective work.

The trial court correctly concluded that the photo identification of defendant was not impermissibly suggestive. It was unnecessary for the court to proceed to the second step of the analysis and determine whether there was a substantial likelihood of irreparable misidentification. *See State v. Hannah*, 312 N.C. 286, 290, 322 S.E.2d 148, 151 (1984). This argument is without merit.

III. Scott Property

[3] In his third argument, defendant contends that the court erred in sentencing him for felonious possession of stolen property as to the Scott property when the jury's verdict only supports a misdemeanor possession of stolen property judgment. We agree.

"When a charge of felony possession of stolen goods is based on the goods having been stolen pursuant to a breaking and entering a court cannot properly accept a guilty verdict on the charge of felony possession of stolen goods when defendant has been acquitted of the breaking and entering charge." *State v. Goblet*, 173 N.C. App. 112, 121,

618 S.E.2d 257, 264 (2005) (quoting *State v. Perry*, 305 N.C. at 229-30, 287 S.E.2d at 813).

Defendant asserts that *State v. Matthews* is controlling. In that case, defendant was charged with felonious breaking and entering and felonious larceny. The jury did not reach a verdict on felony breaking and entering but found defendant guilty of felonious larceny. On appeal, this Court held that "[u]nder N.C. Gen. Stat. § 14-72 (2003), defendant's larceny could be considered a felony, rather than a misdemeanor, only if the value of the property he took was more than $1,000.00 or if he committed the larceny in the course of a felonious breaking and entering." *Matthews*, 175 N.C. App. 550, 556, 623 S.E.2d 815, 820 (2006).

We hold that *Matthews* is analogous to the instant case. Defendant was charged in a three-count indictment with felonious breaking and entering pursuant to N.C. Gen. Stat. § 14-54(A), felonious larceny pursuant to N.C. Gen. Stat. § 14-72(A), and felonious possession of stolen goods pursuant to N.C. Gen. Stat. § 14-71.1. The indictment alleged that the value of the property stolen from Scott's garage was $981.00. The count charging Felonious Possession of Stolen Goods reads as follows:

> [T]he defendant named above unlawfully, willfully and feloniously did possess the personal property described in Count II above, which property was stolen property, being the personal property of the person, corporation, and other legal entity described in Count II above, and having the value described in Count II above, knowing and having reasonable grounds to believe the property to have been feloniously stolen, and *taken pursuant to the felonious breaking and entering described in Count I above*. (emphasis added)

Count I of the indictment alleged that defendant feloniously broke and entered the Scott building with the intent to commit a felony; to wit, larceny.

In order for the charge of possession of stolen goods to be a felony, rather than a misdemeanor, the State was required to show an additional element of either (1) the property stolen had a value of more than $1,000.00, or (2) that the property was stolen pursuant to a breaking or entering. In this case, the trial court submitted the charge of felonious possession of stolen property to the jury solely on the theory that the property was stolen pursuant to a breaking or enter-

ing. The jury was not instructed as to the value of the property. Since the jury found defendant not guilty of the charge of breaking or entering, and the indictment for felonious possession of stolen goods specifically referred to defendant having committed the breaking and entering, defendant cannot be guilty of felonious possession of stolen goods, but only of misdemeanor possession of stolen goods. *See Matthews*, 623 S.E.2d at 820.

The State argues that it presented evidence at trial that the property stolen was worth more than $1,000.00. This argument fails to comprehend that the critical factor is that the jury was not charged on this element and therefore could not have found that the goods were worth more than $1,000.00. The jury was instructed as to the charge of felonious possession of stolen goods *solely* on the theory that the goods were stolen pursuant to a breaking or entering.

We hold that the judgment of felonious possession of stolen goods must be vacated, and this charge remanded to the trial court for entry of judgment on the charge of misdemeanor possession of stolen goods. *See Matthews*, 175 N.C. App. at 557, 623 S.E.2d at 820.

[4] In his fourth argument, defendant contends that the court erred in denying his motion to dismiss the charge of possession of stolen goods as to the Scott property. We disagree.

"In ruling on a motion to dismiss at the close of evidence . . . a trial court must determine whether there is substantial evidence of each essential element of the offenses charged." *State v. Williams*, 154 N.C. App. 176, 178, 571 S.E.2d 619, 620 (2002) (citations omitted). "Evidence is substantial if it is relevant and is sufficient to persuade a rational juror to accept a particular conclusion." *Goblet*, 173 N.C. App. at 118, 618 S.E.2d at 262 (citation omitted). The evidence must be considered in the light most favorable to the State. *Id.* 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).

The essential elements of misdemeanor possession of stolen property are:

(1) possession of personal property;

(2) which has been stolen;

(3) the possessor knowing or having reasonable grounds to believe the property to have been stolen; and

(4) the possessor acting with a dishonest purpose.

State v. Perry, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982) (citing N.C. Gen. Stat. § 14-71.1 (citations omitted)).

With regard to the element of "knowing or having *reasonable grounds to believe* the property to have been stolen," our courts have held that defendant's guilty knowledge can be either actual or implied. *State v. Parker*, 316 N.C. 295, 303-04, 341 S.E.2d 555, 559-60 (1986). "The well-settled rule in North Carolina is that evidence of flight of an accused may be admitted as some evidence of guilt." *State v. Mash*, 305 N.C. 285, 287, 287 S.E.2d 824, 826 (1982). In *Parker*, our Supreme Court concluded that the circumstantial evidence of defendant's knowledge presented by the State was substantial "when the police attempted to stop the vehicle, the defendant proceeded to flee . . ." *Parker*, 316 N.C. at 304, 341 S.E.2d at 560. The *Parker* Court further stated that, under those circumstances, "an accused's flight is evidence of consciousness of guilt and therefore of guilt itself." *Id.*

The State presented evidence that defendant was in possession of a stolen vehicle in which the tools were tall enough to obscure part of the rear cab window and were visible by casual passers-by. The vehicle and tools were reported stolen just a few hours before Sellers made the stop of the truck which defendant was in. Finally, immediately after Sellers pulled over the truck, defendant exited the vehicle and fled the scene.

We hold the State presented substantial evidence tending to show that the defendant knew or had reasonable grounds to believe the tools were stolen. This argument is without merit.

IV. Truck

[5] In his fifth argument, defendant contends that the trial court erred in entering judgment on the possession of stolen property charge relating to the truck, since the jury convicted the defendant of an offense for which he was not charged. We agree.

It is error for a defendant to be "found guilty of an offense for which he was not charged." *State v. Carlin*, 37 N.C. App. 228, 229, 245 S.E.2d 586, 587 (1978). Our courts have held that possession of stolen property under N.C. Gen. Stat. § 14-71.1 and possession of a stolen vehicle under N.C. Gen. Stat. § 20-106 are separate and distinct statutory offenses. *See State v. Bailey*, 157 N.C. App. 80, 87, 577 S.E.2d 683, 688 (2003).

As to the truck, defendant was indicted for the offense of felonious possession of stolen property pursuant to N.C. Gen. Stat. § 14-71.1. The elements of misdemeanor possession of stolen property are set forth in section III of this opinion. In order to elevate the crime to a felony, the State must show an additional element that either (1) the property was stolen pursuant to a breaking or entering, *State v. Weakley*, 176 N.C. App. 642, 651, 627 S.E.2d 315, 321 (2006) (citation omitted), or (2) the value of the property was more than $1,000.00. *See State v. Davis*, 302 N.C. 370, 373, 275 S.E.2d 491, 493 (1981).

However, in its instructions to the jury on the charge of felonious possession of the Toyota truck, the court only charged the jury on two elements, as follows:

> First, that the defendant possessed a vehicle; the Toyota truck. The defendant possessed the vehicle if he was aware of its presence and either by himself, or together with others, had both the power and intent to control its disposition or use. And second, that the defendant knew or had reasonable grounds to know that . . . the vehicle . . . had been stolen or unlawfully taken.

The jury returned a guilty verdict of "felony possession of a stolen motor vehicle." The judgment specifically referenced N.C. Gen. Stat. § 20-106 as the statutory basis for the charge.

The court's charge to the jury was for the offense of possession of a stolen vehicle under N.C. Gen. Stat. § 20-106. By charging the jury under the incorrect statute, the trial court lessened the State's burden of proof by not requiring the State to prove an element which elevated the charge from a misdemeanor to a felony, i.e. that the truck had a value of over $1,000.00.

The State argues that since the trial court charged the jury on the value of the truck in connection with the charge of felonious larceny of the truck, this was sufficient to support a conviction of felonious possession of stolen goods. We find this argument disingenuous at best. As set forth above, the trial court only instructed the jury on two elements concerning the possession of stolen goods charge relating to the truck. As to each charge, the trial court charged the jury separately as to each element that it was required to find, with no cross-reference to any of the other charges. We further note that the jury found defendant not guilty of felonious larceny of the truck.

The State further contends that the reference to N.C. Gen. Stat. § 20-106 on the judgment was merely a clerical error. Had the trial

court correctly charged the jury under N.C. Gen. Stat. § 14-71.1, this would indeed be so. However, when the trial judge charges the jury on an offense that is completely different from the charge contained in the indictment, we are required to hold that the judgment imposed by the trial court is incorrect, and the judgment must be arrested. *See Carlin*, 37 N.C. App. at 229, 245 S.E.2d at 587.

V. Habitual Felon

[6] Since the two underlying felony convictions have been vacated and arrested, the judgment sentencing defendant for habitual felon status must also be vacated.

Judgment for felonious possession of stolen goods from Scott garage is VACATED and REMANDED for resentencing on misdemeanor possession of stolen goods.

Judgment for felonious possession of stolen goods (truck) is ARRESTED.

Judgment imposed for habitual felon status is VACATED.

Judges BRYANT and GEER concur.

ANNE WADE, EMPLOYEE-PLAINTIFF v. CAROLINA BRUSH MANUFACTURING CO., EMPLOYER-DEFENDANT, AND NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, SUCCESSOR IN INTEREST TO RELIANCE INSURANCE CO., CARRIER-DEFENDANT

No. COA06-729

(Filed 20 November 2007)

Workers' Compensation— failure to comply with Rules—no statement of grounds for appeal—pro se litigant—waiver in interest of justice—abuse of discretion

The authority vested in the Industrial Commission under Rule 801 to waive violations of its Rules in the interest of justice is discretionary rather than obligatory, but must involve a sense of overall justice encompassing the interests of all parties and the goals of the Workers' Compensation Act. Here, the Industrial Commission abused its discretion by waiving a pro se plaintiff's non-compliance with the requirement of a state-

ment of the grounds for the appeal in such a way that defendant first learned of the grounds for appeal when it received the Opinion and Award.

Appeal by defendants from an Opinion and Award entered 23 February 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 March 2007.

No brief filed for plaintiff-appellee.

Mullen, Holland, & Cooper, P.A., by James R. Martin, for defendants-appellants.

STEELMAN, Judge.

The Commission abused its discretion by invoking the provisions of Rule 801 to waive compliance with Rule 701 of the Rules of the North Carolina Industrial Commission. *See* Workers' Comp. R. Of N.C. Indus. Comm'n 701(2) & (3), 2007 Ann. R. (N.C.) 1038; Workers' Comp. R. Of N.C. Indus. Comm'n 801, 2007 Ann. R. (N.C.) 1041. We reverse and vacate the Commission's Opinion and Award.

I. Factual Background

On 29 November 1999, Anne Wade (plaintiff) injured her right hand in the course of her duties in her employment with Carolina Brush Manufacturing Company (defendant). In early 2003, plaintiff sought treatment for pain in her neck extending into her right arm. She was diagnosed with a degenerative disc disease in her cervical spine. This condition ultimately resulted in a pinched nerve, which was the cause of her pain. Plaintiff worked continuously through May 2003 while undergoing non-invasive pain management. On 10 June 2003, plaintiff began a medical leave, during which she underwent surgery to address her cervical condition.

Plaintiff filed a Form 33 with the North Carolina Industrial Commission on 29 July 2003, seeking a determination that her cervical condition and required treatment were caused by her work-related injury of 29 November 1999.

During a post-surgical exam in August 2003, plaintiff reported some continuing weakness and numbness in her right arm but "not a lot of pain." On 2 September 2003, plaintiff returned to work on a half-day basis. She resumed working full-time on 2 October 2003.

II. Procedural History

On 24 August 2004, plaintiff's claims were heard before Chief Deputy Commissioner Stephen T. Gheen, who filed an Opinion and Award in this matter on 1 March 2005. Plaintiff's surgeon opined that the 1999 accident was not the cause of the degenerative disc condition but trauma such as the 1999 incident can aggravate the condition and cause nerve injury. The Deputy Commissioner denied workers' compensation benefits on the basis that plaintiff failed to prove that her cervical condition was aggravated by her 1999 injury. Plaintiff's attorney subsequently moved to withdraw as attorney of record.

Plaintiff filed a *pro se* notice of appeal to the Full Commission on 11 March 2005. On 18 March 2005, the docket director for the Industrial Commission acknowledged receipt of plaintiff's notice of appeal and advised plaintiff that a Form 44 "must be filed within twenty-five days from receipt of the transcript." The transcript was mailed on or about 16 May 2005. Plaintiff never filed a Form 44 or a brief with the Commission. On 3 August 2005, defendants moved to dismiss plaintiff's appeal before the Full Commission, with prejudice, because of plaintiff's failure to file a Form 44, a brief, or a request for an extension of time.

In denying the defendants' motion to dismiss,[1] the Commission stated:

> [A]lthough plaintiff has failed to satisfy the requirements of Workers' Comp. Rules 701(2) and (3) that plaintiff state the grounds of her appeal with particularity within twenty-five days after receiving the transcript of evidence in the present action, the interest of justice obligates the Commission, in its discretion, to waive the requirements of Rule 701(2) and (3) pursuant to . . . Rule 801 in light of plaintiff's status as a *pro se* appellant. The Full Commission concludes that plaintiff has met all statutory requirements to pursue her appeal, and that any failure by plaintiff to satisfy the additional requirements set forth in the Commission's workers' compensation rules is excused pursuant to those same rules. It follows that dismissal of plaintiff's appeal in the present action pursuant to Workers' Comp. Rule 613(1)(c) would be inappropriate.

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1. The Commission incorporated its denial of defendants' motion to dismiss into the 23 February 2006 Opinion and Award.

On 23 February 2006, the Full Commission issued an Opinion and Award, concluding "as a matter of law that plaintiff properly applied for review . . . in accordance with N.C. Gen. Stat. § 97-85." The Commission reversed the Opinion and Award of the Deputy Commissioner and awarded plaintiff disability compensation and medical treatment "as reasonably required to effect a cure, give relief, or lessen the period of her disability." The Full Commission concluded that the plaintiff suffered an injury on 29 November 1999 in which "she injured her right hand and cervical spine[,]" and such injury was compensable under the Workers' Compensation Act. Chairman Lattimore dissented, asserting that the claim should be dismissed "for failure to file a Form 44, or to state with particularity the grounds for appeal." Defendants appeal.

III. Analysis

The dispositive issue on appeal is whether the Commission complied with the terms of the Workers' Compensation Act and its own procedural rules when it invoked the provisions of Rule 801 to overlook plaintiff's non-compliance with Rule 701 of the Rules of the North Carolina Industrial Commission. We hold that the Commission did err and reverse the decision of the Commission.

Industrial Commission Rule 701 states in part:

> (2) After receipt of notice of appeal, the Industrial Commission will supply to the appellant a Form 44 Application for Review upon which appellant must state the grounds for the appeal. The grounds must be stated with particularity, including the specific errors allegedly committed by the Commissioner or Deputy Commissioner and, when applicable, the pages in the transcript on which the alleged errors are recorded. Failure to state with particularity the grounds for appeal *shall* result in abandonment of such grounds, as provided in paragraph (3). Appellant's completed Form 44 and brief must be filed and served within 25 days of appellant's receipt of the transcript or receipt of notice that there will be no transcript, unless the Industrial Commission, in its discretion, waives the use of the Form 44. . . .
>
> (3) Particular grounds for appeal not set forth in the application for review *shall be deemed abandoned*, and argument thereon shall not be heard before the Full Commission.

Workers' Comp. R. of N.C. Indus. Comm'n 701(2) & (3), 2007 Ann. R. (N.C.) 1038 (emphasis added). Thus, the penalty for non-compliance with the particularity requirement is waiver of the grounds, and, where no grounds are stated, the appeal is abandoned. *See Roberts v. Wal-Mart Stores, Inc.*, 173 N.C. App. 740, 744, 619 S.E.2d 907, 910 (2005); *Adams v. M.A. Hanna Co.*, 166 N.C. App. 619, 623-24, 603 S.E.2d 402, 405-06 (2004).

> The North Carolina Industrial Commission has the power not only to make rules governing its administration of the act, but also to construe and apply such rules. Its construction and application of its rules, duly made and promulgated, in proceedings pending before the said Commission, *ordinarily* are final and conclusive and not subject to review by the courts of this State, on an appeal from an award made by said Industrial Commission.

Winslow v. Carolina Conference Ass'n, 211 N.C. 571, 579-80, 191 S.E. 403, 408 (1937) (emphasis added); *see also Shore v. Chatham Mfg. Co.*, 54 N.C. App. 678, 681, 284 S.E.2d 179, 181 (1981). "While the construction of statutes adopted by those who execute and administer them is evidence of what they mean, that interpretation is not binding on the courts." *Vernon v. Steven L. Mabe Builders*, 336 N.C. 425, 433, 444 S.E.2d 191, 195 (1994) (citations and internal quotations omitted).

A. Rule 701 and *Roberts*

In *Roberts v. Wal-Mart Stores, Inc.*, 173 N.C. App. 740, 619 S.E.2d 907 (2005), this Court discussed in detail the ramifications of a party's failing to file a Form 44 or any document setting forth with particularity the grounds for an appeal to the Full Commission. Roberts' claim for workers' compensation benefits was denied by the Deputy Commissioner, and she gave notice of appeal. *Id.* at 742, 907 S.E.2d at 909. However, she failed to file a Form 44 with the Commission setting forth the basis of her appeal and did not file a brief with the Commission. *Id.* The Full Commission entered an Opinion and Award in favor of Roberts. *Id.* at 742-43, 907 S.E.2d at 909. On appeal, this Court reversed the Full Commission and vacated its Opinion and Award. *Id.* at 744, 907 S.E.2d at 910. While Rule 701(2) provides that the Commission, in its discretion, may waive the requirement of filing a Form 44, Rule 701 "specifically requires that grounds for appeal be set forth with particularity." *Id.* (quoting *Adams*, 166 N.C. App. at 623, 603 S.E.2d at 406) (internal quotations omitted).

> [T]he portion of Rule 701 requiring appellant to state with particularity the grounds for appeal *may not be waived* by the Full Commission. Without notice of the grounds for appeal, an appellee has no notice of what will be addressed by the Full Commission. The Full Commission violated its own rules by failing to require that plaintiff state with particularity the grounds for appeal and thereafter issuing an Opinion and Award based solely on the record.

Roberts, 173 N.C. App. at 744, 619 S.E.2d at 910 (emphasis added).

The underlying facts in the instant case are identical to *Roberts*, which mandated that the decision of the Commission be reversed. However, in *Roberts*, Rule 801 was not at issue, and its impact on the relevant provisions of Rule 701 was not addressed.

B. The Nature of Rule 801

The Commission's ruling contains sharply conflicting language. On the one hand, it states that, under Rule 801, the Commission is *obligated* in the interest of justice by plaintiff's *pro se* status to waive its own Rule 701 requirements. Yet, in the same sentence, it refers to the discretionary nature of Rule 801.

> [T]he interest of justice *obligates* the Commission, *in its discretion*, to waive the requirements of Rule 701(2) and (3) pursuant to . . . Rule 801 in light of plaintiff's status as a *pro se* appellant. (emphasis added)

The referenced rule, Industrial Commission Rule 801, provides that:

> In the interest of justice, these rules *may be waived* by the Industrial Commission. The rights of any unrepresented plaintiff will be given special consideration in this regard, to the end that a plaintiff without an attorney shall not be prejudiced by mere failure to strictly comply with any one of these rules.

Workers' Comp. R. of N.C. Indus. Comm'n 801, 2007 Ann. R. (N.C.) 1041 (emphasis added).

The use of the word "may" has been interpreted by our Supreme Court to connote discretionary power, rather than an obligatory one. *Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 402-03, 584 S.E.2d 731, 737 (2003); *In re Hardy*, 294 N.C. 90, 97, 240

S.E.2d 367, 372 (1978); *Felton v. Felton*, 213 N.C. 194, 198, 195 S.E. 533, 536 (1938).

We state unequivocally that the authority vested in the Commission under Rule 801 to waive violations of the rules in the interest of justice is discretionary and not obligatory. If the power was obligatory, then no *pro se* litigant could ever be required to follow any of the Industrial Commission rules.

Our standard of review of the Commission's exercise of a discretionary power is a deferential one, and the Commission's decision will not be overturned absent an abuse of discretion. "Abuse of discretion results where the . . . ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citing *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985)).

There are two relevant portions of Rule 801: the first sentence dealing with waiver in the context of the "interest of justice," and the second sentence which gives deference to *pro se* litigants who fail to *strictly comply* with the rules promulgated by the Commission to govern the review process.

C. Rule 801 and *Pro se* Litigants

Rule 801 provides that a *pro se* party shall not be prejudiced by a "mere failure to strictly comply with any one of these rules." In the instant case, plaintiff's conduct in failing to file or articulate any statement of grounds for her appeal to the Full Commission does not constitute a "mere failure to strictly comply with any one of the rules." Rather, it constitutes total noncompliance with a fundamental rule of the Commission, Rule 701(2), which, as noted, specifically requires that the grounds for the appeal be stated "with particularity." Workers' Comp. R. of N.C. Indus. Comm'n 701(2), 2007 Ann. R. (N.C.) 1038. We hold that the Commission's invocation of Rule 801 in the context of plaintiff's total failure to comply with the provisions of Rule 701 was an abuse of discretion.

It should be clearly understood that the Commission does have the discretion to apply Rule 801 in cases where a *pro se* litigant fails to *strictly* comply with the rules. Had the plaintiff filed a defective Form 44 or other document setting forth the grounds for appeal, even if inexpertly drawn, the Commission could have applied Rule 801 to waive strict compliance.

D. Rule 801 and the Interest of Justice

In addition to the discretionary powers pertaining to *pro se* litigants, the first sentence of the rule authorizes the waiver of the rules "[i]n the interest of justice." The concept of "interest of justice" is not limited to any particular litigant or a *pro se* litigant, but rather must encompass a sense of overall justice in the case. The application of this standard requires the Commission to consider not only the interests of all parties, but the goals and objectives of the Workers' Compensation Act, and the integrity of the adjudicatory process before the Commission. Implicit in the requirement of justice is that no rule of the Industrial Commission may compel a result incompatible with the fundamental rights of any party. *See Handy v. PPG Indus.*, 154 N.C. App. 311, 571 S.E.2d 853 (2002) (emphasizing the importance of neutrality and impartiality of any tribunal in maintaining the integrity of our judicial and quasi-judicial processes).

In *Roberts*, we emphasized that without compliance with the provisions of Rule 701(2), requiring appellants to state with particularity the grounds for appeal, "an appellee has no notice of what will be addressed by the Full Commission." *Roberts*, 173 N.C. App. at 744, 619 S.E.2d at 910. Such notice is required for the appellee to prepare a response to an appeal to the Full Commission. *See id.*

In this matter, the Full Commission incorporated its ruling on defendants' motion to dismiss into its Opinion and Award, and waived oral argument. Thus the defendant first learned of the grounds for appeal when it received the Opinion and Award. We find the Commission's actions troublesome. Without notice and a hearing, the Commission appears to have determined the possible grounds for plaintiff's appeal, found evidence in the record to support these grounds, and constructed legal arguments in support of these grounds. By so doing, the Commission placed itself in a dual role of advocate for the plaintiff and adjudicator of the case. This is inconsistent with the role of the Industrial Commission as set forth in Chapter 97 of the North Carolina General Statutes. *See Handy*, 154 N.C. App. at 317, 571 S.E.2d at 857-58.

We hold that the Commission's application of Rule 801, in light of plaintiff's "*pro se* status," to waive compliance with the provisions of Rule 701 in the interest of justice was an abuse of discretion. Its actions are incompatible with the fundamental right of defendants to notice of the grounds for plaintiff's appeal. *See id.*

We further hold that the Commission's denial of the defendants' motion to dismiss for failure to comply with the provisions of Rule 701 was in error.

IV. Conclusion

We hold that, under the specific facts of this case, the Industrial Commission abused its discretion in invoking the provisions of Rule 801 to waive plaintiff's compliance with the provisions of Rule 701(2). Consequently, we vacate the 23 February 2006 Opinion and Award and remand the matter to the Full Commission for entry of an order granting defendants' motion to dismiss.

Because of our holding above, we do not reach defendants' remaining assignments of error.

VACATED and REMANDED.

Judges WYNN and JACKSON concur.

BARBARA GLOVER MANGUM, TERRY OVERTON, DEBORAH OVERTON, AND VAN EURE, PETITIONERS-APPELLEES v. RALEIGH BOARD OF ADJUSTMENT, PRS PARTNERS, LLC, AND RPS HOLDINGS, LLC, RESPONDENTS-APPELLANTS

No. COA06-1587

(Filed 20 November 2007)

1. Zoning— special use permit—adjoining property owners—not aggrieved parties with standing

Adjoining property owners were not aggrieved parties with standing to contest the decision of a city board of adjustment granting a special use permit to respondents for an adult entertainment establishment based on provisions of the city code because those provisions do not purport to address the issue of standing to contest a zoning decision; the right to petition a trial court for a writ of certiorari is governed by N.C.G.S. § 160A-388(e2); and mere ownership of adjoining property is insufficient to establish standing.

2. Zoning— aggrieved parties—special use permit—adult entertainment establishment—adjoining property owners—failure to allege and prove special damages

Allegations by petitioners, adjoining property owners, that an adult establishment would have adverse effects on their properties because of inadequate parking, safety and security concerns, stormwater runoff, trash and noise were insufficient to allege "aggrieved party" status so as to give the petitioners standing to contest the decision of a city board of adjustment granting a special use permit for an adult entertainment establishment where petitioners failed to allege that they would suffer special damages distinct from the rest of the community. Even if petitioners properly alleged aggrieved party status, there was insufficient evidence to support a finding that the values of their properties would decrease as a result of the issuance of the special use permit or that they would suffer special damages distinct from the rest of the community.

Appeal by Respondents from order entered 12 September 2006 by Judge Narley L. Cashwell in Superior Court, Wake County. Heard in the Court of Appeals 22 August 2007.

Smith Moore LLP, by James L. Gale, David L. York, and Laura M. Loyek, for Petitioners-Appellees.

Poyner & Spruill LLP, by Robin Tatum Currin and Keith H. Johnson, for Respondents-Appellants PRS Partners, LLC and RPS Holdings, LLC.

McGEE, Judge.

PRS Partners, LLC and RPS Holdings, LLC (Respondents) applied to the City of Raleigh Inspections Department on 15 November 2005 for a special use permit to operate a "[Gentlemen's]/Topless Adult Upscale Establishment" at 6713 Mt. Herman Road (the subject property) in Raleigh, North Carolina. The Raleigh Board of Adjustment (the Board) held a hearing on 9 January 2006 regarding issuance of the requested special use permit. At the hearing, Respondents and those in opposition to the requested permit introduced evidence. At the conclusion of the hearing, the Board made numerous findings of fact and conclusions of law. The Board determined Respondents were entitled to a special use permit and the permit was issued.

Barbara Glover Mangum, Terry Overton, Deborah Overton, and Van Eure (collectively Petitioners) filed a petition for writ of certiorari on 24 March 2006 in Superior Court, Wake County. Petitioner Barbara Glover Mangum alleged she owned Triangle Equipment Company, Inc. and the real property on which it was located, which was immediately adjacent to the subject property. Petitioners Terry and Deborah Overton alleged they owned several properties immediately adjacent to the subject property, and that they owned Triangle Coatings, Inc., which was located on one of their properties. Petitioner Van Eure alleged she was the owner of the Angus Barn restaurant, located near the subject property. She further alleged that she, "as well as patrons of the Angus Barn, will travel in close proximity to [the subject property] and will be affected by the proposed use of [the subject property]." Petitioners further alleged in the petition that they, "as adjoining landowners, testified [at the hearing before the Board] regarding the adverse effects the proposed Adult Establishment would have on their properties, including concerns regarding inadequate parking, safety and security, stormwater runoff, trash, and noise."

Respondents filed a motion to dismiss the petition for writ of certiorari for lack of subject matter jurisdiction. Specifically, Respondents argued that Petitioners lacked standing to contest the issuance of the special use permit. In an order entered 12 September 2006, the trial court denied Respondents' motion to dismiss and reversed the Board's decision approving Respondents' application for a special use permit. Respondents appeal.

Respondents argue the trial court erred by denying their motion to dismiss Petitioners' writ of certiorari petition for lack of standing. We agree. " 'Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction.' " *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002) (quoting *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)), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003). A trial court's determination of standing is reviewed *de novo*. *Id.* at 114, 574 S.E.2d at 51.

Pursuant to N.C. Gen. Stat. § 160A-388(b) (2005), "any person aggrieved" may appeal the decision of a zoning officer to the Board of Adjustment. Further, under N.C. Gen. Stat. § 160A-388(e2) (2005), an "aggrieved party" may appeal a Board of Adjustment decision to su-

perior court by filing a petition for writ of certiorari. Thus, a petitioner will have standing to seek review of the decision of a Board of Adjustment if the petitioner is an "aggrieved party" within the meaning of the statute. *See Heery v. Zoning Board of Adjustment*, 61 N.C. App. 612, 613, 300 S.E.2d 869, 870 (1983). However, if a petitioner is not an aggrieved party, and therefore does not have standing, this Court does not have subject matter jurisdiction. *See Sarda v. City/Cty. of Durham Bd. of Adjust.*, 156 N.C. App. 213, 575 S.E.2d 829 (2003) (dismissing an appeal for lack of subject matter jurisdiction because the petitioners lacked standing).

We must determine whether Petitioners are aggrieved parties with standing to contest the decision of the Board. "An aggrieved party is one who either shows a legal interest in the property affected or, in the case of a 'nearby property owner, [shows] some special damage, distinct from the rest of the community, amounting to a reduction in value of [that owner's] property.' " *Lloyd v. Town of Chapel Hill*, 127 N.C. App. 347, 350, 489 S.E.2d 898, 900 (1997) (quoting *Allen v. City of Burlington Bd. of Adjustment*, 100 N.C. App. 615, 618, 397 S.E.2d 657, 659 (1990) (citation omitted)). Further, the damages that are alleged to result from the zoning action cannot be too general; the petitioner must present evidence that it "will or has suffered . . . pecuniary loss to its property" as a result of the zoning action. *Kentallen, Inc. v. Town of Hillsborough*, 110 N.C. App. 767, 770, 431 S.E.2d 231, 233 (1993) (holding that "evidence presented before the Board, that the requested construction would increase '[t]he negative impact' on the petitioner's property and 'would not be visually attractive,' is much too general[.]").

Moreover, a petitioner cannot merely allege aggrieved party status. "The petition must . . . allege 'the manner in which the value or enjoyment of [the] [petitioner's] land has been or will be adversely affected.' " *Id.* at 769, 431 S.E.2d at 232 (quoting 3 Edward H. Ziegler, Jr., *Rathkopf's The Law of Zoning and Planning* § 43.04[1] (1993) (footnote omitted)). "Once the petitioner's aggrieved status is properly put in issue, the trial court must, based on the evidence presented, determine whether an injury 'has resulted or will result from [the] zoning action.' " *Id.* at 770, 431 S.E.2d at 232 (quoting *Rathkopf's* at 43.04[1]).

[1] Respondents first argue the trial court erred by relieving Petitioners of their burden to show they were aggrieved parties. We agree. In its order, the trial court specifically concluded:

> 1. By its express terms, the Raleigh City Code protects "adjacent properties" by requiring the Board to make findings regarding the secondary effects of the proposed Adult Establishment on such adjacent properties. The Code also specifically recognizes that Adult Establishments "because of their very nature" have "serious objectionable operational characteristics" that extend into surrounding neighborhoods. § 10-2144(3), (4).
>
> 2. Petitioners therefore have standing based on the ordinance itself, and the line of cases which otherwise require proof of distinct "special damages" in order to have standing to challenge a quasi-judicial zoning decision pursuant to N.C. Gen. Stat. [§] 160A-388(e2) [is] not apposite. Because Petitioners, as adjacent and nearby landowners, fall within the class of property-owners expressly granted protection by the Raleigh City Code, this Court finds that Petitioners have standing to seek review of the Board's decision granting the Special Use Permit.

We hold that the trial court's reliance on the Raleigh City Code was misplaced. The Raleigh City Code provisions relied upon by the trial court do not purport to address the issue of standing to contest a zoning decision. Rather, the right to petition a trial court for a writ of certiorari is governed by statute. *See* N.C.G.S. § 160A-388(e2). Moreover, the trial court's ruling contravenes longstanding precedent that mere ownership of adjoining property is insufficient to establish a petitioner's standing. *See Sarda*, 156 N.C. App. at 215, 575 S.E.2d at 831 (holding that "[the] [p]etitioners' mere averment that they own land in the immediate vicinity of the property for which the special use permit is sought . . . is insufficient to confer standing upon them."); *Kentallen*, 110 N.C. App. at 770, 431 S.E.2d at 233 (holding that "[the petitioner's] allegation that it is the 'owner of adjoining property' does not satisfy the pleading requirement[.]"). Therefore, the trial court erred by concluding that Petitioners had standing based solely on provisions of the Raleigh City Code.

[2] Respondents next argue the trial court erred by concluding, in the alternative, that "the Petition and the Certified Record include allegations regarding increased traffic, increased water runoff, parking, and safety concerns sufficient to establish 'special damages' for purposes of standing." We agree.

In the present case, Petitioners did not sufficiently allege "aggrieved party" status. In the petition for writ of certiorari, Petitioner Barbara Glover Mangum alleged she was the owner of real property

immediately adjacent to the subject property, and that she owned Triangle Equipment Company, Inc., situated on her real property. Petitioners Terry and Deborah Overton alleged they owned several properties immediately adjacent to the subject property, and that they owned Triangle Coatings, Inc., situated on one of their properties. Petitioner Van Eure alleged she was the owner of the Angus Barn restaurant, located near the subject property. She also alleged that she, "as well as patrons of the Angus Barn, will travel in close proximity to [the subject property] and will be affected by the proposed use of [the subject property]." These allegations are insufficient to establish Petitioners' standing as they merely allege ownership of adjacent or nearby property. *See Sarda*, 156 N.C. App. at 215, 575 S.E.2d at 831; *Kentallen*, 110 N.C. App. at 770, 431 S.E.2d at 233.

Petitioners did allege in the petition for writ of certiorari that "Petitioners, as adjacent landowners, testified regarding the adverse effects the proposed Adult Establishment would have on their properties, including concerns regarding inadequate parking, safety and security, stormwater runoff, trash, and noise." However, Petitioners did not allege that they would suffer " 'special damages distinct from the rest of the community.' " *Lloyd*, 127 N.C. App. at 351, 489 S.E.2d at 900 (citations omitted).

In *Lloyd*, the intervenors alleged ownership of property in the vicinity of the property for which the variances were sought and also alleged that the variances would have a material adverse effect upon the value of the intervenors' properties. *Id.* However, because the petitioners did not specify how the granting of the variances at issue would cause them special damages, distinct from the rest of the community, our Court held that the trial court erred by granting the intervenors' motion to intervene. *Id.* at 351, 489 S.E.2d at 900-01. Moreover, in *Heery*, the petitioners alleged they would suffer a decline in the value of their properties by the granting of the requested special use permit. *Heery*, 61 N.C. App. at 613, 300 S.E.2d at 870. However, "the petitioners failed to allege, and the Superior Court failed to find, that [the] petitioners would be subject to 'special damages' distinct from the rest of the community. Without a claim of special damages, the petitioners are not 'aggrieved' persons . . . and they have no standing." *Id.* at 614, 300 S.E.2d at 870.

As in *Lloyd* and *Heery*, Petitioners in the present case failed to allege how they would be subject to special damages, distinct from the rest of the community, by the granting of the special use

permit. Accordingly, Petitioners failed to plead sufficient special damages, and the trial court erred by denying Respondents' motion to dismiss.

Even assuming, *arguendo*, that Petitioners properly alleged aggrieved party status, we hold there was insufficient evidence to support a finding that Petitioners would sustain special damages. Furthermore, the trial court failed to make such a finding, merely determining that Petitioners had stated "allegations" sufficient to establish special damages. *See Lloyd*, 127 N.C. App. at 351, 489 S.E.2d at 901 (stating: "Assuming *arguendo* [the] intervenors properly alleged they would be 'aggrieved' by grant of the variances, . . . the record reveals no evidence which would sustain a finding by the trial court of special damages to which [the] intervenors might be subjected, nor did the trial court's order contain such a finding, merely providing that it appeared the 'motion should be allowed.' ").

In the present case, LaMarr Bunn (Mr. Bunn), a licensed landscape architect and a licensed real estate broker, testified for Petitioners at the hearing before the Board. Mr. Bunn testified that the proposed parking plans on the subject property would be inadequate, and that "[p]atrons of the proposed use will park not only along Mt. Herman Road, but also in the lots and driveways of the adjacent businesses which then would have to care for the trash and other items being strewn on other business properties." Mr. Bunn further testified that the stormwater plans for the subject property were inadequate.

Mr. Bunn also testified that he had conducted a review of 911 calls from two businesses similar to Respondents' proposed use. There had been over 400 calls made to 911 from those two businesses over the previous year, while no 911 calls had been made from the subject property. The Board allowed this testimony, and Mr. Bunn's testimony regarding traffic and transportation issues, as the bases for Mr. Bunn's opinions regarding valuation of Petitioners' properties. However, Mr. Bunn did not testify that the value of any of Petitioners' properties would decrease as a result of the proposed use on the subject property. Rather, Mr. Bunn merely raised the concerns cited above. The only testimony regarding a decrease in property value as a result of the special use permit concerned a property not owned by Petitioners. Mr. Bunn testified that the proposed use would decrease the value of a fifteen-acre lot across the street from the subject property, which property was not owned by Petitioners.

Petitioner Barbara Glover Mangum testified she was "concerned" about the parking plans. Specifically, she testified that

> [i]f even one vehicle were to park on that street, because it is such a narrow little street with no shoulders, if one car parks between a proposed club and my property, tractor trailers bringing my equipment in, my construction equipment in at night, would not be able to make the turn into my driveway.

She also testified that her property was lower in elevation than the subject property, and "that cause[d] [her] great concerns of flooding and water issues." She further stated that if Respondents were granted the special use permit, she would be "scare[d]" and "frighten[ed]" for the safety and security of the people on Mt. Herman Road. Petitioner Terry Overton testified he was concerned about security on his property:

> I've been in this particular area for 28 years in this same building and I've only had 2 calls in 28 years for any kind of problem in my business whatsoever. And I don't think that would remain the case should I have an influx of more people coming in. That's my personal opinion.

In *Lloyd*, although the intervenors testified about the adverse effects of the granting of the variance, our Court held that "nothing in the statements of [the] intervenors to the Board evidenced a diminishment of property values or revealed an assertion of special damages 'distinct from the rest of the community.' " *Lloyd*, 127 N.C. App. at 352, 489 S.E.2d at 901. In *Kentallen*, our Court held that evidence that "the requested construction would increase '[t]he negative impact' on the petitioner's property and 'would not be visually attractive,' [was] much too general to support a finding that [the petitioner] will or has suffered any pecuniary loss to its property due to the issuance of the permit." *Kentallen*, 110 N.C. App. at 770, 431 S.E.2d at 233.

Likewise, in the present case, Petitioners did not present any evidence that the value of their properties would decrease as a result of the issuance of the special use permit, or that they would suffer damages distinct from the rest of the community. *See Lloyd*, 127 N.C. App. at 352, 489 S.E.2d at 901. Moreover, the evidence presented by Petitioners at the hearing was too general and speculative to support a finding that "an injury 'has resulted or will result from [the] zoning action.' " *See Kentallen*, 110 N.C. App. at 770, 431 S.E.2d at 232 (quot-

ing *Rathkopfs* at § 43.04[1]). Accordingly, we hold the trial court erred by denying Respondents' motion to dismiss.

The order of the trial court is vacated, and the matter is remanded to the trial court for entry of an order (1) dismissing the petition for writ of certiorari filed 24 March 2006; (2) vacating the trial court's order entered 12 September 2006; and (3) reinstating the special use permit issued by the Board. *See Kentallen*, 110 N.C. App. at 770, 431 S.E.2d at 233; *Heery*, 61 N.C. App. at 614, 300 S.E.2d at 871. Because we determine that Petitioners lacked standing to contest the issuance of the special use permit, we do not address Respondents' remaining arguments.

Vacated and remanded.

Judges STEPHENS and SMITH concur.

MARGARET JONES REID, ADMINISTRATOR OF THE ESTATE OF WILLIAM REID, JR., PLAINTIFF v. JACK C. COLE, M.D., CHRISTIAN MANN, M.D., CLIFFORD W. LINDSEY, M.D., CAROLINA PHYSICIANS, P.A., PITT MEMORIAL HOSPITAL FOUNDATION, INC., AND PITT COUNTY MEMORIAL HOSPITAL INCORPORATED, DEFENDANTS

No. COA07-272

(Filed 20 November 2007)

1. Appeal and Error— appealability—denial of motion to dismiss—writ of certiorari—administration of justice

Although defendants' appeal in a medical malpractice case from the denial of their motion to dismiss is typically an appeal from an interlocutory order, the Court of Appeals did not need to determine whether a substantial right was affected based on its election in its discretion to grant defendants' petition for writ of certiorari to address the merits of the appeal and its determination that the administration of justice would best be served by granting defendants' petition.

2. Pleadings— suit filed by nonattorney administrator—not nullity—defect cured by attorney's appearance

A medical malpractice wrongful death action filed pro se by the administrator of a deceased patient's estate was not a legal

nullity because the administrator was not an attorney, and this defect in plaintiff's complaint was cured by the subsequent appearance of a properly licensed and admitted attorney for plaintiff after the statute of limitations had expired.

Judge JACKSON dissenting.

Appeal by defendants Clifford W. Lindsey, M.D., Pitt Memorial Hospital Foundation, Inc., and Pitt County Memorial Hospital, Incorporated from an order entered 31 October 2006 by Judge Thomas D. Haigwood in Pitt County Superior Court. Heard in the Court of Appeals 18 September 2007.

Hemmings & Stevens, P.L.L.C., by Kelly A. Stevens, for plaintiff-appellee.

Yates, McLamb & Weyher, L.L.P., by Dan J. McLamb and Samuel G. Thompson, Jr., for defendants-appellants Pitt County Memorial Hospital, Incorporated, Clifford W. Lindsey, M.D., and Pitt Memorial Hospital Foundation, Inc.

HUNTER, Judge.

Clifford W. Lindsey, M.D., Pitt Memorial Hospital Foundation, Inc., and Pitt County Memorial Hospital, Incorporated ("defendants") appeal the denial of their motion to dismiss Margaret Jones Reid's ("plaintiff") medical malpractice action. After careful consideration, we affirm the order of the trial court.

William Reid, Jr. ("Mr. Reid"), plaintiff's husband, died 25 February 2004 at Pitt County Memorial Hospital. Plaintiff was appointed the administrator of his estate ("the estate"). She retained counsel to pursue a claim of wrongful death against defendants on behalf of the estate. Approximately one month prior to the expiration of the statute of limitations on the wrongful death claim, plaintiff's attorney relocated and withdrew from representation. Thereafter, plaintiff filed a *pro se* complaint against defendants alleging that they were negligent in the wrongful death of Mr. Reid. Defendants filed motions to dismiss with their answer on the ground that plaintiff was not an attorney and thus could not appear *pro se* on behalf of the estate. Defendants argued that the improper appearance rendered plaintiff's complaint a legal nullity and therefore plaintiff was barred from refiling the action with counsel because the statute of limitations had since expired. Plaintiff opposed the motions, arguing that

any defect in her complaint was cured by the subsequent appearance of counsel, based on this Court's ruling in *Theil v. Detering*, 68 N.C. App. 754, 315 S.E.2d 789 (1984).

Defendants' motions to dismiss were denied by the trial court on 31 October 2006. In its order, the trial court certified the matter for immediate appeal pursuant to N.C. Gen. Stat. § 1-277 (2005) and N.C. Gen. Stat. § 1A-1, Rule 54(b) (2005), stating that "there is no justifiable reason for delay and . . . hereby certifies this Order as immediately appealable to the North Carolina Court of Appeals."

Defendants present the following issues for this Court's review: (1) whether the appeal is properly before this Court; and (2) whether the trial court erred in denying defendants' motions to dismiss.

I.

[1] Typically, the denial of a motion to dismiss is not immediately appealable to this Court because it is interlocutory in nature. *McClennahan v. N.C. School of the Arts*, 177 N.C. App. 806, 808, 630 S.E.2d 197, 199 (2006). Interlocutory appeals may be heard, however, where: (1) the order affects a substantial right; or (2) the trial court certified the order pursuant to Rule 54 of the North Carolina Rules of Civil Procedure. *Id.* Where as here, the order is not "final" as to any party, the party seeking review of the interlocutory order still must show that it affects a substantial right even with trial court certification. *James River Equip., Inc. v. Tharpe's Excavating, Inc.*, 179 N.C. App. 336, 340-41, 634 S.E.2d 548, 552-53 (2006). Thus, the fact that the trial court certified its order for immediate appeal does not alter defendants' obligation to show that a substantial right has been affected.

Plaintiff has filed a motion to dismiss defendants' appeal on the grounds that it is interlocutory and does not affect a substantial right. Defendants concede that the appeal is interlocutory in nature, but argues that the order affects a substantial right. While we agree that the appeal is interlocutory, we need not determine whether the trial court's order affects a substantial right because we have elected in our discretion to grant defendants' petition for writ of *certiorari* and to address the merits of the appeal. *See* N.C.R. App. P. 21(a)(1); N.C. Gen. Stat. § 7A-32(c) (2005); *Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co.*, 141 N.C. App. 569, 574, 541 S.E.2d 157, 161 (2000) (same). Even were we to conclude that the appeal did not affect a substantial right, the grant of *certiorari* is still appropri-

ate here, where the administration of justice will best be served by granting defendants' petition. *See Staton v. Russell*, 151 N.C. App. 1, 7, 565 S.E.2d 103, 107 (2002). Accordingly, plaintiff's motion to dismiss defendants' appeal is denied.

II.

[2] Defendants argue that the trial court erred in denying their motions to dismiss plaintiff's cause of action because plaintiff's complaint was a legal nullity. If the complaint is determined to be a legal nullity, then the statute of limitations on the estate's claim expired on 25 February 2006, prior to plaintiff's counsel's appearance in the action. Because we find this Court's opinion in *Theil* controlling, we affirm the trial court's denial of defendants' motions to dismiss.

The issue in *Theil* was "whether the trial court erred in holding that plaintiff's complaint was a nullity because it was prepared and filed by an attorney not authorized to practice law in this state, and in dismissing plaintiff's action on that basis." *Id.* at 755, 315 S.E.2d at 790. In that case, the plaintiff was an Ohio resident stationed at Camp Lejeune, North Carolina. *Id.* The *Theil* plaintiff retained an Ohio attorney to represent him against a North Carolina defendant in a claim arising out of a motor vehicle accident which had occurred in North Carolina. *Id.* The complaint was filed days before the expiration of the applicable statute of limitations, but plaintiff's Ohio counsel had neither retained local counsel nor qualified under N.C. Gen. Stat. § 84-4.1 to appear in the action. *Id.* at 755-56, 315 S.E.2d at 790. The defendant filed a motion to dismiss the complaint on the grounds that plaintiff's counsel was not qualified to represent him in the action, such that the filing of the complaint was a legal nullity. *Id.* at 755, 315 S.E.2d at 790. Approximately three weeks after the filing of the motion, an entry of appearance was filed by a North Carolina attorney for the plaintiff. *Id.* The trial court, however, dismissed the complaint on the grounds that the filing of the complaint by an unauthorized person on plaintiff's behalf rendered the action a nullity, such that the plaintiff's claim was now barred by the statute of limitations. *Id.*

On appeal, this Court reversed the trial court and held that "a pleading filed by an attorney not authorized to practice law in this state is not a nullity." *Id.* at 756, 315 S.E.2d at 791. In the instant case, plaintiff concedes that she was not qualified to file a complaint on behalf of the estate or any other entity aside from herself in her individual capacity. *See* N.C. Gen. Stat. § 84-4 (2005) (with limited

exceptions, it is unlawful for any person not licensed to practice law in this state to prepare for another person, firm or corporation, any legal document). As stated in *Theil*, however, the fact that plaintiff was not licensed to practice law in this state does not render the complaint a legal nullity. Accordingly, the defect in plaintiff's complaint was cured by the subsequent appearance of a properly licensed and admitted counsel.

Defendants attempt to distinguish *Theil* on the ground that the original attorney in *Theil* was licensed to practice in a different state, whereas plaintiff in this case is not licensed to practice in any state. We find such a distinction immaterial. As plaintiff correctly points out, neither the Ohio attorney in *Theil* nor the plaintiff in this action was admitted to practice law in North Carolina. Moreover, we find the case law relied upon by defendants unpersuasive. First, much of defendants' brief is devoted to discussion of case law from different jurisdictions. Although we will at times use out-of-state decisions as persuasive authority, we need not do so in this case as *Theil* is controlling. Second, defendants' reliance on *Lexis-Nexis v. Travishan Corp.*, 155 N.C. App. 205, 573 S.E.2d 547 (2002), is equally unpersuasive. That case did not address the validity or nullity of a pleading, nor did the defendant corporation ever retain counsel to cure the defect. Accordingly, defendants' arguments as to this issue are rejected and we affirm the ruling of the trial court.

III.

In summary, we deny plaintiff's motion to dismiss defendants' appeal and grant defendants' petition for writ of *certiorari*. We hold that the trial court did not err in denying defendants' motions to dismiss and thus affirm the ruling of the trial court.

Affirmed.

Judge WYNN concurs.

Judge JACKSON dissents in a separate opinion.

JACKSON, Judge, dissenting.

For the reasons stated below, I respectfully dissent from the majority's conclusion to reach the merits of this case. I would (1) hold that the order is interlocutory, (2) grant the motion to dismiss, and (3) deny the petition for writ of *certiorari*.

The majority cites *Staton v. Russell*, 151 N.C. App. 1, 565 S.E.2d 103 (2002), in support of granting *certiorari* stating "the administration of justice will best be served by granting defendants' petition." I do not think granting *certiorari* in this case is warranted, however, as I do not believe that it falls within the criteria established by extensive and longstanding precedent pertaining to interlocutory appeals.

Staton clearly is distinguishable from the instant case. It involved five separate lawsuits with cross-claims and third-party claims which spanned six years. The parties included a United States citizen residing in Virginia, two resident citizens of Columbia, South America—one of whom also was a United States citizen—and two Florida revocable living trusts. Oddly, the appellants and appellee were not adverse parties in any of the five North Carolina lawsuits. The appeal involved a North Carolina order enjoining a related declaratory judgment action filed in Florida. Due to the complexity of the *Staton* case, it is understandable that this Court would grant *certiorari*.

The facts of the instant case are quite dissimilar to those in *Staton*. Notwithstanding the fact that there are two appeals currently before this Court, underlying both is but a single action for wrongful death. There are no cross-claims or third-party claims. All the parties are North Carolina residents or business entities. There is no out-of-state lawsuit involved. Further, although there is some likelihood that dismissing this appeal would only delay our ultimate review, such likelihood is no more so than with any other case of the denial of a motion to dismiss based upon an interlocutory appeal.

Defendants argue that the denial of their motion to dismiss affects a substantial right in that it involves a complaint that should have been treated as a legal nullity; if not reversed, the ruling will allow an illegal and void lawsuit to continue against them. A two-part test has developed to assess the appealability of interlocutory orders as a "substantial right." *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 5, 362 S.E.2d 812, 815 (1987). "First, the right itself must be 'substantial.' Second, the enforcement of the substantial right must be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order." *Id.* at 5-6, 362 S.E.2d at 815 (internal citations omitted).

Here, there is no substantial right which will not be preserved for later appeal, and delay would not injure defendants, other than the ordinary costs of defending the action. "[A]voiding the time and expense of trial is not a substantial right justifying immediate appeal."

Lee v. Baxter, 147 N.C. App. 517, 520, 556 S.E.2d 36, 38 (2001). Accordingly, I would grant the motion to dismiss and deny the petition for writ of *certiorari*.

STATE OF NORTH CAROLINA v. MIGUEL ANGEL GONZALEZ ESCOBAR A/K/A JUAN JOSE ARBUSTOS-NAVARETTE DEFENDANT, HARCO NATIONAL INSURANCE COMPANY,[1] SURETY

No. COA07-397

(Filed 20 November 2007)

1. Civil Procedure— Rule 52—findings

Rule 52 does not require a recitation of evidentiary facts, and the trial court fulfilled its obligations when denying a motion for relief from a bail bond forfeiture by making a specific finding that defendant was located by the surety's efforts, but that the District Attorney was ultimately responsible for returning defendant to Union County. The court's findings did not ignore questions of fact that had to be resolved before judgment could be entered.

2. Rules of Civil Procedure— Rule 52 conclusion—basis in findings

The trial court did not abuse its discretion by making conclusions on allegedly incomplete findings when denying a motion for relief from a bail bond forfeiture.

3. Bail and Pretrial Release— relief from bond forfeiture— extraordinary circumstances not shown

The trial court did not err by concluding that there were no extraordinary circumstances entitling a bail bond surety to relief from a forfeiture judgment where the evidence showed that the surety was aware of defendant's ties to Mexico, failed to verify his bogus social security number, did not stay abreast of defendant's location prior to his court date, and was not responsible for defendant's capture.

Appeal by surety from order entered 16 November 2006 by Judge W. David Lee in Superior Court, Union County. Heard in the Court of Appeals 16 October 2007.

1. Harco National Insurance Company is not listed in the caption of the 16 November 2007 order, but is included in the caption here because it is the appellant.

Kenneth W. Honeycutt, for plaintiff-appellee Union County Board of Education.

Andresen & Associates, by Kenneth P. Andresen, for defendant-appellant Harco National Insurance Company.

WYNN, Judge.

A trial court is not required to recite evidentiary facts in its findings of fact, but is required to make "specific findings on the ultimate facts established by the evidence."[2] Here, a bonding company argues that the trial court erred because it failed to make findings of fact regarding its efforts to locate defendant after he failed to appear at a scheduled court appearance. Because the trial court was not required to make findings of fact specifying the tasks completed by the bonding company, we affirm.

Following Defendant Miguel Angel Gonzalez Escobar's arrest on several counts of trafficking cocaine in violation of N.C. Gen. Stat. § 90-95 (2003), the trial court ultimately set his bond at $250,000. On 27 June 2003, Harco National Insurance Company ("Harco") posted bond for Defendant's release. Defendant failed to appear for a scheduled court appearance on 4 August 2003; consequently, the trial court entered a Notice of Bond Forfeiture and an Order for Defendant's arrest on 14 August 2003.

On 25 November 2003, the Union County District Attorney dismissed the charges against Defendant with leave. The forfeiture became a final judgment on 16 January 2004.

Upon learning of Defendant's failure to appear, Harco, through its agents, engaged in a search to locate him. Harco conducted numerous database searches, monitored residences of Defendant's girlfriend, and contacted various law enforcement officials and relatives of Defendant. Through United States Marshals, Harco learned that Defendant had been deported to Mexico. Additional research revealed that Defendant had returned illegally to the United States and had been arrested in Tennessee. After talking to one of Defendant's relatives, Harco discovered that Defendant was using the alias Juan Arbustos-Navarette. After comparing photographs and next of kin, Harco concluded that Defendant was located in a detention facility in Blount County, Tennessee.

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2. *Chemical Realty Corp. v. Home Federal Sav. & Loan Ass'n of Hollywood*, 65 N.C. App. 242, 249, 310 S.E.2d 33, 37 (1983), *disc. review denied*, 310 N.C. 624, 315 S.E.2d 689, *cert. denied*, 469 U.S. 835, 83 L. Ed. 2d 69 (1984).

On 15 March 2005, Harco informed Detective Macki Goodman of the Union County Sheriff's Department that it had located Defendant. On 21 March 2005, Harco sent a letter to Assistant District Attorney Tina Pope seeking her assistance in "filing the necessary extradition process" for Defendant. On 24 March 2005, the Union County District Attorney reinstated the State's case against Defendant. Subsequently, the District Attorney's office contacted the United States Marshal's Office and had a hold placed on Defendant, who was actually in federal custody, but was being held in Blount County.

In August 2006, Defendant was returned to Union County upon a Writ of Habeas Corpus Ad Prosequendum, prepared by Harco's counsel at the court's direction.

On 5 September 2006, Harco filed a Motion for Relief from Judgment, arguing that pursuant to N.C. Gen. Stat. § 15A-544.8 (2005), extraordinary circumstances existed which entitled Harco to the return of its forfeited money. The trial court denied Harco's Motion for Relief from Judgment on 16 November 2006.

On appeal to this Court, Harco argues that the trial court erred by: (I) failing to make findings of fact regarding its efforts to locate Defendant, thereby violating Rule 52 of our Rules of Civil Procedure and (II) making conclusions of law based on incomplete facts.

I.

[1] Harco first contends that the trial court violated Rule 52 of our North Carolina Rules of Civil Procedure because it failed to include determinative facts in its findings of fact. We disagree.

When the trial court sits without a jury, Rule 52 of our Rules of Civil Procedure requires the court to "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(a)(1) (2005). To meet the requirements of Rule 52:

> [T]he trial court must make a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment. Rule 52(a)(1) does not require recitation of evidentiary facts, but it does require specific findings on the ultimate facts established by the evidence, admissions and stipulations which are determi-

native of the questions involved in the action and essential to support the conclusions of law reached.

Chemical Realty Corp. v. Home Federal Sav. & Loan Ass'n., 65 N.C. App. 242, 249, 310 S.E.2d 33, 37 (1983) (quotation and citations omitted), *disc. review denied*, 310 N.C. 624, 315 S.E.2d 689, *cert. denied*, 469 U.S. 835, 83 L. Ed. 2d 69 (1984). Where a trial court's findings of fact ignore questions of fact that must be resolved before judgment can be entered, the action should be remanded. *Id.* at 250, 310 S.E.2d at 37. In reviewing a trial court's findings of fact, the "findings are conclusive on appeal if supported by competent evidence." *State v. Coronel*, 145 N.C. App. 237, 250, 550 S.E.2d 561, 570 (2001), *disc. review denied*, 355 N.C. 217, 560 S.E.2d 144 (2002).

Under our bail forfeiture statutes, if a criminal defendant is released on bond and fails to appear, the court "shall enter a forfeiture for the amount of that bail bond in favor of the State against the defendant and against each surety on the bail bond." N.C. Gen. Stat. § 15A-544.3(a) (2005). The court then mails a copy of the entry of forfeiture to the defendant and each surety on the bond. *Id.* § 15A-544.4. After 150 days from the notice of the forfeiture, the forfeiture becomes a final judgment of forfeiture, provided that there is no motion to set aside the forfeiture pending on that date. *Id.* § 15A-544.6. A defendant or surety is only entitled to relief from a final judgment of forfeiture if "the person seeking relief was not given notice . . ." or "[o]ther extraordinary circumstances exist that the court, in its discretion, determines should entitle that person to relief." *Id.* § 15A-544.8.

In the context of bond forfeiture, the term "extraordinary circumstances" has been defined as "going beyond what is usual, regular, common, or customary . . . of, relating to, or having the nature of an occurrence or risk of a kind other than what ordinary experience or prudence would foresee." *State v. Edwards*, 172 N.C. App. 821, 825, 616 S.E.2d 634, 636, *disc. review denied*, 360 N.C. 69, 623 S.E.2d 776 (2005). Whether the evidence presented rises to the level of extraordinary circumstances is "a heavily fact-based inquiry and therefore, should be reviewed on a case by case basis." *Coronel*, 145 N.C. App. at 244, 550 S.E.2d at 566.

In this case, Harco argues that the trial court failed to make findings of fact regarding its extensive efforts to locate Defendant, which was determinative of the question of extraordinary circum-

stances. The trial court made the following finding of fact regarding Harco's efforts:

> 4. Efforts of and on behalf of Harco resulted in locating Escobar in the penal system of another jurisdiction, but did not result in the apprehension or capture of Escobar by authorities in that jurisdiction. . . . Escobar's return to this jurisdiction is by writ based upon the continuing efforts of the District Attorney to prosecute Escobar on the original charges in this jurisdiction.

Harco contends that the trial court did not make findings of fact specifying the numerous tasks completed by Harco in its efforts to locate Defendant. However, the trial court was not required to make such findings, as "Rule 52(a)(1) does not require recitation of evidentiary facts." *Chemical Realty Corp.*, 65 N.C. App. at 249, 310 S.E.2d at 37. "[T]he court need only make brief, definite, pertinent findings and conclusions upon the contested matters." *State v. Rakina*, 49 N.C. App. 537, 540-41, 272 S.E.2d 3, 5 (1980) (holding that more specificity in the findings of fact was not required where the surety argued that the trial court failed to address the personal efforts of surety), *disc. review denied*, 302 N.C. 221, 277 S.E.2d 70 (1981). The trial court fulfilled its obligations under Rule 52(a)(1) because it made a specific finding of fact that Harco's efforts resulted in locating Defendant, but the District Attorney was ultimately responsible for returning Defendant to Union County. The trial court's findings of fact did not ignore questions of fact that had to be resolved before judgment could be entered. *Chemical Realty Corp.*, 65 N.C. App. at 250, 310 S.E.2d at 37. Accordingly, we affirm.

II.

[2] Harco next argues that the trial court's conclusions of law constituted an abuse of discretion because the findings of fact were incomplete. We disagree.

We have previously held that "it is within the court's discretion to remit judgment for 'extraordinary cause,' and we therefore review the court's decision . . . for abuse of discretion." *Coronel*, 145 N.C. App. at 243, 550 S.E.2d at 566; N.C. Gen. Stat. § 15A-544.8. A trial court may be reversed for abuse of discretion only "upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

In determining whether a forfeited bond may be remitted for extraordinary cause, courts consider the following factors:

> [T]he inconvenience and cost to the State and the courts; the diligence of sureties in staying abreast of the defendant's whereabouts prior to the date of appearance and in searching for the defendant . . .; [in cases where the defendant has died] the surety's diligence in obtaining information of the defendant's death; the risk assumed by the sureties; [and] the surety's status, be it private or professional . . . .

Coronel, 145 N.C. App. at 248, 550 S.E.2d at 569. Although a surety's diligence is a factor in determining whether a forfeited bond may be remitted for extraordinary cause, "diligence alone will not constitute 'extraordinary cause,' for due diligence by a surety is expected." *Id.* Recently, we held that the mere return of a defendant does not constitute extraordinary circumstances as a matter of law. *Edwards*, 172 N.C. App. at 827, 616 S.E.2d at 637.

We first note that the trial court's findings of fact are binding on appeal because Harco failed to specifically assign error to any of the findings. *State v. Cheek*, 351 N.C. 48, 63, 520 S.E.2d 545, 554 (1999) (noting that because the defendant failed to specifically except to any of the trial court's findings of fact and failed to identify in his brief which of the trial court's findings of fact were not supported by the evidence, the court's review of the assignment of error was limited to whether the trial court's findings of fact supported its conclusions of law), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965 (2000).

In addition to the findings of fact regarding Harco's efforts to locate Defendant, the trial court found that "[at] the time of the posting of the bond, information obtained by the bail agent included that Escobar was born in Mexico." The findings of fact also state that Harco "did not determine the legal status of Escobar in this country at the time of the posting of the bond," and "the only contact on behalf of the surety with Escobar after the initial meeting . . . was sporadic telephone contact." The trial court then concluded that:

> [T]he defendant's failure to appear at the scheduled court date is attributable not only to his voluntary, unlawful acts, but also to the inattention, neglect and lack of diligence by the surety and its agents in obtaining information and in staying abreast of defendant's whereabouts prior to the scheduled court date; that

subsequent efforts by the surety and its agents did not lead to defendant's apprehension and capture but only to locating him in the penal system of a sister State after his apprehension by others.

The trial court's conclusions reflect a consideration of the factors outlined in *Coronel.* 145 N.C. App. at 248, 550 S.E.2d at 569. We have held that where the surety knew at the time it executed a bond that the defendant was a Texas resident and traveled outside of the United States in connection with his employment, "[it] was entirely foreseeable . . . that the sureties would be required to expend considerable efforts and money to locate [defendant] in the event he failed to appear." *State v. Vikre*, 86 N.C. App. 196, 199, 356 S.E.2d 802, 804, *disc. review denied*, 320 N.C. 637, 360 S.E.2d 103 (1987).

[3] Here, the evidence in the record shows that Harco was aware of Defendant's ties to Mexico, failed to verify his bogus Social Security number, did not stay abreast of his location prior to his court date, and, as the trial court stated in its findings of fact, was not responsible for Defendant's capture. Accordingly, we cannot conclude that the trial court abused its discretion in concluding that there were no extraordinary circumstances entitling Harco to relief from judgment.

Affirmed.

Judges HUNTER and GEER concur.

TODD BROWN, GINGER BROWN, INDIVIDUALLY AND AS NEXT FRIENDS TO MACKAYLA BROWN AND GRACIE BROWN, MINOR CHILDREN; ERIC RITTER, INDIVIDUALLY AND AS NEXT FRIEND TO CURT RITTER, MINOR CHILD; WAYNE COBLE, HEATHER COBLE, INDIVIDUALLY AND AS NEXT FRIENDS TO MEGAN COBLE AND HOLLY COBLE, MINOR CHILDREN; DARIN KIDD, CATHY KIDD, INDIVIDUALLY AND AS NEXT FRIENDS TO WILLIAM JOSEPH KIDD AND DAVID KIDD, MINOR CHILDREN; TERRY CURTIS BARBERY, SHERRY BROWN BARBERY, INDIVIDUALLY AND AS NEXT FRIENDS TO BRYANT ANDREW BARBERY AND TORRY SHEREE BARBERY, MINOR CHILDREN; BRYAN JOHNSON, KIMBERLY JOHNSON, INDIVIDUALLY AND AS NEXT FRIENDS TO MICHAEL JOHN ROBINSON AND BRYAN HUNTER JOHNSON, MINOR CHILDREN; DONALD SHELTON, GLORIA SHELTON, INDIVIDUALLY AND AS NEXT FRIENDS TO BUDDY BAKER, MINOR CHILD; ELIZABETH CHRISCO, INDIVIDUALLY AND AS NEXT FRIEND TO FRANK CHRISCO AND TONY CHRISCO, MINOR CHILDREN; WALTER H. JONES, JR., LISA C. JONES, INDIVIDUALLY AND AS NEXT FRIENDS TO CASEY JONES, CHASE JONES, AND CORY JONES, MINOR CHILDREN; DANNY OLDHAM, PAULA OLDHAM, INDIVIDUALLY AND AS NEXT FRIENDS TO DALTON KEITH OLDHAM, MINOR CHILD; SHAWN CULBERSON, DEANNA CULBERSON, INDIVIDUALLY AND AS NEXT FRIENDS TO JORDAN CULBERSON, ALLIE GRACE CULBERSON, AND MAGGIE CULBERSON, MINOR CHILDREN; KEITH SUITS, DARLENE SUITS, INDIVIDUALLY AND AS NEXT FRIENDS TO DALTON SUITS AND RILEY SUITS, MINOR CHILDREN, MARK BRADY, JENNIFER DENISE BRADY, INDIVIDUALLY AND AS NEXT FRIENDS TO SAMANTHA BRADY AND LAUREN BRADY, MINOR CHILDREN; BRAD MOODY, JENNIFER MOODY; PAUL POWERS, TAMMY TYSINGER, INDIVIDUALLY AND AS NEXT FRIENDS TO DYLAN POWERS, MINOR CHILD; WILLIAM E. BRADY, DEBORAH BRADY, INDIVIDUALLY AND AS NEXT FRIENDS TO LANDON BRADY, MINOR CHILD; AND SIMILARLY SITUATED CURRENT STUDENTS OR POTENTIAL SCHOOL AGE STUDENTS RESIDING ON THE RANDOLPH COUNTY SIDE OF THE BENNETT SCHOOL ATTENDANCE ZONE AS DEFINED BY S.B. 233 OF THE SESSIONS LAWS OF 1979, PLAINTIFFS v. CHATHAM COUNTY BOARD OF EDUCATION AND SUPERINTENDENT ANN HART, IN HER OFFICIAL CAPACITY, DEFENDANTS

No. COA06-1577

(Filed 20 November 2007)

1. Schools and Education— consolidated school district— agreement between counties—nullification by state law

A 1931 agreement between two counties that created a consolidated school district for students living in both counties was nullified when the General Assembly established a general and uniform system of schools by its enactment of N.C.G.S. § 115-352(1943).

2. Schools and Education— attendance in another county— prerequisites

Under North Carolina law, students residing in Randolph County have no right to attend schools located in Chatham County without release from Randolph County, acceptance by Chatham County, and payment of a tuition charged at the discre-

tion of the Chatham County Board of Education. N.C.G.S. §§ 115C-366(a) and (b); N.C.G.S. § 115C-366.1.

Appeal by plaintiffs from order entered 28 June 2006 by Judge Carl R. Fox in Superior Court, Chatham County. Heard in the Court of Appeals 21 August 2007.

Stacey B. Bawtinhimer, for plaintiffs-appellants.

Tharrington Smith, L.L.P., by Kenneth A. Soo and Christine T. Scheef, for defendants-appellees.

WYNN, Judge.

Under North Carolina law, students residing in one county may attend the public schools of another county only if they are released by their home school board, accepted by the other school board, and pay whatever tuition is required by that school board for out-of-county students.[1] Here, the plaintiffs, who reside in Randolph County, contend their children should be allowed to attend schools close to their homes but located in neighboring Chatham County without paying tuition, because a 1931 agreement allegedly created a consolidated school district between the counties. Because the General Assembly nullified the existence of the consolidated district when it established a general and uniform system of schools, we affirm the trial court's order of summary judgment.

Plaintiffs are a group of parents and their minor children who live in the so-called "Bennett Attendance Zone," an area around the Town of Bennett that is comprised of property in Randolph and Chatham Counties. Despite their residence in Randolph County, the minor children either have attended, currently attend, or plan to attend the Bennett School, which is physically located in Chatham County. This practice of allowing Randolph County children who also reside in Bennett to attend the Bennett School has been in place since 1931, when the Chatham and Randolph County School Boards agreed—with the approval of county commissioners, the State Board of Education, and the State Equalization Board—to consolidate their schools and establish a single school in Bennett for children from both counties. However, on 12 December 2005, the Chatham County School Board issued a policy to have any "out-of-county" students pay $500.00 in tuition to continue to attend Chatham County schools, including the Bennett School.

1. N.C. Gen. Stat. §§ 115C-366(a),(d), 115C-366.1 (2005).

In response to this policy, Plaintiffs filed a complaint on 11 January 2006 against Defendants Chatham County Board of Education and Superintendent of Schools Ann Hart in her official capacity, seeking a declaratory judgment striking down the policy. Plaintiffs also sought preliminary and permanent injunctions prohibiting the imposition of a tuition fee or any limitation on attendance of the Bennett School by Randolph County students living in the Bennett Attendance Zone. Defendants responded by filing a motion for summary judgment, which the trial court granted on 28 June 2006, finding that Defendants were entitled to judgment as a matter of law.

Plaintiffs appeal from that judgment, arguing that (I) questions of material fact remain as to whether the Bennett Attendance Zone was still in existence after the passage of N.C. Gen. Stat. § 115-352 (1943); and (II) Randolph County students who reside in the Bennett Attendance Zone are entitled as a matter of law to attend the Bennett School without being subject to a tuition fee or capacity limitation.

I.

[1] Plaintiffs first contend that questions of material fact remain as to whether the Bennett Attendance Zone was still in existence after the passage of N.C. Gen. Stat. § 115-352 (1943), such that summary judgment was not properly granted by the trial court. We disagree.

In 1933, the General Assembly passed legislation that abolished "[a]ll school districts, special tax, special charter or otherwise, as now constituted for school administration or for tax levying purposes" and designated counties as the administrative units for schools in North Carolina, except for in cities. N.C. Gen. Stat. § 115-562(4) (1933). Ten years later, another statute was enacted that provided that "all school districts, special tax, special charter, or otherwise, as constituted on May 15, 1933, are hereby declared non-existent as of that date[.]" N.C. Gen. Stat. § 115-352 (1943). This legislation was passed as the State moved to establish a general and uniform system of schools, based on county administrative units and overseen by a state agency.

Also in 1943, the General Assembly directed that "[s]chool districts may be formed out of portions of contiguous counties by agreement of the county boards of education of the respective counties subject to the approval of the state board of education." *Id.* § 115-198. However, if such a district was formed, "the pro rata part of the public school money due for teaching the children residing in one county shall be apportioned by the county board of education of that county, and paid to the treasurer of the other county in which the school-

house is located[.]" *Id.* Although Plaintiffs assigned error to the trial court's finding that simply restates that portion of the statute, they offered no proof of an agreement subsequent to the 1931 agreement between the Randolph and Chatham County School Boards, nor of approval by the state board of education of any such agreement. Furthermore, Plaintiffs have not shown that Randolph County ever paid Chatham County a pro rata share of public school money, as required by the statute if such a school district was officially formed. Plaintiffs' sole offer of "evidence" as to the ongoing existence of the Bennett Attendance Zone consists of the customary practices of the two school boards, rather than any legally binding documents or formally recognized agreements.

Moreover, in 1979, the General Assembly ratified a bill entitled, "An Act to require the Randolph County Board of Education to release and the Chatham Board of Education to accept certain pupils in the Bennett Attendance Zone." 1979 N.C. Sess. Laws Ch. 793. The law described the Bennett Attendance Zone and directed Randolph County to release from attendance "those students who are presently attending the Chatham County Schools, who reside" in the Bennett Attendance Zone, and who request such release. *Id.* Chatham County was then directed to accept such pupils for attendance. *Id.* According to legislative history documents included in the record before us, the language "those students who are presently attending . . . who reside [in the Bennett Attendance Zone" was changed from an earlier version of the bill, which had referenced "all pupils residing within the [Bennett Attendance Zone]." In a finding of fact unchallenged on appeal, the trial court found that this legislation was introduced and passed in response to the Randolph County Board of Education's refusal in the 1960s and 1970s to release Randolph County students living in the Bennett Attendance Zone to attend schools in Chatham County. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.").

We are unpersuaded by Plaintiffs' contention that the 1933 and 1943 legislation had no effect on the Bennett Attendance Zone and the agreement between Randolph and Chatham Counties. Indeed, as found by the trial court and unchallenged by Plaintiffs in their appeal:

> The General Assembly in enacting the [1979] law thus recognized the Bennett Attendance Zone students as students required to

> request release from Randolph County Schools and acceptance by Chatham County schools and did not view those students as residents or domiciliaries of the Chatham County school administrative unit or a Chatham County Schools district entitled to attend the Chatham County schools.

We note, too, that when construing the meaning of a statute, we must "ascertain the legislative intent to assure that the purpose and intent of the legislation are carried out." *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993) (citation omitted). The first step in that process requires us to look to the statutory language to determine if its meaning is plain and clear. *Id.* Moreover, the rules of statutory construction direct us to give "significance and effect" to "every part of the act, including every section, paragraph, sentence or clause, phrase, and word." *Hall v. Simmons*, 329 N.C. 779, 784, 407 S.E.2d 816, 818 (1991) (quotation and citation omitted).

The language of the 1979 bill could not be any plainer in terms of its intent to compel Randolph County to release students residing in the Bennett Attendance Zone and "presently attending" school in Chatham County, and likewise to require Chatham County to accept them as pupils. The 1979 legislation would have no force or effect were we to accept Plaintiffs' position that the Bennett Attendance Zone was still in existence as a "school district" following the 1933 and 1943 legislation. Likewise, as found by the trial court and unchallenged on appeal, students residing in the Bennett Attendance Zone have been required to pay a small tuition to Chatham County for a number of years without objection; Plaintiffs' position is only asserted now that the amount of the tuition has risen dramatically as Chatham County seeks to limit the number of out-of-county students.

Accordingly, we find that no genuine issue of material fact remains as to the question of whether the Bennett Attendance Zone is still in existence. *See Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (citation omitted) (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). This assignment of error is without merit.

II.

[2] Plaintiffs also argue that Randolph County students who reside in the Bennett Attendance Zone are entitled as a matter of law to attend Bennett Elementary School without being subject to a tuition fee or capacity limitation. We disagree.

Under North Carolina law, only students domiciled in a school administrative unit are entitled to attend the unit's public schools. N.C. Gen. Stat. § 115C-366(a) (2005). If students domiciled in one county wish to attend the public schools of another county, they must be released by their home school board and accepted by the school board where they wish to attend. *Id.* § 115C-366(d). The county is permitted to charge tuition for these out-of-county students. *Id.* § 115C-366.1 (2005).

Under the plain meaning of these statutory provisions, students residing in Randolph County have no right to attend schools located in Chatham County without release from Randolph County, acceptance by Chatham County, and a tuition charged at the discretion of the Chatham County School Board. Plaintiffs have failed to show that the Bennett Attendance Zone is still in existence under the law; moreover, none of the Plaintiffs-students fall under the definition of the 1979 legislation for purposes of requiring Chatham County schools to allow them to attend. These assignments of error are without merit.

Affirmed.

Judges HUNTER and BRYANT concur.

JANET C. KNOX, ADMINISTRATRIX OF THE ESTATE OF TOBY R. KNOX; AND JANET C. KNOX, INDIVIDUALLY, PLAINTIFFS v. UNIVERSITY HEALTH SYSTEMS OF EASTERN CAROLINA, INC., PITT COUNTY MEMORIAL HOSPITAL, INCORPORATED; DR. INDIRA MURR; DR. JODY HAIGOOD; DR. KAREN KINNEY; DR. MARK NEWELL; DR. CURTIS BOWER; DR. CHRISTOPHER LOGUE; JOHN DOE; AND MARY DOE, DEFENDANTS

No. COA07-258

(Filed 20 November 2007)

1. Medical Malpractice— failure to comply with Rule 9(j) certification requirements—dismissal of complaint

The trial court did not err in a medical malpractice case by dismissing plaintiff's complaint based on plaintiff's failure to comply with N.C.G.S. § 1A-1, Rule 9(j) certification requirements, because: (1) plaintiff did not dispute that defendant doctors are both specialists, and the evidence revealed that both doctors

were acting within their capacities as specialists under N.C.G.S. § 8C-1, Rule 702 in treating deceased as a trauma patient; (2) plaintiff's witness could not reasonably be expected to qualify as an expert witness as required by Rule 9(j) and did not qualify as an expert under Rule 702(b) or (c) since the witness was not certified as either an emergency room physician like one defendant or a trauma surgeon like the second defendant, nor did the witness practice in either of these areas; and (3) the record did not show any extraordinary circumstances to support certification under Rule 702(e), nor did plaintiff argue such circumstances existed.

2. Appeal and Error— preservation of issues—failure to correspond argument to assignment of error

Although plaintiff contends the trial court erred by failing to find that N.C.G.S. § 1A-1, Rule 9(j) certification did not apply when the constitutional right to a trial by jury is guaranteed and not waived, this argument is dismissed, because plaintiff's argument does not correspond to any of the assignments of error set out in the record on appeal as required by N.C. R. App. P. 10.

Appeal by plaintiff from judgment entered 3 November 2006 by Judge W. Russell Duke, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 15 October 2007.

D. Lynn Whitted for plaintiff appellant.

Helms Mulliss & Wicker, PLLC, by Keith P. Anthony, for Dr. Karen Kinney defendant appellee.

Cranfill, Sumner & Hartzog, LLP, by David W. Ward and Jaye E. Bingham, for Dr. Mark Newell defendant appellee.

McCULLOUGH, Judge.

Appeal by plaintiff from judgment entered 3 November 2006 by Judge W. Russell Duke, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 15 October 2007.

FACTS

The record on appeal tends to show the following facts: Plaintiff's husband, Toby R. Knox, was injured in a motor vehicle accident on 21 December 2003. Mr. Knox was transported to Wilson Medical Center for treatment of his injuries. Due to the extent of Mr. Knox's injuries,

he was then transferred to the trauma center in Pitt County Memorial Hospital ("Hospital") for further treatment.

On 25 December 2003, Mr. Knox's temperature was recorded at 37.9 degrees Celsius (100.22 degrees Fahrenheit). In response, the examining nurse noted the possibility of an infection and classified Mr. Knox as "at risk." On 26 December 2003, a nurse observed Mr. Knox had a temperature of 38.8 Celsius degrees (101.84 degrees Fahrenheit), for which he was given 850 milligrams of Tylenol. On 27 December 2003, Mr. Knox's temperature reached 41.6 degrees Celsius (106.88 degrees Fahrenheit). In an effort to combat Mr. Knox's rising temperature, he was subsequently given a cooling blanket and 800 milligrams of Motrin. On 28 December 2003, Mr. Knox appeared to be in septic shock. On 29 December 2003, Mr. Knox was pronounced dead.

On 17 January 2006, plaintiff filed a complaint for medical malpractice pursuant to North Carolina General Statutes § 90-21.11, against *inter alia* University Health Systems of Eastern Carolina, Inc.; Pitt County Memorial Hospital, Incorporated; Dr. Indira Murr; Dr. Jody Haigood; Dr. Karen Kinney; Dr. Mark Newell; Dr. Curtis Bower; and Dr. Christopher Logue. Plaintiff's complaint alleged the negligence of the foregoing doctors caused Mr. Knox pain and suffering, and ultimately resulted in Mr. Knox's death. In response to the complaint, Dr. Newell moved for, and received, an extension of time to answer the complaint on 10 February 2006. On 23 March 2006, Dr. Newell filed an answer and a motion to dismiss plaintiff's action on the grounds that the complaint failed to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure. On 24 March 2006, Dr. Kinney likewise filed an answer, denying the substantive allegation of the complaint, and a motion to dismiss for failure to comply with Rule 9(j).

On 2 October 2006, the motions to dismiss filed by Dr. Newell and Dr. Kinney were heard before Judge W. Russell Duke, Jr. in Wilson County Superior Court. On 3 November 2006, Judge Duke entered an order granting the motions of Dr. Newell and Dr. Kinney for dismissal of the action due to plaintiff's failure to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure and the absence of justification for an allowance under Rule 702(e) of the North Carolina Rules of Evidence. Plaintiff now appeals the order of the trial court granting defendants' motion for dismissal.

I.

[1] Plaintiff argues the trial court erred in dismissing plaintiff's complaint alleging medical malpractice due to plaintiff's failure to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure. Specifically, plaintiff argues the trial court committed prejudicial error by (1) failing to find as a fact and conclude as a matter of law that neither Dr. Mark A. Newell nor Dr. Karen Kinney performed a surgical operation on the deceased while in their care; (2) failing to find that neither Dr. Newell nor Dr. Kinney performed an operation or performed any surgery on the deceased within a medical specialty; (3) failing to find that since neither Dr. Newell nor Dr. Kinney performed any surgery on deceased, that it was not necessary for plaintiff to allege in her complaint that plaintiff comply with Rule 702(b) of the North Carolina Rules of Evidence or Rule 9(j) of the North Carolina Rules of Civil Procedure; (4) failing to find that plaintiff's expert witness could testify on the standard of health care where the ends of justice could be met; (5) concluding as a matter of law that plaintiff could not have reasonably expected that Dr. Marion Reynolds would qualify as an expert witness under Rule 702 of the Rules of Evidence; (6) failing to find that Dr. Kinney did not treat the deceased and did not perform any surgery on the deceased within a specialty; and (7) failing to find that Rule 9(j) did not apply to plaintiff when the medical specialist performed no surgery on the deceased. We disagree.

"Rule 9(j) of the North Carolina Rules of Civil Procedure requires any complaint alleging medical malpractice by a health care provider to specifically assert 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 [that the expert] is willing to testify that the medical care did not comply with the applicable standard of care[.]' " *Trapp v. Maccioli*, 129 N.C. App. 237, 239-40, 497 S.E.2d 708, 710, *disc. review denied*, 348 N.C. 509, 510 S.E.2d 672 (1998) (citation omitted); *see* N.C. Gen. Stat. § 1A-1, Rule 9(j) (2005). If such an assertion is not made, the trial court must dismiss the complaint. *Trapp*, 129 N.C. App. at 240, 497 S.E.2d at 710.

Rule 702 of our Rules of Evidence provides in pertinent part:

> (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.

. . . .

(c) Notwithstanding subsection (b) of this section, if the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the action, must have devoted a majority of his or her professional time to either or both of the following:

(1) Active clinical practice as a general practitioner; or

(2) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the general practice of medicine.

. . . .

(e) Upon motion by either party, a resident judge of the superior court in the county or judicial district in which the action is pending may allow expert testimony on the appropriate standard of health care by a witness who does not meet the requirements of subsection (b) or (c) of this Rule, but who is otherwise qualified as an expert witness, upon a showing by the movant of extraordinary circumstances and a determination by the court that the motion should be allowed to serve the ends of justice.

N.C. Gen. Stat. § 8C-1, Rule 702 (2005). In the instant case, plaintiff made a motion pursuant to Rule 702(b) of the North Carolina Rules of Evidence and Rule 9(j)(2) of the North Carolina Rules of Civil Procedure stating that she would seek to have an expert witness qualified to testify as to the appropriate standard of medical care. Further,

plaintiff asserted that the ends of justice would be met by allowing the witness to testify should the witness not meet the requirements of Rule 702 subsection (b) or (c).

Subsequent to plaintiff's 702(b) motion, plaintiff identified Dr. Marion Reynolds, a board certified obstetrician, as plaintiff's Rule 9(j) certifying expert. In dismissing plaintiff's action against Dr. Newell and Dr. Kinney, the trial judge concluded that plaintiff could not have reasonably expected Dr. Reynolds to qualify as an expert witness under Rule 702 of the North Carolina Rules of Evidence. The trial judge also concluded that sufficient extraordinary circumstances did not exist such that Dr. Reynolds should be allowed to testify to serve the ends of justice.

Plaintiff now argues the trial judge erred in determining Dr. Reynolds did not meet the requirements of Rule 702 subsections (b) or (c). Plaintiff does not dispute that Dr. Kinney and Dr. Newell are specialists. Rather, plaintiff asserts that neither Dr. Kinney nor Dr. Newell was practicing within their specialty at the time they treated Mr. Knox. Upon review, the record does not support this contention. The undisputed evidence in the record indicates Dr. Kinney is a board certified emergency room physician and Dr. Newell is a board certified trauma surgeon. In addition, the record shows both doctors were acting within their capacities as specialists in treating Mr. Knox as a trauma patient. Thus, both Dr. Kinney and Dr. Newell are properly deemed as specialists under Rule 702. *See Formyduval v. Bunn*, 138 N.C. App. 381, 388, 530 S.E.2d 96, 101, *disc. review denied*, 353 N.C. 262, 546 S.E.2d 93 (2000); N.C. Gen. Stat. § 8C-1, Rule 702. Plaintiff's witness, Dr. Reynolds, is not certified as either an emergency room physician or a trauma surgeon, nor does Dr. Reynolds practice in either of these areas. Therefore, Dr. Reynolds could not reasonably be expected to qualify as an expert witness as required by Rule 9(j), and does not qualify as an expert witness under Rule 702 subsections (b) or (c). *See* N.C. Gen. Stat. § 1A-1, Rule 9(j); N.C. Gen. Stat. § 8C-1, Rule 702(b) and (c).

Plaintiff next argues that if Dr. Reynolds is not a competent expert witness under Rule 702 subsections (b) or (c), she should be certified under Rule 702(e) because the ends of justice would be met by allowing her testimony. We are unpersuaded by plaintiff's argument. The record on appeal does not show any extraordinary circumstances to support the certification of Dr. Reynolds under Rule 702(e), nor does plaintiff argue such circumstances exist. *See* N.C. Gen. Stat. § 8C-1, Rule 702(e). Therefore, we hold the trial

judge did not err in concluding that plaintiff did not comply with Rule 9(j) of the North Carolina Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 9(j).

II.

[2] Plaintiff next contends that the trial court erred by failing to find that Rule 9(j) of the North Carolina Rules of Civil Procedure does not apply when the constitutional right to a trial by jury is guaranteed and not waived. However, the assignment of error plaintiff seeks to support does not make such a contention. *See Wade v. Wade*, 72 N.C. App. 372, 375, 325 S.E.2d 260, 266, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985) ("The assignment of error must clearly disclose the question presented."). Upon review, plaintiff's argument does not correspond to any of the assignments of error set out in the record on appeal. *See* N.C. R. App. P. 10 (2007). This Court has previously held that the "scope of appellate review is limited to the issues presented by assignments of error set out in the record on appeal; where the issue presented in the appellant's brief does not correspond to a proper assignment of error, the matter is not properly considered by the appellate court." *Bustle v. Rice*, 116 N.C. App. 658, 659, 449 S.E.2d 10, 11 (1994) (citation omitted). Accordingly, we decline to address the merits of this argument. *Id.*

Therefore, we hold the trial judge did not err in granting defendants' motion to dismiss for plaintiff's failure to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure.

Affirmed.

Chief Judge MARTIN and Judge ELMORE concur.

CHERYL LINDEMANN WHITE, PETITIONER v. LYNDO TIPPETT, STATE OF NORTH CAROLINA, SECRETARY, DEPARTMENT OF TRANSPORTATION, RESPONDENT

No. COA07-70

(Filed 20 November 2007)

1. Search and Seizure— traffic checkpoint—stop after evasion—constitutionality of checkpoint not in issue

Although petitioner (whose license had been suspended for refusing an intoxilizer test) argued that the trial court erred by concluding that a checkpoint was established constitutionally,

petitioner was not stopped at the checkpoint and the validity of the checkpoint was not in issue.

2. Search and Seizure— driving while impaired—reasonable grounds for stop

A Highway Patrol Trooper had reasonable grounds to believe that a driver had committed an implied consent offense (driving while impaired) from a combination of the driver's evasion of a checkpoint, the odor of alcohol surrounding the driver, and a brief conversation with the driver.

3. Motor Vehicles— intoxilizer test—waiting period for calling attorney—intent to call attorney—clear expression required

The thirty-minute grace period for calling an attorney before taking an intoxilizer test applies only where a petitioner intends to exercise her right to call an attorney and expresses that right clearly. Here, petitioner by her own admission gave no clear indication that she wanted to call an attorney and the officer was not required to wait the full thirty minutes before administering the test.

Appeal by petitioner from judgment entered 19 July 2006 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 August 2007.

The Law Office of David L. Hitchens, PLLC, by David L. Hitchens, for petitioner-appellant.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Kathryne E. Hathcock, for respondent-appellee.

HUNTER, Judge.

Cheryl White ("petitioner") appeals from a judgment entered on 19 July 2006 sustaining the twelve-month suspension of her driving privileges. After careful review, we affirm.

On 29 April 2005, Trooper E. B. Miller of the North Carolina State Highway Patrol was in the area of East John Street and Interstate 485 in Mecklenburg County when he saw several police officers conducting a checkpoint, so he pulled over to assist them. At 12:25 a.m., petitioner approached the checkpoint in the westbound lane of John Street, which was unblocked by vehicles or officers. At this point only

Trooper Miller and one other officer, a Matthews Police Department officer, remained at the checkpoint. The Matthews police officer indicated to petitioner to stop her car next to the front bumper of the police car in the median of the road. That officer then turned away to resume her examination of a driver whom she had just stopped in the eastbound lane.

Trooper Miller testified that he then began to walk toward petitioner's car. For fifteen to twenty seconds, as he was "getting ready to walk around the patrol car" to speak with her, petitioner sat stopped in her car. At that point, before Trooper Miller reached her, she drove off down the road. Trooper Miller ran to his patrol car and pursued her.

As Trooper Miller followed, petitioner drove approximately one tenth of a mile down East John Street and turned into the driveway of her home. Trooper Miller stated that the speed limit is forty-five miles per hour at the spot where the checkpoint was located, then drops to thirty-five miles per hour between there and petitioner's home. He testified that in that tenth of a mile petitioner attained a speed of approximately forty miles per hour.

Trooper Miller followed petitioner into her driveway, where he found her still seated in the driver's seat of the car. Trooper Miller asked her to exit the vehicle, noticed her eyes were glassy and red, and smelled the odor of alcohol. He then administered two Alcosensor tests five minutes apart, and on each petitioner registered a .10. He then placed her under arrest and took her to the Matthews Police Department. There, he asked her to take a test on an intoxilizer; she agreed, but failed to follow his instructions on how to do so for several minutes, until the test ran out. This happened twice, at which point Trooper Miller marked her down as having willfully refused to take the test.

Petitioner's driving privileges were suspended by the North Carolina Division of Motor Vehicles for twelve months due to her willful refusal to submit to the intoxilizer test. She petitioned the Mecklenburg County Superior Court for review of this decision, and on 19 July 2006 the court upheld the suspension. Petitioner now appeals to this Court.

I.

"The scope of an appellate review of a trial court's order affirming or reversing a final agency's decision is governed by G.S. Sec.

150B-52. This Court must determine whether the trial court committed any errors of law." *In re Appeal of Coastal Resources Comm'n Decision*, 96 N.C. App. 468, 472, 386 S.E.2d 92, 94 (1989). Where, as here, "it is alleged that the agency's decision was based on an error of law, then *de novo* review is required." *In re Appeal of Ramseur*, 120 N.C. App. 521, 524, 463 S.E.2d 254, 256 (1995); *see also Eury v. N.C. Employment Security Comm.*, 115 N.C. App. 590, 598, 446 S.E.2d 383, 388 (1994) (conducting *de novo* review where "the assignments of error . . . presented errors of law").

II.

Petitioner makes two related arguments as to her stop and arrest: First, that the checkpoint was unconstitutional, and second, that the officer lacked reasonable grounds to believe she had committed the offense for which she was arrested. We address each of these in turn.

A.

[1] Petitioner first argues that the trial court erred by concluding that the checkpoint at issue was established for the constitutional purpose of examining driver's licenses and registrations. We disagree.

Petitioner's argument on this point is rooted mainly in the case of *State v. Rose*, 170 N.C. App. 284, 612 S.E.2d 336 (2005). We considered the implications of *Rose* for the requirements for checkpoints in *State v. Burroughs*, 185 N.C. App. 496, 648 S.E.2d 561 (2007). There, we considered the same argument petitioner makes here: That the court did not inquire closely enough as to the primary programmatic purpose of the checkpoint. Petitioner's argument is without merit.

This central holding of *Rose* and *Burroughs* concerns the constitutionality of certain types of checkpoints, and thus applies only where the petitioner or defendant has in fact been stopped at a checkpoint. Here, petitioner was not stopped at the checkpoint, and as such her argument based on these cases is irrelevant. While the validity of the checkpoint is not at issue here, petitioner's avoidance of the checkpoint is relevant to her next argument, and as such we address it below.

B.

[2] Petitioner further argues that the trial court erred by concluding that the trooper had reasonable grounds to believe that petitioner had committed an implied consent offense.

We find a case cited by both parties, *State v. Foreman*, 133 N.C. App. 292, 515 S.E.2d 488 (1999), *aff'd as modified*, 351 N.C. 627, 527 S.E.2d 921 (2000) to be precisely on point. There, the defendant made a quick, legal left turn at an intersection where a " 'DWI Checkpoint Ahead' " sign was displayed. *Id.* at 293, 515 S.E.2d at 490. An officer associated with the checkpoint noticed this and pursued the defendant, finding him still in his vehicle parked in a driveway. *Id.* at 293-94, 515 S.E.2d at 490-91. Once back-up arrived, the officer approached the car, found the defendant in the driver's seat, and smelled the odor of alcohol. *Id.* at 294, 515 S.E.2d at 491.

We summarized the holding of *Foreman* in *State v. Stone*, 179 N.C. App. 297, 634 S.E.2d 244 (2006):

> Our Court . . . held that the facts available to the officer before the seizure were "sufficient to raise a reasonable and articulable suspicion of criminal activity." *Id.* at 298, 515 S.E.2d at 493. Our Supreme Court affirmed our Court's decision that the officer had reasonable suspicion of criminal activity, but held that the defendant was not seized until the officer approached the vehicle. *Foreman*, 351 N.C. at 630, 527 S.E.2d at 923.

Id. at 303, 634 S.E.2d at 248. Finally, the Supreme Court concluded that

> it is reasonable and permissible for an officer to monitor a checkpoint's entrance for vehicles whose drivers may be attempting to avoid the checkpoint, and it necessarily follows that an officer, in light of and pursuant to the totality of the circumstances or the checkpoint plan, may pursue and stop a vehicle which has turned away from a checkpoint within its perimeters for reasonable inquiry to determine why the vehicle turned away.

Foreman, 351 N.C. at 632-33, 527 S.E.2d at 924.

In the case at hand, as in *Foreman*, an officer pursued a person who had evaded—intentionally or by accident—a checkpoint and come to a stop in a residential driveway. The officer then approached the stopped car and spoke to the occupants. At that point, from a combination of the driver's evasion of a checkpoint, the odor of alcohol surrounding the driver, and a brief conversation with the driver, the officer had reasonable grounds to believe that the driver had committed an implied-consent offense. *See*, *e.g.*, *State v. Tappe*, 139 N.C. App. 33, 36, 533 S.E.2d 262, 264 (2000) ("[t]o justify a warrantless arrest, it is 'not necessary to show that the offense was

actually committed, only that the officer had a reasonable ground to believe it was committed' ") (citation omitted). As such, this assignment of error is overruled.

III.

[3] Finally, petitioner argues that she did not willfully refuse to submit to the intoxilizer prior to the expiration of the thirty-minute statutory grace period to obtain an attorney. This argument is without merit.

Petitioner makes this argument based on N.C. Gen. Stat. § 20-16.2(a)(6) (2005), which states:

> [B]efore any type of chemical analysis is administered the person charged shall be taken before a chemical analyst authorized to administer a test of a person's breath, who shall inform the person orally and also give the person a notice in writing that:
>
> . . .
>
> (6) The person has the right to call an attorney and select a witness to view for him the testing procedures, but the testing may not be delayed for these purposes longer than 30 minutes from the time when the person is notified of his or her rights.

This statute lays out the four components of a "willful refusal":

> A "willful refusal" occurs whenever a driver "(1) is aware that he has a choice to take or to refuse to take the test; (2) is aware of the time limit within which he must take the test; (3) voluntarily elects not to take the test; and (4) knowingly permits the prescribed thirty-minute time limit to expire before he elects to take the test."

Mathis v. Division of Motor Vehicles, 71 N.C. App. 413, 415, 322 S.E.2d 436, 437-38 (1984) (quoting *Etheridge v. Peters, Comr. of Motor Vehicles*, 301 N.C. 76, 81, 269 S.E.2d 133, 136 (1980)).

Petitioner admits in her brief that "it is not clear from the facts whether [she] wanted an attorney," but then argues that she should have been given the full thirty minutes to *decide whether* she wanted an attorney. This argument is without merit. Only where a petitioner intends to exercise her rights to call an attorney and expresses those rights clearly to the officer does the thirty-minute grace period apply. *See, e.g., McDaniel v. Division of Motor Vehicles*, 96 N.C. App. 495,

497, 386 S.E.2d 73, 75 (1989) (where defendant "gave no indication whatever that he intended to exercise his right to call a lawyer or have a witness present," trial court's conclusion that he willfully refused to take the breathalyzer was correct), *cert. denied*, 326 N.C. 364, 389 S.E.2d 815 (1990); *State v. Buckner*, 34 N.C. App. 447, 451, 238 S.E.2d 635, 638 (1977) (stating that statute does not require officer to wait thirty minutes to conduct breathalyzer test "when the defendant has waived the right to have a lawyer or witness present or when it becomes obvious that defendant doesn't intend to exercise this right"). Petitioner in this case by her own admission gave no clear indication that she wanted to call an attorney, and therefore the officer was not required to wait for the full thirty minutes before administering the test. As such, we overrule this assignment of error.

IV.

Because the officer had reasonable grounds that petitioner had committed an offense and was not incorrect in administering the breathalyzer test before thirty minutes had expired, we affirm the decision of the trial court upholding the suspension of petitioner's driving privileges.

Affirmed.

Judges WYNN and BRYANT concur.

STATE OF NORTH CAROLINA v. JAMES DAVID TAYLOR

No. COA07-297

(Filed 20 November 2007)

Criminal Law— election to proceed without counsel—defendant not properly informed

The trial court did not comply with N.C.G.S. § 15A-1242 during defendant's election to proceed without counsel on charges of speeding in excess of fifteen miles per hour, and the matter was remanded for a new trial. The court failed to properly inform defendant of the range of permissible punishments when it failed to inform defendant that in addition to a maximum 60 day sentence for each charge, he also faced a maximum fine of $1,000 for each charge.

Appeal by defendant from judgment entered 10 May 2006 by Judge Thomas D. Haigwood in Lenoir County Superior Court. Heard in the Court of Appeals 8 October 2007.

Attorney General Roy Cooper, by Assistant Attorney General Robert D. Croom, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

ELMORE, Judge.

On 1 January and 12 January 2006, defendant was issued citations for speeding in excess of fifteen miles per hour. On 21 and 28 February 2006, defendant was convicted in Lenoir County District Court on each of the charges. Thereafter, defendant appealed both convictions to Lenoir County Superior Court.

On 27 March 2006, defendant made an initial appearance before Superior Court Judge Kenneth Crow and signed a waiver of counsel form. Following a trial on 8 May 2006 before Superior Court Judge Thomas D. Haigwood, a jury found defendant guilty of both charges. On 10 May 2006, Judge Haigwood imposed two consecutive thirty-day suspended sentences and a total of six months' supervised probation. Defendant now appeals his convictions.

Defendant's sole argument on appeal is that the trial court erred by allowing defendant to represent himself without establishing that defendant's waiver of his right to counsel was knowing, voluntary, and intelligent as prescribed by N.C. Gen. Stat. § 15A-1242.

At the 27 March 2006 initial appearance, the trial court inquired as to defendant's desire to be represented by counsel as follows:

The Court: It appears that you were convicted of a couple of speeding tickets and appealed it to Superior Court; is that correct?

Defendant: Yes, I did.

The Court: All right. Both of the cases are class 2 misdemeanors. They carry up to 60 days in jail. I wouldn't give you any jail time on them even if the jury convicted you because they're regular speeding tickets, do you understand that?

Defendant: Yes, sir.

The Court: All right. Have you hired a lawyer?

Defendant: No.

The Court: You can either hire a lawyer or you can represent yourself, but you wouldn't be eligible for court appointed counsel. And the reason is because I wouldn't give you any jail time even if you were convicted. Do you understand that, sir?

Defendant: Uh-huh.

The Court: How would you like to proceed on your charges?

Defendant: I wouldn't—I'm going to represent myself.

The Court: You'd like to represent yourself?

Defendant: Yes, sir.

The Court: I need you to sign a piece of paper that says that, sir.

(Bailiff places a document before the defendant and the defendant appears to sign the document.)

Defendant contends that the trial court's inquiry failed to comply with the requirements of N.C. Gen. Stat. § 15A-1242, which governs a defendant's election to proceed without counsel. This statute provides as follows:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2005).

Defendant contends that the trial court failed to meet these statutory requirements when it erroneously informed defendant that he was not entitled to appointed counsel. Specifically, defendant asserts

that the trial court's intention not to sentence defendant to any jail time is not relevant to whether defendant is entitled to appointment of counsel.

While the State asserts that the trial court complied with N.C. Gen. Stat. § 15A-1242 such that a new trial is not warranted, it nevertheless concedes that the trial court improperly imposed suspended sentences because defendant was not represented by counsel. *See State v. Neeley*, 307 N.C. 247, 252, 297 S.E.2d 389, 393 (1982) (holding that where "the crime for which the defendant is charged carries a possible prison sentence of any length, the judge may not impose an active prison sentence on the defendant unless defendant has been afforded the opportunity to have counsel represent him."); *see also Alabama v. Shelton*, 535 U.S. 654, 674, 152 L. Ed. 2d 888, 906 (2002) (holding that a suspended sentence that may result in actual imprisonment may not be imposed unless defendant was represented by counsel in prosecution for the crime charged). Accordingly, the State asserts that this Court should remand for re-sentencing rather than for a new trial.

We agree with the State that the trial court was not permitted to impose a suspended sentence in this case. Because defendant was not represented by counsel, the sentencing judge was limited to a community punishment and a monetary fine. *See* N.C. Gen. Stat. § 15A-1340.23(b) (2005). However, we need not reach the issue of whether defendant was improperly sentenced because we conclude that the trial court failed to comply with N.C. Gen. Stat. § 15A-1242 such that defendant is entitled to a new trial.

First, the trial court failed to properly inform defendant regarding "the range of permissible punishments" that he faced. N.C. Gen. Stat. § 15A-1242(3) (2005). While the trial court correctly informed defendant of the maximum 60-day imprisonment penalty for a Class 2 misdemeanor, *see* N.C. Gen. Stat. §§ 20-141(j1) and 15A-1340.23(c), it failed to inform defendant that he also faced a maximum $1,000.00 fine for each of the charges. *See* N.C. Gen. Stat. § 15A-1340.23(b) (2005).

Furthermore, the trial court's conclusion that defendant was not entitled to appointed counsel was also erroneous. An indigent defendant is entitled to appointment of counsel for "[a]ny case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged." N.C. Gen. Stat. § 7A-451(a)(1) (2005). Regardless of whether defendant was likely to face a term of imprison-

ment in this case, we conclude that defendant did face a fine of greater than $500.00 for each of the charges. Because the sentencing options in this case were limited to a community sentence and a fine for the reasons discussed above, the possibility of the imposition of such a fine was likely in this case, especially given that the total maximum possible fine was $2,000.00 and defendant had been charged with the same speeding offense not once, but twice on two separate occasions. Given the likelihood of a fine greater than $500.00, defendant would have been entitled to the appointment of counsel if it had been determined that he was indigent. As such, the trial court failed to properly advise defendant of "his right to the assignment of counsel." N.C. Gen. Stat. § 15A-1242(1) (2005). Consequently, we conclude that the trial court failed to comply with the requirements of N.C. Gen. Stat. §15A-1242.

Although we recognize that defendant signed a written waiver, "[t]he execution of a written waiver of the right to assistance of counsel does not abrogate the trial court's responsibility to ensure the requirements of N.C. Gen. Stat. § 15A-1242 are fulfilled." *State v. Evans*, 153 N.C. App. 313, 316, 569 S.E.2d 673, 675 (2002). Accordingly, we reverse the judgment and remand the cause for a new trial.

Reversed and Remanded.

Judges WYNN and BRYANT concur.

STATE OF NORTH CAROLINA v. JAMES JORDAN COBB, III

No. COA04-508-2

(Filed 20 November 2007)

Sentencing— aggravating factor—taking property of great monetary value—offense with minimum value

The trial court did not err by finding the aggravating factor that defendant's embezzlements involved taking property of great monetary value where the embezzlement class to which he pled guilty had as an element that the property had a value of $100,000 or more and the amounts of $404,436 and $296,901 were actually embezzled by defendant.

Upon remand from the Supreme Court of North Carolina by defendant from judgments entered on 27 August 2003 and 28 August 2003 by Judge Melzer A. Morgan in Guilford County Superior Court. Originally heard in the Court of Appeals 8 December 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General T. Lane Mallonee, for the State.

Cahoon & Swisher, North, Cooke & Landreth, by A. Wayland Cooke, for defendant-appellant.

STEELMAN, Judge.

This matter comes back before this Court upon the remand of the Supreme Court in *State v. Cobb*, 361 N.C. 414, 646 S.E.2d 365, (2007). The Supreme Court held pursuant to *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, 127 U.S. 2281, 167 L. E. 2d 1114 (2007), that any error under *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), was "harmless beyond a reasonable doubt . . ." *Cobb*, 361 N.C. at 415, 646 S.E.2d at 366. However, this Court was directed to "make determinations on defendant's assignments of error not originally addressed by that court." *Id.* Defendant's appeal contained seven assignments of error; three of these assignments of error were deemed abandoned pursuant to N.C.R. App. P. 28(b)(6) for failure to argue them in defendant's brief. A fourth assignment of error was cursorily argued for preservation purposes only. This Court's opinion addressed the remaining three assignments of error. As to assignments of error six and seven, the trial court's decision was upheld by this Court and that ruling was affirmed by the Supreme Court. As to assignment of error two, defendant made two sub-arguments; first, that the finding of an aggravating factor by the trial judge violated *Blakely*, and second, that it was improper under N.C. Gen. Stat. § 15A-1340.16(d) (2005) to consider the aggravating factor that the offense involved the "taking of property of great monetary value," N.C. Gen. Stat. § 15A-1340.16(d)(14) (2005), when defendant pled guilty to the Class C felonies of embezzlement under N.C. Gen. Stat. § 14-90 (2005), the value of the property being $100,000 or more. The latter question is the only issue not addressed in our prior opinion, and we limit our analysis to that issue.

Facts set forth in the original opinion of this Court are not repeated. Additional facts relevant to this opinion are set forth below. Defendant was indicted on three counts of embezzlement where the amount exceeded $100,000 (Class C felony), and two counts where

the amount was less than $100,000 (Class H felony). The amounts alleged to have been embezzled as to the Class C felonies were $404,436.00, $109,763.00, and $296,901.00, respectively. Defendant pled guilty to all five counts of embezzlement, and they were consolidated for purposes of judgment. The trial court found an aggravating factor as to the embezzlements involving $404,436.00 and $296,901.00, that these offenses involved "the actual taking of property of great monetary value." Four mitigating factors were found by the trial court, but the aggravating factor was found to outweigh the mitigating factors, and an active aggravated-range sentence of 92-120 months was imposed as to the consolidated embezzlement charges.

Defendant argues that since he pled guilty to the Class C felonies of embezzlement, which have as one of their elements that the property has a value of $100,000 or more, that the trial court was prohibited from using the aggravating factor of "great monetary value." N.C. Gen. Stat. § 15A-1340.16(d)(14). We disagree.

Defendant correctly notes that one of the elements of the Class C felony of embezzlement is that the property have a value of $100,000 or more. He is also correct in noting that N.C. Gen. Stat. § 15A-1340.16(d) provides that:

> Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation.

However, this does not end our inquiry.

We note that the learned trial judge only found the aggravating factor as to the embezzlements involving the sums of $404,436.00 and $296,901.00. It was not found as to the count involving $109,763.00. N.C. Gen. Stat. § 15A-1340.15(b) (2005) ("The judgment shall contain a sentence disposition specified for the class of offense and prior record level of the most serious offense, and its minimum sentence of imprisonment shall be within the ranges specified for that class of offense and prior record level[.]").

By pleading guilty, defendant admitted his guilt to all facts set forth in the indictments, including the amounts of the embezzlement of $404,436.00 and $296.901.00. *See State v. Hendricks*, 138 N.C. App. 668, 672, 531 S.E.2d 896, 899 (2000). The question of whether the aggravating factor of "great monetary value" can be used in the context of Class C embezzlement has not been directly addressed by our

courts. However, the use of this aggravating factor has been addressed in the context of felonious larceny.

"Larceny of goods of the value of more than one thousand dollars ($1,000) is a Class H felony." N.C. Gen. Stat. § 14-72(a) (2005). The trial judge is not precluded from finding the taking of property of great monetary value as an aggravating factor. *State v. Thompson*, 309 N.C. 421, 422, 307 S.E.2d 156, 158 (1983).

In larceny cases, this Court has held that twenty-five hundred dollars ($2,500.00) can be an amount of "great monetary value" supporting this aggravating factor in a case of felonious larceny. *State v. Simmons*, 65 N.C. App. 804, 806, 310 S.E.2d 139, 141 (1984). "Other decisions by our Supreme Court and this Court consistently have held that great monetary value included amounts of approximately three thousand dollars." *State v. Pender*, 176 N.C. App. 688, 695, 627 S.E.2d 343, 347 (2006) (citations omitted). "[T]here is no bar that prevents this Court from holding that a great monetary amount may include an amount less than twenty five hundred dollars ($2500.00)[.]" *Id.* at 695, 627 S.E.2d at 348.

Thus, this Court has held that $2,500 to $3,000 can support the aggravating factor of "great monetary value" where the threshold amount of the offense is $1,000. This rationale is applicable to cases involving embezzlements of $100,000 or more.

We decline to establish a rigid test based upon a ratio of the amount embezzled to the threshold amount of the offense. Rather, the ratio is a factor to be considered along with the total amount of money actually taken in deciding whether it is appropriate to find this aggravating factor.

We hold that in this case, the trial court correctly determined that the sums of $404,436.00 and $296,901.00 were sums of "great monetary value" when compared with the threshold amount required for the offense of $100,000.00.

As to the second portion of defendant's second assignment of error, we affirm the ruling of the trial court.

AFFIRMED.

Judges STEPHENS and STROUD concur.

MARGARET JONES REID, IN THE MATTER OF THE ESTATE OF WILLIAM REID, JR., PLAINTIFF v. JACK C. COLE, D.O., CHRISTIAN MANN, M.D., CLIFFORD W. LINDSEY, M.D., CAROLINA PHYSICIANS, P.A., PITT MEMORIAL HOSPITAL FOUNDATION, INC., AND PITT COUNTY MEMORIAL HOSPITAL INC., DEFENDANTS

No. COA07-265

(Filed 20 November 2007)

1. Appeal and Error— appealability—denial of motion to dismiss—writ of certiorari—notice of appeal filed less than a week late—administration of justice

Although defendant's appeal in a medical malpractice case from the denial of their motion to dismiss is typically an appeal from an interlocutory order, the Court of Appeals elected in its discretion to grant defendants' petition for writ of certiorari and to address the merits of the appeal where defendants' notice of appeal was filed less than a week late and the administration of justice would best be served by granting defendants' petition.

2. Appeal and Error— appealability—cross-assignment of error—prior determination in companion case

Plaintiff's cross-assignment of error regarding the trial court's grant of defendants' motion to amend their answer to assert that plaintiff's complaint was a legal nullity based on the unauthorized practice of law does not need to be addressed because the Court of Appeals already concluded in a companion case that the trial court did not err by denying defendants' motion to dismiss plaintiff's medical malpractice action for wrongful death even though defendants contended the complaint was a legal nullity based on the unauthorized practice of law.

Judge JACKSON dissenting.

Appeal by defendants Jack C. Cole, D.O. and Carolina Physicians, P.A. from an order entered 30 November 2006 by Judge Thomas D. Haigwood in Pitt County Superior Court. Heard in the Court of Appeals 18 September 2007.

Hemmings & Stevens, P.L.L.C., by Kelly A. Stevens, for plaintiff-appellee.

Walker, Allen, Grice, Ammons & Foy, L.L.P., by O. Drew Grice, Jr., and Jerry A. Allen, Jr., for defendants-appellants Jack C. Cole, D.O. and Carolina Physicians, P.A.

HUNTER, Judge.

Jack C. Cole, D.O., and Carolina Physicians, P.A. ("defendants"), appeal the denial of their motion to dismiss the complaint signed by Margaret Jones Reid ("plaintiff"), for the unauthorized practice of law.[1] After careful consideration, we affirm the ruling of the trial court.

William Reid, Jr. ("Mr. Reid"), plaintiff's husband, died 25 February 2004 at Pitt County Memorial Hospital. Plaintiff was appointed the administrator of his estate ("the estate"). She retained counsel to pursue a claim of wrongful death against defendants on behalf of the estate. Approximately one month prior to the expiration of the statute of limitations on the wrongful death claim, plaintiff's attorney relocated and withdrew from representation. Thereafter, plaintiff filed a *pro se* complaint against defendants alleging that they were negligent in the wrongful death of Mr. Reid.

Defendants in this case, filed an answer and moved the trial court to dismiss plaintiff's complaint pursuant to N.C.R. Civ. P. 12 and, after an amendment, alleged that the complaint was barred by the statute of limitations. Defendants, however, waived hearing on their motion to dismiss, relying instead on co-defendants' motions in the companion case that plaintiff's complaint was a legal nullity. Plaintiff opposed the motions, arguing that any defect in her complaint was cured by the subsequent appearance of counsel, based on this Court's ruling in *Theil v. Detering*, 68 N.C. App. 754, 315 S.E.2d 789 (1984). The trial court denied defendants' motion to dismiss on 30 November 2006. In its order, the trial court also certified the matter for immediate appeal pursuant to N.C. Gen. Stat. § 1-277 (2005) and N.C. Gen. Stat. § 1A-1, Rule 54(b) (2005), stating that "there is no justifiable reason for delay" and certified the order as immediately appealable to this Court. Defendants appeal this denial.

I.

[1] Before turning to the merits of the case, plaintiffs have motioned this Court to dismiss the appeal, arguing that: (1) the notice of appeal was not timely filed; and (2) the order is interlocutory and thus not immediately appealable. For the following reasons, the motion is denied.

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1. This is a companion case to *Reid v. Cole*, 187 N.C. App. 261, 652 S.E.2d 718 (2007), and the underlying facts are the same.

Even assuming that the notice of appeal was not timely filed, defendants have petitioned this Court for a writ of *certiorari*. This Court has the authority to review the merits of an appeal by *certiorari* even if notice of appeal was not timely filed. *Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997); *see also* N.C.R. App. P. 21(a)(1) (either appellate court may grant writ of *certiorari* and hear an appeal even though the action was not timely filed). Moreover, this Court also has the authority to grant a writ of *certiorari* to an interlocutory appeal that does not affect a substantial right and hear the merits of the case. *Staton v. Russell*, 151 N.C. App. 1, 7, 565 S.E.2d 103, 107 (2002); *see also Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co.*, 141 N.C. App. 569, 574, 541 S.E.2d 157, 161 (2000). In this case, we have elected in our discretion to grant defendants' petition for writ of *certiorari* and to address the merits of the appeal. The grant of *certiorari* is particularly appropriate here, where defendants' notice of appeal was filed less than a week late and the administration of justice will best be served by granting defendants' petition. *See Staton*, 151 N.C. App. at 7, 565 S.E.2d at 107. Plaintiff's motion to dismiss is therefore denied.

II.

[2] Defendants argue that the trial court erred in denying their motion to dismiss plaintiff's cause of action because plaintiff's complaint was a legal nullity. If the complaint is determined to be a legal nullity, then the statute of limitations on the estate's claim expired on 25 February 2006, prior to plaintiff's counsel's appearance in the action. For the reasons discussed in the companion case, we hold that the trial court did not err in denying defendants' motion to dismiss. Because the trial court did not err in denying defendants' motion to dismiss, we need not address plaintiff's cross-assignment regarding the trial court's grant of defendants' motion to amend their answer to assert that plaintiff's complaint was a legal nullity.

III.

In summary, we grant defendants' petition for writ of *certiorari* and thus deny plaintiff's motion to dismiss. We also hold, for the reasons stated in the companion case, that the trial court did not err in denying defendants' motion to dismiss. We therefore affirm the order of the trial court.

Affirmed.

Judge WYNN concurs.

Judge JACKSON dissents in a separate opinion.

JACKSON, Judge, dissenting.

For the reasons stated in the companion case, I respectfully dissent from the majority's conclusion to reach the merits of this case. I would (1) hold that the order is interlocutory, (2) grant the motion to dismiss, and (3) deny the petition for writ of *certiorari*.

IN THE MATTER OF: V.A.L., A MINOR CHILD

No. COA07-242

(Filed 20 November 2007)

Juveniles— out of home placement—delegation of authority

The trial court did not err by ordering a juvenile to participate in an out of home placement even though the juvenile contends the court impermissibly delegated its authority without designating the out of home placement, because: (1) the trial court ordered the juvenile to cooperate with an out of home placement and placed the juvenile in detention while said placement became available; and (2) while the trial court may have left the specific details of the out of home placement with New River Behavioral Health Care, it did not delegate its authority as to which dispositional alternatives were imposed in the new juvenile order.

Appeal by the juvenile from an order entered 26 September 2006 by Judge Edgar B. Gregory in Alleghany County District Court. Heard in the Court of Appeals 11 October 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Elizabeth Leonard McKay, for the State.

James N. Freeman, Jr., for juvenile-appellant.

BRYANT, Judge.

V.A.L.[1] (the juvenile) appeals from an order continuing the juvenile's probation and ordering the juvenile to cooperate with an out of

1. Initials are used to protect the identity of the juvenile.

home placement. For the reasons stated herein, we affirm the order of the trial court.

Facts and Procedural History

On 4 April 2006, the juvenile was adjudicated a delinquent juvenile by the trial court, put on probation and ordered to participate in Project Challenge, which consisted of sixty-five hours of community service. In July of 2006, the juvenile failed to show up to perform community service as directed by Project Challenge and the Juvenile Court Counselor filed a Motion for Review for a probation violation on 28 July 2006.

This matter came on for hearing before the Honorable Edgar B. Gregory, Judge presiding, at the 12 September 2006 session of Alleghany County Juvenile Court. During this hearing, the juvenile admitted to the trial court that the allegations asserted in the Motion for Review were true. The trial court subsequently entered an order on 26 September 2006, continuing the juvenile's probation with the new condition that the juvenile cooperate with an out of home placement and be placed in detention until this placement is available. The juvenile appeals.

The sole issue the juvenile raises on appeal is whether the trial court erred in ordering the juvenile to participate in an out of home placement without designating the out of home placement because this is an impermissible delegation of authority. We disagree.

If the trial court finds by the greater weight of the evidence that the juvenile has violated the conditions of probation then the trial court "may continue the original conditions of probation, modify the conditions of probation, or, . . . order a new disposition at the next higher level on the disposition chart . . . ." N.C. Gen. Stat. § 7B-2510(e) (2005). However, a trial court may not delegate its authority to impose these dispositional alternatives to another person or entity. *In re Hartsock*, 158 N.C. App. 287, 292, 580 S.E.2d 395, 399 (2003) (holding "the court, and the court alone, must determine which dispositional alternatives to utilize with each delinquent juvenile").

In *Hartsock*, this Court held it was an impermissible delegation of authority for the trial court to order a delinquent juvenile to "cooperate with placement in a residential treatment facility *if deemed necessary* by MAJORS counselor or Juvenile Court Counselor." *Id.* at 289, 580 S.E.2d at 397 (emphasis added). Similarly, we have held that

a new condition of probation ordering the juvenile to "cooperate with any out of home placement *if deemed necessary*, or if arranged by the Court Counselor, including, but not limited to, a wilderness program" is an impermissible delegation of authority. *In re S.R.S.*, 180 N.C. App. 151, 157, 636 S.E.2d 277, 283 (2006) (emphasis added). However, this Court has held that an order where a juvenile was to "cooperate and participate in a residential treatment program as directed by court counselor or mental health agency" was not an improper delegation of the trial court's authority, as "[t]he determination of whether M.A.B. would participate in a residential treatment program was made by the trial court, but the specifics of the day-to-day program were to be directed by the Juvenile Court Counselor or Mental Health Agency." *In re M.A.B.*, 170 N.C. App. 192, 194-95, 611 S.E.2d 886, 888 (2005). In *Hartsock* and *S.R.S.*, the trial court improperly delegated its authority when it left the determination of whether an out of home placement was *necessary* up to a third party. In *M.A.B.*, the trial court itself decided it was necessary for the juvenile to participate in an out of home placement, but left the details of that placement up to a third party.

Here, the trial court ordered the juvenile to continue on probation with the new condition that the juvenile "shall cooperate with an out of home placement and be placed in detention until this said placement is available." Further, the Juvenile Conditions form entered 13 September 2006 indicates the trial court ordered the juvenile to cooperate with placement for nine months in a residential treatment program "as directed by New River Behavioral Health Care[,]" and indicated the placement should be at "Timber Ridge[.]" The trial court did not leave the determination of whether the out of home placement was necessary to another. Rather, the trial court ordered the juvenile to cooperate with an out of home placement and placed the juvenile in detention until said placement became available. Thus, while the trial court may have left the specific details of the out of home placement with New River Behavioral Health Care, the trial court did not delegate its authority as to which dispositional alternatives were imposed in the new juvenile order. This assignment of error is overruled.

Affirmed.

Judges STEELMAN and GEER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 20 NOVEMBER 2007

ABDO v. M.B. KAHN CONSTR. CO. No. 07-454	Buncombe (06CVS685)	Dismissed
BYRD v. BYRD No. 07-36	Currituck (03CVD283)	Affirmed
FREEMAN v. FREEMAN No. 06-1434	Henderson (03CVD154)	Reversed in part and remanded for additional findings of fact as provided in this opinion
GEORGE v. GEORGE No. 07-66	New Hanover (03CVD2851)	Affirmed in part and vacated and remanded in part
IN RE C.J.G.S. & M.M.J.S. No. 07-586	Richmond (03J77-78)	Affirmed
IN RE ESTATE OF MILLS No. 07-334	Union (05E247)	Affirmed
IN RE M.B.M. No. 07-378	Wake (03JB56)	Affirmed
LUDEMAN v. BRADFORD CLINIC, INC. No. 07-50	Mecklenburg (06CVS3887)	Affirmed
MYERS v. BRYANT No. 07-491	Lee (05CVS1092)	Affirmed
SANDOVAL v. PILLOWTEX CORP. No. 07-474	Indus. Comm. (I.C. NO. 351615)	Affirmed
STATE v. ALVARDO No. 07-105	Alamance (04CRS56874) (04CRS56878)	Affirmed
STATE v. BECK No. 07-605	Forsyth (00CRS52819)	No error
STATE v. BENITEZ No. 07-493	Cabarrus (03CRS1013)	Affirmed
STATE v. BOBBITT No. 07-270	Wake (04CRS102544)	Affirmed
STATE v. BRITT No. 07-461	Wake (05CRS73730) (05CRS30584)	No error

STATE v. CLARK No. 07-545	Guilford (02CRS101021-24)	Dismissed
STATE v. CROCKETT No. 07-371	Cleveland (06CRS50812-13)	Dismissed
STATE v. DONNELL No. 07-427	Guilford (03CRS84711-12)	Affirmed
STATE v. FORNEY No. 07-330	Guilford (05CRS85656) (05CRS85659)	No error
STATE v. FOSTER No. 07-476	Cumberland (05CRS62183) (05CRS65445) (05CRS67124) (06CRS50512)	Affirmed
STATE v. GALANIS No. 07-215	Randolph (03CRS9291)	No error
STATE v. GINYARD No. 07-594	Buncombe (05CRS54941)	Vacated
STATE v. KOHLS No. 07-327	Wayne (05CRS58177) (05CRS58234)	No error
STATE v. MASSEY No. 06-1619	Lincoln (03CRS1047)	Reversed
STATE v. PERKINS No. 07-506	Forsyth (04CRS60931)	No error
STATE v. SANCHEZ No. 07-558	Mecklenburg (05CRS257350) (05CRS257352)	Affirmed
STATE v. SEEK No. 06-1650	Cumberland (04CRS68631-33)	No error
STATE v. STANLEY No. 06-1669	Guilford (05CRS23011-12)	No error
STATE v. STEWART No. 07-517	Graham (05CRS50181-82)	No error in part, reversed in part and remanded for resentencing
STATE v. STREET No. 07-213	Montgomery (04CRS51936) (04CRS51938) (05CRS1585)	No error in part, reversed in part

STATE v. TALLEY No. 07-89	Yadkin (03CRS2079-98)	Affirmed and remanded for correction of clerical error
STATE v. VALDOVINOS No. 06-1485	Alamance (04CRS56876-77)	Affirmed
STATE v. WELBORN No. 07-567	Iredell (05CRS54184)	No error
STATE v. WIGGINS No. 07-716	Pitt (07CRS356)	Affirmed
STATE v. WILLIAMS No. 07-349	Rutherford (04CRS2976-78)	No error
STATE v. WILLIAMS No. 07-438	Johnston (05CRS55240)	No error
STATE v. ZIRKLE No. 07-437	Dare (05CRS53613) (06CRS3069-77)	Vacated and remanded for resentencing

STATE OF NORTH CAROLINA v. JANET BELL HALL

No. COA07-9

(Filed 4 December 2007)

1. Evidence— expert opinion—likelihood of defendant's release following insanity verdict

The opinion of a mental health expert that defendant would not be released from involuntary commitment for decades if she was found not guilty by reason of insanity was properly excluded from a first-degree murder trial. Defendant presented no evidence tending to show that the testimony would help the jury understand the evidence or determine a fact in issue.

2. Criminal Law— procedures following insanity verdict—failure to give requested instructions

The trial court did not err in a first-degree murder prosecution by not giving defendant's modified instructions on post-conviction procedures if defendant was found not guilty by reason of insanity. The instruction given by the court sufficiently informed the jury of the commitment hearing procedures, properly instructed the jury on the central meaning of the statute, and substantially complied with defendant's request. N.C.G.S. § 15A-1321.

3. Criminal Law— cumulative errors—no reasonable possibility of different outcome

The cumulative effect of alleged errors in a first-degree murder prosecution did not deprive defendant of a fair trial. The evidence on the record is sufficient to support the jury's verdicts, and there is no reasonable possibility that the jury would have reached a different verdict had the trial court admitted the contested testimony and given defendant's requested instruction.

4. Evidence— out-of-court statements—instructions on jury's use

There was no plain error in a first-degree murder prosecution from the trial court's instruction that evidence of out-of-court statements by witnesses could only be considered for impeachment or corroboration.

5. Criminal Law— prosecutor's argument—disposition to murder

The trial court did not err in a prosecution for first-degree murder and attempted first-degree murder by overruling defend-

ant's objection to the prosecutor's closing argument that defendant was a person with a disposition toward murder. Assuming that the statement was improper despite evidence that defendant had twice threatened to kill the victims, the jury found defendant guilty based on felony murder rather than premeditated murder, and the evidence supported the jury's verdicts.

6. Criminal Law— discovery—basis of charge

The trial court did not err in a first-degree murder prosecution by denying defendant's motion for reciprocal disclosure of the State's theory of the case and by instructing on a theory of felony murder for which defendant had no notice. The short-form murder indictment is sufficient to charge first-degree murder on the basis of any theory set forth in N.C.G.S. § 14-17, including felony murder, and the State is not required to choose its theory of prosecution prior to trial. Defendant may file a motion for a bill of particulars for further disclosure of the facts that support the charge alleged in the indictment.

7. Appeal and Error— record on appeal—sealed evidence not included—not reviewed

An assignment of error to the trial court classifying certain documents as non-discoverable in a first-degree murder prosecution was dismissed where the evidence was sealed by the trial court and not included in the appellate record.

Appeal by defendant from judgments entered 24 May 2005 by Judge Beverly T. Beal in Caldwell County Superior Court. Heard in the Court of Appeals 18 October 2007.

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

Appellate Defender Staples Hughes, *by Assistant Appellate Defender Daniel Shatz*, *for defendant-appellant.*

TYSON, Judge.

Janet Hall ("defendant") appeals from judgments entered after a jury found her to be guilty of first-degree murder and attempted first-degree murder. We find no error.

I. Background

A. State's Evidence

Defendant lived in Granite Falls with her husband, James Hall ("Mr. Hall"), their sixteen-year-old daughter, Ashley ("Ashley"), and their eleven-year-old son, Eric ("Eric"). On 26 February 2004, the children's school was canceled due to snow. At approximately 10:00 a.m., Ashley awoke after defendant started to beat her on the head with a baseball bat. Defendant then shot Ashley twice: once in the collar bone and once in the chest. Eric came running down the hall towards Ashley's room. Defendant turned around and shot him in the abdomen and in the back of the neck.

Ashley struggled with defendant for control of the baseball bat and attempted to run away. Ashley ran into the living room where defendant followed her and continued to hit her with the baseball bat. Defendant shot at Ashley a third time, but missed. Defendant kept asking Ashley "why [she] wouldn't die, why [she] couldn't go in peace like her brother did."

Defendant entered the master bedroom and Ashley crawled down the hall into the bathroom. Ashley got into the bathtub and filled it with hot water to stay warm. Ashley remained in the bathtub for several hours until her father arrived home from work at approximately 3:15 p.m..

Mr. Hall entered the residence, walked through the living room, and into the master bedroom. He discovered Eric lying on the floor dead. Defendant was lying on the bed under the covers, with two plastic bags over her head. Mr. Hall asked defendant what had happened. Defendant did not respond. Mr. Hall ripped the bags off of defendant's head and repeatedly asked her what happened and where the telephone was located. Defendant eventually told Mr. Hall where she had hidden the telephone, but asked him not to call 911 because she did not want to go to jail. When Mr. Hall called 911, defendant left the house, entered her vehicle, and drove away. After Mr. Hall called 911, he found Ashley "laying, bleeding, and dying" in the bathtub. Mr. Hall picked Ashley up, brought her to the living room, laid her on the couch and covered her with a blanket.

Law enforcement officers arrived at the Hall residence shortly thereafter. Officers observed blood present in the kitchen, on the living room carpet, and on the floor and walls of the hallway. In the master bedroom, officers found a silver Phoenix Arms .25 caliber semi-

automatic pistol on a dresser. The safety on the pistol was turned off and two live rounds were present in the pistol's magazine. Officers recovered three fired projectiles from inside the Hall residence. Additionally, two fired projectiles were recovered from Ashley's body and one from Eric's body. Testimony tended to show that a total of six projectiles were fired at the crime scene.

Caldwell County Sherrif's Lieutenant Michael Longo ("Officer Longo") arrived and found Ashley lying on the couch. Ashley was pale, shaken, and very frightened. Ashley told Officer Longo defendant had "flipped out" and "went crazy" and had committed these crimes. Ashley described the attack to Officer Longo but could not remember all of the details. Mr. Hall told officers at the scene he believed defendant had committed these crimes and described what he observed after he arrived home from work and entered the residence.

A half-mile down the road, defendant's vehicle rear-ended Barry and Monica Shook's vehicle. Defendant fled the scene of the collision. State Trooper Kevin Milligan ("Trooper Milligan") responded to the call reporting the hit-and-run accident. Trooper Milligan received a description of defendant's car and its license plate number. At approximately 8:30 p.m., Trooper Milligan spotted defendant's vehicle and followed her. Trooper Milligan requested back-up and attempted to stop defendant's vehicle.

A high speed chase ensued. Trooper Milligan and other officers pursued defendant at speeds exceeding 110 miles an hour. The chase ended when defendant crashed head-on into oncoming traffic. Trooper Milligan testified defendant appeared to be "extremely impaired" and was "unaware of what was going on around her."

Defendant was transported to Catawba Memorial Hospital. Defendant was subsequently arrested and transported to the Caldwell County Sheriff's Office. Defendant was charged with and tried capitally for the murder of Eric and for the attempted murder of Ashley.

At trial, Ashley testified defendant had threatened to kill her on two prior occasions. Approximately a year and a half prior to 26 February 2004, defendant told Ashley to follow her outside into the yard. Defendant fired her gun in the air and told Ashley if "she didn't act better" defendant was going to shoot her. A second incident occurred approximately one year prior to 26 February 2004. While Ashley was standing in the kitchen after dinner, defendant came up behind her, put a knife to her throat, and told Ashley if she did not act

better "[defendant] wouldn't think twice about doing it." Ashley testified she was scared after both threats. Defendant had hurt her before and Ashley believed defendant would probably do it again.

SBI Special Agent Shane Green ("Agent Green") testified that based on the number of fired projectiles found at the crime scene and the number of live rounds remaining in the pistol's magazine, defendant had to reload her pistol while committing these crimes. Agent Green also testified that reloading the pistol's magazine could take up to twenty-five seconds.

B. Defendant's Evidence

Defendant's evidence tended to show the relationship between defendant and Eric was loving, while her relationship with Ashley was more complex. Defendant disapproved of Ashley's friends and became highly upset when she discovered Ashley had intentionally cut herself. Defendant sought therapy for Ashley, who refused to attend. Ashley acknowledged that she had previously lied to DSS, falsely alleging her father had abused her so she could leave the house. Ashley believed her parents were overly restrictive. Mr. Hall had broken up physical fights between defendant and Ashley on more than one occasion. Despite these conflicts, defendant was described as "an excellent mother who loved her daughter" by family acquaintances.

Defendant produced evidence of a long history of depression. Defendant first sought treatment in 1996, after her father's death. In 1998, Dr. Guttler, defendant's family physician, prescribed Zoloft to treat defendant's depression. Dr. Guttler prescribed a different medication when Zoloft reportedly made defendant "jittery." Defendant continued to suffer from depression and experienced suicidal thoughts. In November 1998, defendant was admitted to the psychiatric unit at Frye Memorial Hospital to be evaluated by a psychiatrist. Defendant stayed in the hospital for a day and a half. Defendant was treated in the hospital and post-release by Dr. Kim. Upon Dr. Kim's retirement, defendant's care was turned over to Dr. Synn.

In November 2003, defendant experienced complications with her medication, including tremors, anxiety, insomnia, and depression. During this time, Dr. Synn significantly changed defendant's medication. In February 2004, defendant complained she was again depressed. During the month of February 2004, Dr. Synn adjusted and changed defendant's medication a total of four times, the last time being on 25 February 2004, the day before the crimes were committed.

Defendant retained two mental health experts, Dr. James Bellard ("Dr. Bellard") and Dr. John Warren ("Dr. Warren"), to examine her and to testify to their opinion of her mental state at the time the crimes were committed. Dr. Bellard qualified as an expert in forensic psychiatry and testified defendant suffered from depression with psychotic features and from substance induced mood disorder on 26 February 2004. Dr. Bellard testified defendant developed a delusion that she had to die and her children could not live without her. Dr. Bellard opined defendant did not know the nature and quality of her actions, could not tell right from wrong, and was unable to form the specific intent to kill.

Dr. Warren, a clinical psychologist, examined defendant in jail on 2 March 2004. Dr. Warren testified that on 26 February 2006, defendant suffered from major depression with psychotic features and from substance induced mood disorder. Dr. Warren also opined that defendant did not know the nature and quality of her acts and could not appreciate the wrongfulness of her conduct. Dr. Warren opined defendant was unable to form a specific intent to kill due to her delusional beliefs. Dr. Warren stated the "medication effects on this woman worsened and were [the] proximate cause of the episode that she had on February 26th 2004."

Dr. Nicole Wolfe ("Dr. Wolfe"), a forensic psychiatrist at Dorothea Dix Hospital, examined defendant at the request of the State. Dr. Wolfe agreed with Dr. Bellard's and Dr. Warren's diagnoses. Dr. Wolfe opined that defendant was so severely depressed and her mind was so clouded by medication, that she could not appreciate the difference between right and wrong and was unable to form the specific intent to kill.

Dr. Richard Kapit ("Dr. Kapit") testified as a non-examining expert in psychiatry and adverse drug reactions. Dr. Kapit testified that Zoloft, a medication defendant had taken, could "flip a person into a . . . manic state[] where they can become psychotic, [experience] false beliefs, and be very rash, impulsive and dangerous. . . . There is an increased risk of mania causing suicide and homicide." Dr. Kapit conceded that reports of homicidal reactions from the drug "were extremely rare."

On 18 April 2005, defendant was tried capitally in Caldwell County Superior Court. On 19 May 2005, the jury found defendant to be guilty of the attempted murder of Ashley and guilty of first-degree murder of Eric under the felony murder rule. On 24 May 2005,

following a capital sentencing hearing, the jury recommended life imprisonment without the possibility of parole. The trial court sentenced defendant to life imprisonment without parole for the conviction of first-degree murder and imposed a consecutive sentence of a minimum of 155 and a maximum of 195 months imprisonment for defendant's conviction of attempted first-degree murder. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) excluding Dr. Bellard's testimony regarding the post-conviction consequences of finding defendant not guilty by reason of insanity; (2) overruling defendant's objection to the pattern jury instruction and refusing to give her proposed modified instruction; (3) instructing the jury that evidence of witnesses' out-of-court statements could only be considered for the purpose of impeaching or corroborating trial testimony; (4) overruling defendant's objection to the prosecutor's closing argument describing her as having "a disposition towards murder"; (5) denying her motion for reciprocal disclosure of the State's theory of the case; and (6) refusing to provide discoverable items following the court's *in camera* review.

III. Excluding Expert Testimony

[1] Defendant argues the trial court erred by using Rule 403 to exclude Dr. Bellard's offered testimony regarding the post-conviction consequences of the jury finding defendant not guilty by reason of insanity. We disagree.

A. Standard of Review

"Whether to exclude expert testimony under Rule 403 is within the sound discretion of the trial court and will only be reversed on appeal for abuse of discretion." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 463, 597 S.E.2d 674, 689 (2004). "An abuse of discretion occurs when a trial judge's ruling is manifestly unsupported by reason." *State v. Summers*, 177 N.C. App. 691, 697, 629 S.E.2d 902, 907 (internal citations and quotations omitted), *disc. rev. denied*, 360 N.C. 653, 637 S.E.2d 192 (2006).

B. Analysis

Expert testimony is admissible "[i]f 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 . . . may testify thereto in the form of an opinion." N.C. Gen. Stat. § 8C-1, Rule 702(a) (2005) (emphasis supplied). In determining the admissibility of expert testimony, "[t]he trial court must always be satisfied that the [] testimony is relevant." *Howerton*, 358 N.C. at 462, 597 S.E.2d at 688. The trial court "has inherent authority to limit the admissibility . . . [of] expert testimony, under North Carolina Rule of Evidence 403 . . . ." *Id.* at 462, 597 S.E.2d at 689.

N.C. Gen. Stat. § 8C-1, Rule 403 (2005) provides, "[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." (Emphasis supplied). This Court has stated, "[We] will not intervene where the trial court has properly weighed both the probative and prejudicial value of evidence before it." *Tomika Invs., Inc. v. Macedonia True Vine Pent. Holiness Ch. of God*, 136 N.C. App. 493, 498, 524 S.E.2d 591, 595 (2000).

Defense counsel sought to have Dr. Bellard offer his opinion to the jury of the likelihood of defendant's release from involuntary commitment at Dorothea Dix Hospital if she were to be found not guilty by reason of insanity. During *voir dire*, Dr. Bellard opined defendant would not be released from involuntary commitment "for decades." The trial court found:

> such information is [ir]relevant to this case in that it will not help the jury understand the evidence or determine a fact in issue. . . . Assuming arguendo that it has some probative value the Court would apply [the N.C. Gen. Stat. § 8C-1, Rule] 403 valuation and find that the probative value is far outweighed by the confusion of the issues.

The trial court cited *State v. Mancuso* as the basis of its ruling. 321 N.C. 464, 364 S.E.2d 359 (1988).

In *Mancuso*, defense counsel sought to offer testimony from an Assistant Attorney General on the State's procedures for treating people involuntarily committed to the State's mental health facilities. 321 N.C. at 468, 364 S.E.2d at 362. The State objected and the trial court sustained the objection based on the "subject matter about which [the expert] planned to testify." *Id.* at 468-69, 364 S.E.2d at 362. Our Supreme Court upheld the trial court's ruling stating, "defendant . . . made no showing that [the expert] testimony on involuntary commit-

ment procedures would help the jury understand the evidence, or determine a fact in issue." *Id.* at 469, 364 S.E.2d at 363.

Here, the trial court "properly weighed both the probative and prejudicial value of evidence before it." *Tomika Invs., Inc.*, 136 N.C. App. at 498, 524 S.E.2d at 595. The trial court found Dr. Bellard's testimony could confuse the issues of the case with the possible consequences and his testimony would not assist the jury in regard to any matter in issue or fact. Defendant has presented no evidence tending to show Dr. Bellard's testimony "would help the jury understand evidence, or determine a fact in issue." *Mancuso*, 321 N.C. 469, 364 S.E.2d 363. The trial court properly excluded Dr. Bellard's testimony under Rules 403 and 702(a) of the North Carolina Rules of Evidence. Defendant has failed to show an abuse of discretion in the trial court's ruling. This assignment of error is overruled.

IV. Involuntary Commitment Procedure Instructions

[2] Defendant argues the trial court erred by overruling her objection to the pattern jury instructions and refusing to give her proposed modified instruction of the post-conviction commitment procedures following a verdict of not guilty by reason of insanity. We disagree.

A. Standard of Review

We review jury instructions:

> contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed . . . . The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by [the] instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, *it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.*

State v. Blizzard, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005) (emphasis supplied) (internal citations and quotations omitted).

B. Analysis

"[U]pon request, a defendant who interposes a defense of insanity to a criminal charge is entitled to an instruction by the trial judge setting out *in substance* the commitment procedures outlined in G.S. 122-84.1, [repealed and replaced by N.C. Gen. Stat. § 122C], applica-

ble to acquittal by reason of mental illness." *State v. Hammonds*, 290 N.C. 1, 15, 224 S.E.2d 595, 604 (1976) (emphasis supplied). "[F]ailure to give such instructions [is] prejudicial because the jury might tend to return a verdict of guilty so as to ensure that the accused would be incarcerated for the safety of the public and for his own safety." *State v. Bundridge*, 294 N.C. 45, 53, 239 S.E.2d 811, 817 (1978) (citing *Hammonds*, 290 N.C. 1, 224 S.E.2d 595 (1978)). Our Supreme Court in *Hammonds* did not set forth the precise jury instructions to be given for post-conviction involuntary commitment procedures under the statute. *State v. Harris*, 306 N.C. 724, 727, 295 S.E.2d 391, 393 (1982). The appellate court must undertake "a case by case determination" of whether the trial court substantially complied with this rule. *Id.*

Our Supreme Court has held when a trial court instructs the jury on:

> the central meaning of the statute: that if defendant was acquitted by reason of insanity, he would not be released but would be held in custody until a hearing could be held to determine whether he should be confined to a state hospital. . . . [is] sufficient to remove any hesitancy of the jury in returning a verdict of not guilty by reason of insanity, engendered by a fear that by so doing they would be releasing the defendant at large in the community.

Id.

Here, defendant requested a modified jury instruction regarding post-verdict commitment procedures after a verdict of not guilty by reason of insanity. The trial court instructed on involuntary commitment procedures as follows:

> A defendant found not guilty by reason of insanity shall immediately be committed to a state mental facility. After the defendant has been automatically committed, the defendant shall be provided a hearing in [sic] within fifty days. At this hearing the defendant shall have the burden of proving by preponderance of the evidence that the defendant no longer has a mental illness, or is no longer dangerous to others. If the Court is so satisfied it shall order the defendant discharged and released. If the Court finds that the defendant has not met the burden of proof upon the defendant, then it shall order that in patient commitment continue *for a period not to exceed ninety days. This involuntary commitment will continue* subject to periodic review until the Court finds that the defendant no longer has a mental illness or is no longer dangerous to others.

(Emphasis supplied). Defendant's proposed modified instruction deleted the language italicized above from the pattern jury instruction. Defendant argues the pattern jury instruction was ambiguous and misled the jury to believe if defendant was found not guilty by reason of insanity, she would be released no more than ninety days after the initial hearing. We disagree.

"A trial court is not required to give requested instructions verbatim." *State v. Allen*, 322 N.C. 176, 197, 367 S.E.2d 626, 637 (1988) (citation omitted). The trial court gave the pattern jury instruction regarding involuntary commitment procedures pursuant to N.C.P.I.—Crim. 304.10. These instructions sufficiently informed the jury of the commitment hearing procedures in N.C. Gen. Stat. § § 15A-1321 and N.C. Gen. Stat. § 122C. *Id.* at 198-99, 367 S.E.2d at 638. We find the trial court properly instructed the jury on "the central meaning of the statute" and its instruction substantially complied with defendant's request. *Harris*, 306 N.C. at 727, 295 S.E.2d at 393. This assignment of error is overruled.

C. Cumulative Effect of Alleged Errors

[3] Defendant asserted during oral argument that the cumulative effect of the preceding alleged errors deprived defendant of a fair trial. We disagree.

"[A] defendant has the burden of demonstrating not only error, but also that the error[s] complained of [were] prejudicial, i.e., that there is a reasonable possibility that a different verdict would have been reached had the errors not been committed." *State v. Temples*, 74 N.C. App. 106, 109-10, 327 S.E.2d 266, 268 (citations omitted), *disc. rev. denied*, 314 N.C. 121, 332 S.E.2d 489 (1985). The State presented evidence that defendant: (1) had threatened to kill Ashley on two prior occasions more than a year prior to these crimes; (2) contemplated death before the crimes occurred; (3) had to reload her gun while shooting both Ashley and Eric; (4) while attempting to murder Ashley, stated "why [will you not] die . . . and go in peace like [your] brother did"; (5) hid the telephone so Ashley and Mr. Hall were unable to call 911; (6) asked Mr. Hall not to call 911 because "she did not want to go to jail"; (7) fled the crime scene after Mr. Hall called 911; (8) rear-ended another vehicle and fled the scene of the accident; and (9) engaged in a high speed chase with police, only stopping when she crashed head on into oncoming traffic.

We find the evidence presented on the record is sufficient to support the jury's verdicts. The jury rejected premeditation and delibera-

tion and chose felony murder as the basis to support defendant's first-degree murder conviction. The above evidence supports the jury's: (1) rejection of defendant's evidence and defense of insanity and (2) finding that defendant knew right from wrong and understood the nature and quality of her actions when she committed the crimes. We hold there is no reasonable possibility the jury would have reached a different verdict had the trial court admitted Dr. Bellard's testimony and given defendant's modified jury instruction on post-conviction involuntary commitment procedures.

V. Prior Statements Instruction

[4] Defendant argues the trial court's instruction that evidence of out-of-court statements by witnesses could only be considered for impeachment or corroboration constitutes plain error. We disagree.

A. Standard of Review

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental error*, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)) (emphasis original).

B. Analysis

Defendant argues Ashley's statements to Officer Longo that defendant had "flipped out" and "went crazy" and Mr. Hall's statement to a 911 operator that defendant's "nerves were shot" were admissible for substantive purposes. We disagree.

Defendant correctly states that both Ashley's and Mr. Hall's out-of-court statements were admitted into evidence without objection. Subsequently, the trial court gave the jury instructions regarding witnesses' prior statements pursuant to N.C.P.I.—Crim. 105.20. The trial court stated:

> Members of the jury, when evidence has been received tending to show that at an earlier time a witness made a statement, either spoken or in writing, *which may be consistent or may conflict with that witness [sic] testimony*, you should not consider such earlier statement 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 such earlier statement was made, and that it is consistent, or that it does conflict with the testimony of the witness at this trial, then you may consider this together with all other facts and circumstances bearing upon the witness [sic] truthfulness in deciding whether you believe or disbelieve the witness testimony at this trial.

(Emphasis supplied). Defendant concedes that she neither objected to this instruction nor requested additional instructions.

N.C.P.I.—Crim. 105.20 is a correct statement of the law regarding prior inconsistent statements. Prior inconsistent statements are not admissible as substantive evidence. *State v. Williams*, 355 N.C. 501, 533, 565 S.E.2d 609, 628 (2002) (citations omitted), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003).

On cross-examination, Ashley denied telling Officer Longo defendant had "flipped out" and "went crazy" when he arrived at the crime scene. Subsequently, defense counsel asked Officer Longo how Ashley responded when he asked her what occurred that morning. Officer Longo testified, "I had asked Ashley what happened and she stated, 'My mom just flipped out; she went crazy.' " Defense counsel properly impeached Ashley's trial testimony with proof of a prior inconsistent statement. *State v. Whitley*, 311 N.C. 656, 663, 319 S.E.2d 584, 589 (1984). Defendant's argument that Ashley's statement was admissible as substantive evidence is without merit. The trial court properly instructed the jury that prior inconsistent statements could only be used for impeachment purposes.

Further, at trial, Mr. Hall did not testify to what he stated to the operator when he called 911. Therefore, Mr. Hall's statement that defendant's "nerves were shot" was neither a prior consistent nor inconsistent statement. The jury instruction was therefore not applicable to Mr. Hall's statement.

Presuming *arguendo*, Ashley's and Mr. Hall's statements could be admissible as substantive evidence under some theory, defendant has failed to show that the trial court's pattern jury instruction consti-

tutes "plain error." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378. Defendant presented extensive opinion testimony from four mental health expert witnesses concerning her mental state at the time of the crime. Additionally, the jury heard the following evidence: (1) Mr. Hall's and Ashley's testimony regarding defendant's behavior leading up to 26 February 2004; (2) defendant's comment to Ashley about dying together; (3) Ashley's testimony regarding defendant's behavior at the time of the crime; (4) Mr. Hall's testimony describing defendant's behavior after the crime had occurred; and (5) Trooper Milligan's testimony that defendant was "extremely impaired" and "unaware of what was going on around her."

The State presented overwhelming evidence to support the jury's guilty verdict. Under plain error review, defendant has failed to show the alleged "instructional mistake had a probable impact on the jury's finding that the defendant was guilty." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378. This assignment of error is overruled.

VI. Prosecutor's Closing Argument

[5] Defendant argues the trial court erred by overruling defendant's objection to the portion of the prosecutor's closing argument describing defendant as a person with "a disposition towards murder." We disagree.

A. Standard of Review

> The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection. In order to assess whether a trial court has abused its discretion when deciding a particular matter, this Court must determine if the ruling could not have been the result of a reasoned decision.

State v. Jones, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (internal citations and quotations omitted).

B. Analysis

During closing arguments, "an attorney may . . . on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue." N.C. Gen. Stat. § 15A-1230 (2005). "Counsel are given wide latitude in arguments to the jury and are permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence." *State v.*

Richardson, 342 N.C. 772, 792-93, 467 S.E.2d 685, 697, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996).

A prosecutor's closing remarks "are to be viewed in the context in which they are made and in light of the overall factual circumstances to which they refer." *State v. Davis*, 349 N.C. 1, 44, 506 S.E.2d 455, 479 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999). To justify a new trial, an inappropriate prosecutorial comment must be sufficiently grave to constitute prejudicial error. *State v. Britt*, 291 N.C. 528, 537, 231 S.E.2d 644, 651 (1977). "[T]o reach the level of prejudicial error in this regard . . . the prosecutor's comments must have so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Worthy*, 341 N.C. 707, 709-10, 462 S.E.2d 482, 483 (1995) (citation omitted).

During the prosecutor's closing argument, he stated "if one has a disposition toward murder . . . ." We review the prosecutor's closing argument as a whole and must determine in what context the statement was being made. Prior to the challenged statement, the prosecutor argued defendant: (1) had a motive for killing her family; (2) contemplated death; and (3) was not having delusions, but was thinking of killing her family. Viewed in the context of these arguments, it appears by making the challenged statement, the prosecutor was arguing defendant should be found guilty of first-degree murder based on defendant's premeditated and deliberate murder of Eric and attempted murder of Ashley.

"The trial court has a duty, upon objection, to censor remarks not warranted by either the evidence or the law, or remarks calculated to mislead or prejudice the jury." *State v. Britt*, 288 N.C. 699, 712, 220 S.E.2d 283, 291 (1975). The trial court overruled defendant's objection to the challenged statement and concluded, "the argument of counsel is supported by some evidence." The trial court based this ruling on evidence presented tending to show defendant had threatened to kill Ashley on two occasions prior to 26 February 2004. The prosecutor properly argued "the evidence that [was] [] presented and all reasonable inferences that c[ould] be drawn from that evidence." *Richardson*, 342 N.C. at 792-93, 467 S.E.2d at 697. Defendant has failed to show the trial court abused its discretion by overruling defendant's objection to a portion of the prosecutor's statement.

Presuming *arguendo* the statement was improper, the prosecutor's statement did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Worthy*,

341 N.C. at 709-10, 462 S.E.2d at 483 (1995). The jury found defendant guilty of first-degree murder under the theory of felony murder, not on the basis of premeditation and deliberation. The State presented overwhelming evidence that defendant had shot and killed Eric while she was attempting to murder Ashley. This evidence supports the jury's verdicts on both convictions. This assignment of error is overruled.

VII. Reciprocal Disclosure

[6] Defendant argues the trial court erred by denying defendant's motion for reciprocal disclosure of the State's theory of the case and by instructing the jury on a theory of felony murder for which the defense had no notice. We disagree.

Defendant filed a pre-trial motion for reciprocal disclosure concerning the theory upon which the State sought a conviction of first-degree murder, including the disclosure of the felonies which supported felony murder. The trial court denied defendant's motion. Defendant argues the denial of this motion violates defendant's constitutional rights to due process and prior notice of the charges against her. Based on existing North Carolina law, defendant's argument is without merit.

Our Supreme Court has repeatedly held a short-form murder indictment is sufficient to charge first-degree murder on the basis of *any theory* set forth in N.C. Gen. Stat. § 14-17, including felony murder. *State v. Garcia*, 358 N.C. 382, 388, 597 S.E.2d 724, 731-32 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005); *State v. Braxton*, 352 N.C. 158, 174, 531 S.E.2d 428, 437 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *State v. King*, 311 N.C. 603, 608, 320 S.E.2d 1, 5 (1984).

"The State is not required at any time to elect a theory upon which it will proceed against the defendant on the charge of first degree murder." *State v. Clark*, 325 N.C. 677, 684, 386 S.E.2d 191, 195 (1989). Further, "[b]y requesting . . . the State [to] identify which predicate felony it intended to prove at trial, defendant essentially sought disclosure of the State's legal theory. . . . The State is not required to choose its theory of prosecution prior to trial." *Garcia*, 358 N.C. at 389-90, 597 S.E.2d at 732.

If defendant seeks further disclosure of the facts that support the charge alleged in the indictment, defendant may file a motion for a

bill of particulars. N.C. Gen. Stat. § 15A-925(b) (2005); *State v. Randolph*, 312 N.C. 198, 210, 321 S.E.2d 864, 872 (1984). This assignment of error is overruled.

VIII. Discovery

[7] Defendant argues the trial court erred by refusing to provide discoverable items following its *in camera* review. We dismiss this assignment of error.

A. Standard of Review

"A trial court's order regarding matters of discovery are generally reviewed under an abuse of discretion standard." *Morin v. Sharp*, 144 N.C. App. 369, 374, 549 S.E.2d 871, 874 (citation omitted), *disc. rev. denied*, 354 N.C. 219, 557 S.E.2d 531 (2001). "An abuse of discretion occurs when a trial judge's ruling is manifestly unsupported by reason." *Summers*, 177 N.C. App. at 697, 629 S.E.2d at 907.

B. Analysis

At trial, defendant requested a copy of the prosecutor's file under N.C. Gen. Stat. § 15A-903(a)(1). The State compiled a work product inventory of materials it argued were protected from disclosure as attorney work product pursuant to N.C. Gen. Stat. § 15A-904. After *in camera* review, the trial court ruled that some materials defendant had requested were non-discoverable and would be placed under seal for appellate review. These materials are not included as part of the record on appeal.

"It is the duty of the appellant to see that the record is properly [prepared] and transmitted." *Hill v. Hill*, 13 N.C. App. 641, 642, 186 S.E.2d 665, 666 (1972). The appellant also has the duty to ensure that the record is complete and contains the materials asserted to contain error. *Pharr v. Worley*, 125 N.C. App. 136, 139, 479 S.E.2d 32, 34 (1997). Rule 9 of the North Carolina Rules of Appellate Procedure requires that "exhibit[s] offered in evidence and *required for understanding of errors assigned* shall be filed in the appellate court." N.C.R. App. P. 9(d)(2) (2008) (emphasis supplied).

Here, the record on appeal does not contain the non-discoverable materials the trial court placed under seal. This omission prevents this Court from determining whether the trial court erred in classifying certain State documents as non-discoverable pursuant to N.C. Gen. Stat. § 15A-904. This assignment of error is dismissed.

IX. Conclusion

Defendant failed to show the trial court abused its discretion by "properly weigh[ing] both the probative and prejudicial value of evidence before it" and excluding Dr. Bellard's testimony from the jury, regarding the likelihood of defendant's release from Dorothea Dix Hospital if the jury found her to be not guilty by reason of insanity. *Tomika Invs., Inc.*, 136 N.C. App. at 498, 524 S.E.2d at 595. The trial court's jury instruction explained "the central meaning of the statute" and substantially complied with defendant's request for a jury instruction regarding post-verdict commitment procedures if defendant were to be found not guilty by reason of insanity. *Harris*, 306 N.C. at 727, 295 S.E.2d at 393.

The trial court properly instructed the jury regarding witnesses' prior statements. The trial court properly overruled defendant's objection to a portion of the prosecution's closing argument because the prosecutor's statement was "warranted by the evidence" presented at trial. *Britt*, 288 N.C. at 712, 220 S.E.2d at 291.

Based on existing North Carolina law, the trial court was not required to order the State to disclose to defendant the underlying theory to support the charge of first-degree murder prior to trial. *Garcia*, 358 N.C. at 389-90, 597 S.E.2d at 732. Finally, the record is devoid of sealed documents reviewed by the trial court *in camera*. We cannot determine whether the trial court erred in classifying documents in the State's file as non-discoverable pursuant to N.C. Gen. Stat. § 15A-904.

Defendant received a fair trial, free from the prejudicial errors she preserved, assigned, and argued. Under plain error review, the absence of all or any of the alleged plain errors would not have had a probable impact on the jury's finding that defendant was guilty. We find no error.

No Error.

Judges McCULLOUGH and STROUD concur.

IN THE MATTER OF: L.B.

No. COA07-549

(Filed 4 December 2007)

Appeal and Error— notice of appeal—signed by guardian ad litem instead of parents—lack of jurisdiction

Respondent parents' appeal from the termination of their parental rights is dismissed based on an insufficient notice of appeal signed by trial counsel and the guardian ad litem (GAL) for each respondent, because: (1) the GAL's role is limited to one of assistance and not one of substitution to undertake acts of legal import; (2) the General Assembly could have stated the GAL was authorized to enter consent orders, accept service of process, file pleadings, or otherwise act on a parent's behalf, but it did not; (3) although it is appropriate for the GAL to assure that the notice of appeal, or other pleading or legal document, is filed properly with the parents' signatures as required by N.C. R. App. P. 3A(a), it is not appropriate for the GAL to sign the notice of appeal in place of the parents; (4) nowhere in N.C.G.S. § 7B-1002 is a parent's GAL designated as a proper party who may give written notice of appeal under N.C.G.S. § 7B-1001; and (5) Appellate Rules 3, 3A, and 4 all concern how and when appeals are to be taken, and the appeal must be dismissed if those Rules are not complied with based on lack of jurisdiction.

Judge STEELMAN dissenting.

Appeal by respondents from judgment entered 2 February 2007 by Judge Marvin P. Pope, Jr. in Buncombe County District Court. Heard in the Court of Appeals 4 September 2007.

Matthew J. Middleton, for Buncombe County Department of Social Services, petitioner-appellee.

Jerry W. Miller, for guardian ad litem.

Richard E. Jester, for mother, respondent-appellant.

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

JACKSON, Judge.

Opal and Ellis B. ("respondents") appeal the termination of their parental rights to their son, L.B., on 2 February 2007. For the reasons stated below, we dismiss the appeal.

On 13 February 2002, the Buncombe County Department of Social Services ("DSS") received a report concerning respondents' first child. Social workers visited respondents' home and found that it was inadequately maintained. The infant was in a drawer on the floor of a cold room, lying in his own urine. Respondent mother could not recall the last time the baby's diaper had been changed. She stated that he had last been fed six hours earlier. The social workers returned to the home the next day and found the doors and windows of the home open. Respondent mother could not remember the last time the baby's diaper had been changed or when he had last been fed. Respondents did not have a facility for bathing the child. The child was adjudicated a neglected child on 7 June 2002.

Respondents underwent psychological evaluations on 26 September 2002. Respondent mother's evaluation indicated she would be unlikely to "effectively raise a child without ongoing external supports present in the home." She was "prone to becoming cognitively confused, socially isolated, and potentially neglectful due to her limitations." Respondent father's evaluation indicated that he was "psychologically disconnected from the needs and feelings of others" and that during the evaluation "there was no expression of affection for his child or concerns for his needs." It concluded that given his psychological makeup, cognitive delays, and past history,[1] there was a high risk of abuse and neglect as a parent, should he be allowed around the child.

Respondents' parental rights as to their first child were terminated on 8 October 2003, upon findings that they had neglected the child and willfully left the child in foster care for more than twelve months. Respondents never appealed that order.

DSS obtained non-secure custody of L.B. on 27 October 2005, one day after birth, after receiving a report that respondents were having trouble caring for the infant. Respondents underwent new psychological evaluations on 28 April 2006, which disclosed that little had changed since the 2002 evaluations.

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1. Respondent father has an extensive criminal history dating back to 1972. He pled guilty in 1979 to raping a child under the age of twelve. He also has convictions in 1999 of assault on a female and assault on a child under the age of twelve. He violated a domestic violence protective order in 2000.

L.B. has special medical needs. He has acid reflux, which impacts his ability to swallow food. He also has poorly developed muscle tone and asthma. L.B. takes several medications that must be administered in precise amounts and at specific times throughout the day. The complexity of the medical care required for L.B. mandates that any person who cares for him must be attentive and able to understand the actions that must be taken to provide adequate care for him.

On 15 August 2006, DSS filed a petition to terminate respondents' parental rights as to L.B. A hearing was held on 6 and 7 December 2006. The trial court concluded that grounds existed to terminate respondents' parental rights in that (1) pursuant to North Carolina General Statutes, section 7B-1111(a)(6) they were incapable of providing the proper care and supervision of the child such that the child was dependent and there was a reasonable probability that such incapability would continue for the foreseeable future; and (2) pursuant to North Carolina General Statutes, section 7B-1111(a)(9) their parental rights to another child had been involuntarily terminated on 8 October 2003, and because of their significant cognitive and intellectual limitations they were unable to provide a safe home for L.B. Additionally, the court concluded that grounds existed to terminate respondent father's parental rights pursuant to North Carolina General Statutes, section 7B-1111(a)(1), in that he had neglected L.B. both before and after he came into DSS custody. The court concluded that termination of respondents' parental rights was in L.B.'s best interests, and ordered respondents' parental rights terminated on 2 February 2007. Both parents appeal.

We first address a motion to dismiss the appeal which is pending before this Court. DSS argues that respondents' notices of appeal are not signed by respondents as required by Appellate Rule 3A(a). This rule governs appeals in juvenile cases and provides that "both the trial counsel and appellant must sign the notice of appeal[.]" N.C. R. App. P. 3A(a) (2007). The notices of appeal in the instant case were signed by trial counsel and the guardian *ad litem* ("GAL") for each respondent (appellant). The question we must decide is whether the signature of an appellant's GAL is a sufficient signature by the "appellant" as required by Rule 3A(a). We hold that it is not.

Respondents' GALs were appointed pursuant to North Carolina General Statutes, section 7B-1101.1, which *permits* the appointment of a GAL when a parent is suspected of having diminished capacity. *See* N.C. Gen. Stat. § 7B-1101.1 (2005). Chapter 35A of the North Carolina General Statutes also governs the appointment of guardians.

Pursuant to Chapter 35A, a guardian *shall* be appointed for a party who has been *adjudicated* mentally incompetent. *See* N.C. Gen. Stat. § 35A-1120 (2005).

A GAL appointed pursuant to section 7B-1101.1 does not possess the same authority as a guardian appointed pursuant to Chapter 35A. "The essential purpose of guardianship [appointed pursuant to Chapter 35A] for an incompetent person is to *replace* the individual's authority to make decisions with the authority of a guardian when the individual does not have adequate capacity to make such decisions. N.C. Gen. Stat. § 35A-1201(a)(3) (2005) (emphasis added). In contrast, a GAL's authority is more limited. Pursuant to North Carolina General Statutes, section 7B-1101.1(e), a GAL "may engage in all of the following practices:" (1) helping the parent to enter consent orders, as opposed to entering consent orders on behalf of the parent; (2) facilitating service of process on the parent, as opposed to accepting service of process on behalf of the parent; (3) assuring that necessary pleadings are filed, as opposed to filing pleadings on behalf of the parent; and (4) assisting the parent, as opposed to acting on the parent's behalf, to ensure that the parent's procedural due process requirements are met. *See* N.C. Gen. Stat. § 7B-1101.1(e) (2005).

The dissent misconstrues our reading of section 7B-1101.1(e). We do not imply that a GAL's actions are limited to those enumerated in the statute. We acknowledge that prior to the enactment of section 7B-1101.1, a GAL's role in termination cases was unclear. *See In re Shepard*, 162 N.C. App. 215, 227, 591 S.E.2d 1, 9 (2004) ("North Carolina case law offers little guidance as to . . . any specific duties of a GAL assigned to a parent-ward in a termination proceeding."). This statute serves to clarify the GAL's role in these proceedings. However, the language of the General Assembly is clear that the GAL's role is limited to one of assistance, not one of substitution. The General Assembly could have stated that the GAL was authorized to enter consent orders, accept service of process, file pleadings, or otherwise act on a parent's behalf, but it did not.

In addition, the General Assembly amended the statutes regarding the appointment of GALs in termination proceedings effective 1 October 2005. With those revisions, there no longer is a requirement that parents be adjudicated incompetent pursuant to Chapter 35A in order to have a GAL appointed.

Pursuant to former section 7B-1101, when the termination petition was based on section 7B-1111(6), alleging the parent was inca-

pable of caring for the child, and the incapability was the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or another similar cause or condition, the trial court was required to appoint a GAL in accordance with Rule 17 of the North Carolina Rules of Civil Procedure to represent the parent. *See* N.C. Gen. Stat. §§ 7B-1101, 7B-1111(6) (2004). "Chapter 35A of the general statutes sets forth the procedure for determining incompetency, which the trial judge must comply with when conducting a competency hearing under Rule 17." *In re J.A.A. & S.A.A.*, 175 N.C. App. 66, 73, 623 S.E.2d 45, 49 (2005).

In its 2005 revisions to Chapter 7B, the General Assembly retained the requirement that the appointment of a GAL be in accordance with Rule 17 only when the parent is under the age of eighteen years. *See* N.C. Gen. Stat. § 7B-1101.1(b) (2005). Pursuant to the current section 7B-1101.1, the court may appoint a GAL to represent a parent having only a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest. *See* N.C. Gen. Stat. § 7B-1101.1(c) (2005). This threshold is significantly lower than that required for appointment of a guardian pursuant to the requirements of Chapter 35A.

A proceeding to declare an individual incompetent and appoint a guardian pursuant to Chapter 35A is much more complex. The party seeking appointment of a guardian and the party for whom the guardian is sought both are entitled to present testimony and documentary evidence, to subpoena witnesses and the production of documents, and to examine and cross-examine witnesses in regard to the party's competence. N.C. Gen. Stat. § 35A-1112(b) (2005). The party for whom the guardian is sought is entitled to be represented by counsel of his own choice or by an appointed GAL. N.C. Gen. Stat. § 35A-1107(a) (2005). Should a GAL be appointed pursuant to North Carolina General Statutes, section 35A-1107(a), the GAL "shall make every reasonable effort to determine the *respondent's wishes* regarding the incompetency proceeding and any proposed guardianship." N.C. Gen. Stat. § 35A-1107(b) (2005) (emphasis added). The party for whom the guardian is sought is entitled to a trial by jury. N.C. Gen. Stat. § 35A-1110 (2005). He may appeal to the superior court for a hearing *de novo*. N.C. Gen. Stat. § 35A-1115 (2005).

There is no evidence that the General Assembly intended the GAL—as it did the guardian—to exercise legal rights *in lieu of* the respondent parents as the dissent attempts to argue. Rather, the language of section 7B-1101.1 plainly indicates the role of the GAL is to

assist the parents rather than *replace* their authority to undertake acts of legal import themselves. *See In re Shepard*, 162 N.C. App. at 227, 591 S.E.2d at 9 (the role of the GAL is to "assist in explaining and executing" the parent's rights). Therefore, although it is appropriate for the GAL to *assure* that the notice of appeal—or other pleading or legal document—is filed properly with the parents' signatures as required by North Carolina Rules of Appellate Procedure 3A(a), it is not appropriate for the GAL to sign the notice of appeal in place of the parents.

Furthermore, pursuant to North Carolina General Statutes, section 7B-1001(b), written notice of appeal is to be given "by a proper party as defined in G.S. 7B-1002." N.C. Gen. Stat. § 7B-1001(b) (2005). Such proper parties are (1) a juvenile who is acting through his GAL; (2) a juvenile without a GAL, in which case "the court shall appoint [one] pursuant to G.S. 1A-1, Rule 17 "; (3) DSS; (4) "a parent, a guardian appointed under G.S. 7B-600 [for a juvenile] or Chapter 35A of the General Statutes [for a parent], or a custodian as defined in G.S. 7B-101 who is a nonprevailing party"; and (5) any party who was unsuccessful in obtaining a termination of parental rights. N.C. Gen. Stat. § 7B-1002 (2005). Nowhere in section 7B-1002 is a parent's GAL designated as a "proper party" who may give written notice of appeal pursuant to section 7B-1001.

In *Stockton v. Estate of Thompson*, 165 N.C. App. 899, 600 S.E.2d 13 (2004), this Court held that a GAL appointed for decedent's two legitimated children had no statutory authority to intervene in a paternity proceeding initiated by the mother of decedent's illegitimate child. *Id.* at 902, 600 S.E.2d at 16 ("We conclude that the General Assembly, in explicitly listing who may be a party to a paternity proceeding . . . , did not intend for others not set forth in the statute to intervene in such a paternity proceeding. To hold otherwise, would render ineffective the [statute's] clear and unambiguous meaning.") Similarly, by explicitly listing who may give written notice of appeal in Chapter 7B cases, the General Assembly did not intend for those not listed to have the right to perfect an appeal.

Appellate Rule 3A became effective 1 May 2006 and applies to all cases appealed on or after that date. Therefore we are faced with a case of first impression interpreting this new requirement. However, "[a]ppellate Rule 3 [governing notice of appeal for civil cases] is jurisdictional and if the requirements of this rule are not complied with, the appeal must be dismissed." *Currin-Dillehay Bldg. Supply v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683, *disc. rev. denied*, 327

N.C. 633, 399 S.E.2d 326 (1990) (citing *Giannitrapani v. Duke University*, 30 N.C. App. 667, 670, 228 S.E.2d 46, 48 (1976)). Similarly, "when a [criminal] defendant has not properly given notice of appeal [pursuant to Rule 4 governing notice of appeal for criminal cases], this Court is without jurisdiction to hear the appeal." *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005) (citing *State v. McMillian*, 101 N.C. App. 425, 427, 399 S.E.2d 410, 411, *disc. rev. denied*, 328 N.C. 335, 402 S.E.2d 842 (1991)). Because Appellate Rules 3, 3A, and 4 all concern how and when appeals are to be taken, Rule 3A is similarly jurisdictional, and if not complied with, the appeal must be dismissed.

Because we hold that a GAL's signature on the notice of appeal is not sufficient to grant this Court jurisdiction, we cannot address the merits of the appeal. Accordingly, we dismiss the matter.

DISMISSED.

Judge STEELMAN dissents in a separate opinion.

Judge STROUD concurs.

STEELMAN, Judge, dissenting.

I must respectfully dissent from the majority opinion.

"[T]he appointment of a guardian *ad litem* will divest the parent of their fundamental right to conduct his or her litigation according to their own judgment and inclination." *In re J.A.A.*, 175 N.C. App. 66, 71, 623 S.E.2d 45, 48-49 (2005) (citation omitted). The effect of the majority opinion in this matter is to convert guardians *ad litem* appointed for parents under N.C. Gen. Stat. § 7B-1101.1 into nothing more than glorified hand-holders during termination of parental rights proceedings. I do not believe that this was the intent of the General Assembly.

I. Structure of N.C. Gen. Stat. § 7B-1101.1

Prior to the enactment of 2005 N.C. Sess. Laws 398, the District Court was required to appoint a guardian *ad litem* for a parent in a termination of parental rights proceeding where there was an allegation that the parental rights be terminated pursuant to N.C. Gen. Stat. § 7B-1111(6) and the incapability to provide proper care for the child was the result of "substance abuse, mental retardation, mental ill-

ness, organic brain syndrome, or another similar cause or condition." N.C. Gen. Stat. § 7B-1101(1) (2005).

Sections 14 and 15 of 2005 N.C. Sess. Laws 398 (effective for petitions filed after 1 October 2005) deleted the portions of N.C. Gen. Stat. § 7B-1101 pertaining to appointments of guardians *ad litem*, and replaced them with a new statute, N.C. Gen. Stat. § 7B-1101.1. This statute provided that appointment of a guardian *ad litem* for parents under the age of 18 years who were not married or otherwise emancipated was to be in accordance with the provisions of Rule 17 of the North Carolina Rules of Civil Procedure subsection (b). It further provided for appointment of a guardian *ad litem* for an adult parent "if the court *determines* that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest." N.C. Gen. Stat. § 7B-1101.1(c) (emphasis added). Finally, subsection (e) provides that:

> Guardians ad litem appointed under this section may engage in all of the following practices:
>
> 1) Helping the parent to enter consent orders, if appropriate.
>
> 2) Facilitating service of process on the parent.
>
> 3) Assuring that necessary pleadings are filed.
>
> 4) Assisting the parent and the parent's counsel, if requested by the parent's counsel, to ensure that the parent's procedural due process requirements are met.

N.C.G.S. § 7B-1101.1(e).

The majority opinion makes several erroneous conclusions concerning this statute. First, it states that the authority of a guardian *ad litem* appointed under N.C. Gen. Stat. § 7B-1101.1 is limited to powers set forth in subsection (e). This is not correct. Subsection (e) states that guardians "*may* engage in all of the following practices . . ." The purpose of this subsection is not to limit the powers of the guardian *ad litem*, but rather to emphasize the role of a guardian *ad litem* in these proceedings as "a guardian of procedural due process for [the] parent, to assist in explaining and executing her rights." *In re Shepard*, 162 N.C. App. 215, 227, 591 S.E.2d 1, 9 (2004). Rather than limiting the powers of a guardian *ad litem*, subsection (e) merely assists in defining the role of the guardian in the peculiar circumstances of a termination of parental rights proceeding.

Second, the majority places emphasis upon the different procedures for appointment of a guardian *ad litem* for minors and adults set forth in subsections (b) and (c) of N.C. Gen. Stat. § 7B-1101.1. Under subsection (b), for minors, the appointment procedure is pursuant to Rule 17 of the Rules of Civil Procedure. The reason for this procedure is obvious. Minors are presumed by law not to have the requisite capacity to handle their own affairs. *See In re Clark*, 303 N.C. 592, 281 S.E.2d 47 (1981). Based upon this presumption, there is no requirement of a hearing under Rule 17 for the appointment of a guardian *ad litem* for minors.

The situation is different for an adult, and this is clearly recognized by subsection (c). A guardian *ad litem* can only be appointed if there is a determination that the parent is "incompetent" or has "diminished capacity." This subsection clearly contemplates a hearing before a guardian *ad litem* can be appointed. The 2005 statute did away with the provision requiring that a guardian "shall be appointed" where an allegation of incapability is contained in the petition. As noted in *J.A.A.*, prior to the appointment of a guardian *ad litem* for an adult parent, the trial court should conduct a hearing and "must determine whether the parents are incompetent within the meaning of N.C. Gen. Stat. § 35A-1101[.]" *In re J.A.A.*, 175 N.C. App. at 71, 623 S.E.2d at 48.

II. Application to Instant Case

The fundamental misconception of the majority is that the guardians *ad litem* in this case were appointed in a manner inconsistent with the provisions of Chapter 35A. I freely acknowledge that the General Assembly could have drafted the provisions of Chapter 35A, Rule 17, and N.C. Gen. Stat. § 7B-1101.1 with more clarity, precision, and guidance as to how they are to interact with each other. However, I must assume that the General Assembly was aware of the provisions of Chapter 35A and Rule 17 at the time of the enactment of N.C. Gen. Stat. § 7B-1101.1, and that they intended for the provisions to work together. *See State ex rel. Utilities Comm. v. Thornburg*, 84 N.C. App. 482, 485, 353 S.E.2d 413, 415 (1987).

The record in this case is devoid of any information as to the procedure used by the trial court in the appointment of the guardians *ad litem* for the parents. The only thing that appears in the record is the order of appointment. In the absence of anything in the record to the contrary, I must assume that the order of appointment, regular on its face, was properly entered. *See Fungaroli v. Fungaroli*, 51 N.C. App.

363, 368, 276 S.E.2d 521, 524 (1981). I further note that petitioner makes no argument that the order of appointment was not properly entered. I would thus conclude that the order of appointment was properly entered in accordance with the provisions of both Chapter 35A and N.C. Gen. Stat. § 7B-1101.1.

III. Powers of the Guardian *Ad Litem*

The majority opines that the powers of a guardian *ad litem* are limited and do not encompass the authority to execute the notice of appeal in this matter. This misconstrues the nature of a guardian *ad litem*. It is true that a guardian *ad litem's* powers are limited; they are limited to acting on behalf of the parent in the context of the termination of parental rights proceeding. Once that proceeding is concluded, so is the role of the guardian *ad litem*.

However, in the context of the termination of parental rights proceedings, the guardian has full authority to act on behalf of the parent. The reason for the appointment is that the "parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest." N.C. Gen. Stat. § 7B-1101.1(c) (2005). The majority would have a guardian *ad litem* appointed, but require that the incompetent person or a person of diminished capacity act on his or her own behalf in making all of the fundamental decisions concerning the litigation proceedings, including deciding whether to appeal the case.

I would conclude that it was not the intent of the General Assembly to create a separate class of guardians *ad litem* for adult parents in termination of parental rights proceedings that have no legal authority, and are reduced to the role of holding the parent's hand during the proceeding. There is no more important proceeding in our court system than one where the relationship between a parent and child is forever torn asunder. I would hold that guardians *ad litem* of parents who are incompetent or of diminished capacity are fully empowered to act on their behalf, including the authority to execute a notice of appeal on their behalf pursuant to Rule 3A of the North Carolina Rules of Appellate Procedure.

I would deny DSS's motion to dismiss respondents' appeal based upon the failure of respondents to sign the notice of appeal, and I would reach the merits of respondents' appeal.

IV. Delay in Entry of Orders

Respondents both argue the trial court erred by failing to enter a written order within 30 days after completion of the termination of parental rights hearing as required by N.C.G.S. § 7B-1109(e) and by failing to enter a permanency planning order within thirty days after the hearing as required by N.C.G.S. § 7B-907(c). I disagree.

This Court has held that a trial court's violation of statutory time limits in a juvenile case is not reversible error *per se*; instead, the complaining party must articulate the prejudice arising from the delay in order to justify reversal. *In re S.N.H. & L.J.H.*, 177 N.C. App. 82, 86, 627 S.E.2d 510, 513 (2006) (citations omitted). Respondents have not demonstrated any prejudice resulting from the delays of twenty-five days in filing the termination order and of five days in filing the permanency planning order. This argument is without merit.

V. Mother's Appeal

Mother contends that the court's findings of fact and conclusions of law are not supported by adequate evidence. Mother further argues that "[t]he trial court erred in its conclusions of law . . . in that they are not supported by competent evidence and are not legally correct." I disagree.

The process of terminating parental rights has two stages. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001) (citation omitted). The first stage is the adjudicatory stage, in which "the petitioner has the burden of establishing by clear and convincing evidence that at least one of the statutory grounds listed in N.C.G.S. § 7B-1111 exists." *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (citation omitted). Appellate review of the order terminating parental rights is limited to whether the findings of fact are supported by clear, cogent and convincing evidence, and whether the findings in turn support the court's conclusions of law. *In re McMillon*, 143 N.C. App. 402, 408, 546 S.E.2d 169, 174 (2001) (citations omitted). Findings of fact not challenged on appeal are binding on the appellate court. *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984) (citation omitted).

If the court determines that at least one ground for termination exists, it moves to the dispositional stage, and must consider whether terminating parental rights is in the best interests of the child. *Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908. Our review of

the court's determination regarding the child's best interests is for abuse of discretion. *Anderson*, 151 N.C. App. at 98, 564 S.E.2d at 602 (citation omitted).

Mother's primary argument is that the Americans with Disabilities Act and Adoption and Safe Families Act required DSS to take affirmative and pro-active steps to assist a mentally retarded parent in caring for a child.

However, this argument does not correspond to any of mother's assignments of error. Appellate review is "limited to the issues presented by assignments of error set out in the record on appeal; where the issue presented in the appellant's brief does not correspond to a proper assignment of error, the matter is not properly considered by the appellate court." *Bustle v. Rice*, 116 N.C. App. 658, 659, 449 S.E.2d 10, 11 (1994) (citation omitted). Additionally, this issue was not presented to the trial court. A party will not be allowed to raise an issue for the first time on appeal. *In re Crawford*, 134 N.C. App. 137, 142, 517 S.E.2d 161, 164 (1999). Finally, in *In re C.M.S.*, 184 N.C. App. 488, S.E.2d (2007), we held that the Americans with Disabilities Act does not prohibit the termination of parental rights of a mentally handicapped parent. This argument should be dismissed.

Although mother assigned error to various findings of fact, she did not argue them in her brief, and those which were not argued are deemed abandoned pursuant to N.C.R. App. P. 28(b)(6). As to the remainder, mother does not expressly argue that these findings are not supported by clear, cogent and convincing evidence, but instead makes the argument discussed above.

Finally, mother contends that the court erred during the dispositional stage in failing to expressly state its consideration of the factors listed in N.C.G.S. § 7B-1110 regarding the determination of the best interests of the child. However, there is no requirement that the trial court make findings of fact during the dispositional stage, *Blackburn*, 142 N.C. App. at 613, 543 S.E.2d at 910, and I would hold there was no error committed by the trial court. In making its determination of L.B.'s best interests, the court considered the arguments of counsel, as well as DSS's evidence regarding the child's special medical needs. Mother does not allege an abuse of discretion, and I would find none.

I would affirm the termination of mother's parental rights in the minor child L.B.

VI. Father's Appeal

Father first contends that findings of fact numbers 6, 12-14, 17, 19, and 21-22 are not supported by clear, cogent and convincing evidence. I disagree.

In finding of fact number 6, the court found that the parties consented to continuation of the termination hearing until the week of court commencing 4 December 2006. Father argues there is no evidence of consent.

N.C.G.S. § 7B-1109(d) allows the court to continue, with or without the parties' consent, the termination hearing beyond the 90-day period.

While the order continuing the hearing does not explicitly state that continuance was with the consent of the parties, the finding is not without support in the record. The order states that a necessary witness could not be present at the next available date, which was within the 90-day period, and that the next date that all of the parties could be present was the date on which the termination hearing was actually heard. Nothing in the record shows that respondents objected to the continuance at the time it was entered. I further note that the statute does not require consent of the parties for a continuance to be granted. This argument is without merit.

Father next challenges certain findings of fact on the ground they are not actually findings of fact but recitations of evidence. I would disagree.

An "adjudicatory order shall be in writing and shall contain appropriate findings of fact and conclusions of law." N.C.G.S. § 7B-807(b) (2005). The court's findings in an adjudicatory order "must be more than a recitation of allegations[]" and must include sufficient ultimate facts for this Court to determine whether the order is supported by evidence. *Anderson*, 151 N.C. App. at 97, 564 S.E.2d at 602. "Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts." *Woodard v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951). "An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts." *Id.* at 472, 67 S.E.2d at 645 (citations omitted). "There is nothing impermissible about describing testimony, so long as the court ultimately makes its own findings, resolving any material disputes." *In re C.L.C.*, 171 N.C.

App. 438, 446, 615 S.E.2d 704, 708 (2005), *aff'd per curiam and disc. review improvidently allowed*, 360 N.C. 475, 628 S.E.2d 760 (2006).

I have examined the challenged findings of fact. These findings refer to prior orders entered in this matter, as well as reports and evaluations prepared and conducted by a psychologist and a social worker, all of which are evidentiary facts. After noting these evidentiary facts, the court then made an ultimate finding of fact. A representative example of such finding is finding of fact number 17, in which the court incorporated by reference a copy of the psychological evaluations the parents underwent on 28 April 2006. The court summarized the evaluations and then made an ultimate finding of fact that:

> The court finds that the respondent father has purposefully chosen not to follow the recommendations of the psychological evaluations that were designed to decrease risk to the minor child. The court finds that the cognitive and intellectual limitations and anger management issues are substantially the same on the date of this Termination hearing as when the Department became involved with the respondent father in 2002 and that these limitations are likely to continue into the foreseeable future.

I would overrule this assignment of error.

Father next contends that the court erred in relying upon hearsay and other incompetent evidence, namely the psychological assessment reports, in making its findings of fact. I disagree.

In challenging an alleged erroneous evidentiary ruling in a juvenile proceeding, "an appellant must show that the court relied on the incompetent evidence in making its findings." *In re Huff*, 140 N.C. App. 288, 301, 536 S.E.2d 838, 846 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001) (citation omitted). If there is competent evidence in the record to support the court's findings, "we presume that the court relied upon it and disregarded the incompetent evidence." *Id.*

There is ample competent evidence in the testimony of the psychologist and social workers who conducted the evaluations and prepared the reports to support the court's findings of fact. I would overrule this assignment of error.

In his next argument, father contends that the trial court considered inappropriate evidence in making its findings of fact, and that its

conclusions of law are not supported by its findings of fact, including its determination of L.B.'s best interests. I disagree.

Having concluded that the court did not rely upon inappropriate evidence in making its findings of fact, I would hold that the trial court's findings support its conclusions of law. Although father alleges the court's determination of the child's best interest "is unsupported by appropriate findings of fact," he does not assert abuse of discretion, and I would find none. This argument is without merit, and I would affirm the termination of father's parental rights in the minor child L.B.

Father's final argument is that the court erred in failing to conduct the termination hearing within 90 days after the filing of the petition. I would disagree.

The trial court's failure to conduct a termination hearing within 90 days from the filing of the petition as required by N.C.G.S. § 7B-1109(a) will not result in reversal of the order unless the complaining party can demonstrate prejudice resulting from the delay. *In re S.W.*, 175 N.C. App. 719, 722, 625 S.E.2d 594, 596, *disc. review denied*, 360 N.C. 534, 635 S.E.2d 59 (2006).

Here, no prejudice resulting from the hearing being held approximately three weeks after the 90 days had expired has been shown. This argument is without merit.

Father does not argue his fourth assignment of error in his brief, and acknowledges that the argument has been rendered moot due to the inclusion of page 16 of the Record of Appeal. Mother's identical assignment of error is likewise moot.

VII. Conclusion

I would hold that the guardians *ad litem* were authorized to sign the notice of appeal on behalf of each of the parents.

I would further affirm the order of the trial court terminating the parents' parental rights to the minor child L.B.

STATE OF NORTH CAROLINA v. TORRIANO THOMPSON

No. COA07-351

(Filed 4 December 2007)

1. Identification of Defendants— spontaneous in-court identification—motion to suppress denied

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to suppress an identification made by a witness who immediately said "That's the guy . . ." when defendant was brought into court. The trial court's conclusions were supported by its findings: the witness had seen the shooter before the crime, she had ample opportunity to see him at the crime, and no one had suggested to her that she should identify anyone in court.

2. Criminal Law— continuance denied—preparation for cross-examination

The trial court did not err in a first-degree murder prosecution by denying defendant's motion for a continuance to prepare for cross-examination of a witness who identified defendant as he was brought into the courtroom. Defendant had almost three years to prepare for the possibility that this person, the only eyewitness, might identify him. Also, defendant vigorously cross-examined the witness.

3. Criminal Law— continuance denied—preparation for cross-examination

The trial court did not err in a first-degree murder prosecution by denying a defendant's motion for a continuance to prepare for the cross-examination of a witness who had participated in the crime. The trial took place three years after the shooting and defense counsel conceded that the witness list included this person. Moreover, the testimony was largely cumulative.

4. Evidence— mental health records sealed by trial court—reviewed on appeal

Mental health, substance abuse, or treatment records concerning a witness in a first-degree murder prosecution which had been sealed by the trial court were reviewed on appeal and found to contain no material evidence favorable for the defense.

5. Appeal and Error— preservation of issues—discovery—material not included in record—report not in State's possession

Defendant did not preserve for appeal the issue of his right to discoverable material from jail records and the results of a psychological evaluation conducted privately at the request of a witness's attorney. The record does not include the jail records or a request for them, and the psychological report concerning the witness was not in the State's possession.

Appeal by Defendant from judgment entered 21 April 2006 by Judge J. Gentry Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 October 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General L. Michael Dodd, for the State.

Kathryn L. VandenBerg, for Defendant.

ARROWOOD, Judge.

Defendant, Torriano Thompson, appeals from judgment entered on his conviction of first degree murder and armed robbery. We find no error.

In the early morning hours of 24 May 2003, law enforcement officers from the Charlotte-Mecklenburg Police Department were summoned to the Howard Johnson hotel on Tuckaseegee Road in Charlotte, North Carolina (the Howard Johnson). There they found Arthur Reyes (Reyes) lying on the floor of his room, having died from gunshot wounds to his knee and chest. On 29 May 2003, Defendant was arrested and charged with armed robbery and first degree murder of Reyes. In April 2006, almost three years after his arrest, Defendant was tried before a Mecklenburg County jury.

The State's trial evidence tended to show, in pertinent part, the following: In May 2003 Reyes was employed in the construction industry. On Friday 23 May 2003, Reyes received his salary in cash and checked into Room 147 at the Howard Johnson. Pankaj Patel (Patel), the owner of the Howard Johnson, testified that he noticed a number of visitors to Reyes' room, including Virgil Young (Young), a man whom Patel had previously banned from the hotel. Around midnight on 23 May, Patel and his assistant, Aakush Joshi (Joshi), left the hotel to run some errands. On their return, Patel and Joshi heard gun-

shots and saw Reyes lying on the floor of Room 147. Patel immediately called 911, and law enforcement officers arrived shortly thereafter. Joshi corroborated Patel's testimony, and added that the Howard Johnson was frequented by drug users and prostitutes, and that he had seen an African-American man leaving Room 147 just after the gunshots.

The most important testimony came from three of the State's witnesses: Paula Greene (Greene), Shari Queen (Queen), and Catrina Coates Clarty (Clarty). Greene provided the only eyewitness testimony about the shooting. She testified that on 23 May 2003 she was staying in Room 106 of the Howard Johnson. At that time Greene was a prostitute and frequent user of crack cocaine, with a criminal record that included drug charges. When shown a photograph of Russell Calfee, Greene identified him as a man who was known to give drug users and prostitutes rides in his car in exchange for drugs or money.

On 23 May Calfee gave Greene a ride to the Guest House hotel, located next to the Howard Johnson. The Guest House, like the Howard Johnson, was frequented by drug users and prostitutes. At the Guest House, Greene visited a woman named Jody. Several others were visiting Jody, including Queen, another drug user and prostitute. Queen told the group at Jody's room that she'd been smoking crack with Reyes, and that he had a lot of money. Queen tried to get someone to help her rob Reyes.

Greene did not want to participate in the robbery. Instead she returned to the Howard Johnson, hoping to negotiate a sex-for-money transaction with Reyes before Queen did, in order to "steal her trick." Sometime after midnight, Greene went to Reyes' room, where she and Reyes decided to smoke crack and have sex. A little while later, they heard someone knock on the door and ask to come in. Reyes did not open the door because Greene recognized Queen's voice and threatened to leave if Reyes let Queen in the room. However, when they heard a second knock a few minutes later, Reyes opened the door.

Greene testified that as soon as the door was open, the Defendant burst into the room holding a gun and shouting at Reyes to "Give me your G—d—- money!" Greene urged Reyes to comply with Defendant's demand. When Reyes did not heed Greene's advice, the Defendant shot Reyes several times, and Greene saw Reyes fall on the ground. The Defendant took Reyes' wallet, which Greene described

as having a Harley Davidson™ logo and an attached chain, and then ran out of the room.

Queen's testimony placed Defendant in Reyes' room at the time Reyes was shot, with a plan to rob Reyes. Queen testified that in 2003 she was a drug addict and prostitute. She first met Defendant in Jody's room a few days before Reyes was shot. On 23 May 2003 Queen spent time at Jody's with Defendant and his cousin Eric Sloan (Sloan), before going to the Howard Johnson to engage in prostitution. At the Howard Johnson, Queen introduced herself to Reyes and visited with him in his room for several hours. Reyes told Queen that he wanted crack cocaine and sex, and Queen promised to provide both. She called drug dealers of her acquaintance, and a man she knew as "Duck" came to Room 147 and sold Reyes a small amount of crack cocaine. Queen and Reyes smoked it, and agreed to postpone their sexual activity. A few minutes later, Young joined them and the three smoked crack cocaine and talked. Queen called another drug dealer she knew as "D'Lo," who sold Reyes a larger quantity of crack cocaine. Queen testified that she and Young noticed that Reyes had a lot of money.

After several hours, Queen excused herself and returned to Jody's room at the Guest House. Jody was entertaining guests that night, including Greene, Calfee, Defendant, and Sloan. Queen told the assembled friends about Reyes, stressing how much money he appeared to have and tried to recruit someone to help her rob him. Jody was disinclined to help, as she and Reyes were friends. As previously discussed, Greene took the opportunity to sneak away and arrange a paid "date" with Reyes before Queen did. Queen judged Calfee to be insufficiently stalwart for a robbery. However, when Defendant agreed to help Queen steal Reyes' money, she accepted his offer. Sloan drove Calfee's car back to the Howard Johnson, accompanied by Defendant, Queen, and Calfee. Queen testified that she and Defendant went to Reyes' room in the early morning hours of 24 May, with the intention of robbing Reyes. Their plan was for Queen to knock on the door and gain admittance to Reyes' room. When Reyes opened the door, Queen would leave. Defendant would then pretend to be a drug dealer and when Reyes took out money to pay for drugs, Defendant would grab the money and leave.

At the Howard Johnson, Queen and Defendant disembarked and went to Reyes' room. Queen corroborated Greene's testimony that the first time she knocked Reyes refused to open the door. When she knocked again and Reyes opened the door to admit her, Queen imme-

diately turned and went back to the car. A few minutes after she got back to Calfee's car, Defendant returned, holding a black wallet with a chain. Defendant told Sloan "I had to shoot him." They returned to Jody's room at the Guest House, and Queen and Calfee received $60.00 and $40.00, respectively, for their part in the robbery.

Queen was questioned several times by law enforcement officers, gave recorded statements, and identified photographs of Young, Defendant, Greene, and the drug dealers she knew as Duck and D'Lo. After her third interview, Queen was arrested and charged with first degree murder, armed robbery, and attaining the status of a habitual felon. Shortly before trial, Queen accepted a plea arrangement in which the State agreed to drop the charges of first degree murder and attaining the status of a habitual felon, in exchange for Queen's truthful testimony at Defendant's trial and her plea of guilty to one count of armed robbery and one count of common law robbery. On cross-examination, Queen admitted that: she was a long-time drug user and prostitute; she had an extensive criminal record; she initially lied to the police about her role in the shooting; she had been diagnosed with serious psychological and emotional problems; and she was motivated to testify in part to shorten her own prison sentence.

Catrina Coates Clarty testified that she and Defendant dated for about a year and had broken up several months before Reyes was shot but remained good friends. On 24 or 25 May 2003 Defendant called Clarty and said he needed to talk to her. When they met the next day, Defendant told Clarty that he had shot Reyes. Clarty's recitation of what Defendant told her generally corroborated the testimony of other witnesses. Defendant told Clarty that Queen had described Reyes as an easy target for robbery; that Defendant, Queen, and others drove from the Guest House to the Howard Johnson; and that after Queen knocked on Reyes' door and got him to open it, Defendant went in and told Reyes to "give up" his money. Defendant also admitted to Clarty that he had shot Reyes, although he described the shooting as the accidental result of a "tussle" over Defendant's gun.

Clarty was upset by Defendant's confession and feared that she could face criminal charges unless she shared the information with law enforcement officers. A few days later, Clarty met with Charlotte-Mecklenburg Police Department Homicide Detective Valencia Rivera and gave a statement detailing Defendant's admissions to her. Clarty also worked with law enforcement officers to lure Defendant into

meeting her at a prearranged location, where Defendant was arrested without incident.

Other State's witnesses corroborated the testimony of Queen, Greene, and Clarty. Calfee testified that he was socially acquainted with both Defendant and Sloan, and that in May 2003 he was a crack cocaine user who earned money for drugs by giving people rides in his car. In the early morning hours of 24 May 2003, Calfee, Sloan, Defendant, Greene, and Queen visited Jody in her hotel room and then used Calfee's car to drive next door to the Howard Johnson. Queen and Defendant got out of the car, while Calfee stayed behind and smoked crack cocaine. Queen came back first, followed by Defendant, who said "I shot him in the leg" as he got in the car.

Sloan testified that he was a good friend of Defendant, and that on 24 May 2003 Sloan drove Calfee's car from the Guest House to the Howard Johnson. Sloan understood their purpose was to "pick up" some money, but heard nothing about a robbery. Before leaving Jody's room, Defendant obtained Sloan's gun which he still had several hours later, when Sloan dropped Defendant off at his house.

Chantell Hill testified that in May 2003 she was Defendant's girlfriend, and that she had seen him with a gun several times during their relationship. Hill recalled that on the evening of 23 May 2003 Defendant went out with Calfee. She also identified cell phone accounts corresponding to calls that may have been made by Defendant.

Young testified that he had spent time in Reyes' room with Queen, and that the three had been drinking and smoking crack cocaine. He corroborated Queen's testimony that she had left before he did. At around midnight, Reyes asked Young to go next door to a gas station and buy more beer and cigarettes. However, when he got back to the hotel, Young saw law enforcement officers there, so he did not go to Reyes' room.

The State also presented testimony from law enforcement officers who had investigated the case and taken statements from State's witnesses. Their testimony generally corroborated that of the other witnesses. Additional State's evidence will be discussed as necessary to the issues on appeal.

The Defendant did not present evidence. Following the presentation of evidence, the jury found the Defendant guilty of first degree murder on the theory of felony murder, but found him not guilty of

murder on the theory of premeditation and deliberation. He was also convicted of armed robbery. Defendant was sentenced to life in prison without parole for first degree murder, and judgment was arrested on his conviction of armed robbery. From this judgment, Defendant timely appealed.

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[1] Defendant argues first that the trial court erred by allowing Paula Greene to identify Defendant as the shooter, on the grounds that her identification was based on an impermissibly suggestive procedure, lacked reliability, held a substantial risk of mistaken identification, and had no independent origin. We disagree.

As the only eyewitness to Reyes' shooting, Greene was questioned several times by law enforcement officers. Her statements were recorded and provided to defense counsel prior to trial. In one statement Greene said that, although she did not know the name of the shooter, she had seen him a few times before the shooting, and would recognize him if she saw him in person. However, the State did not ask Greene to participate in any pretrial identification procedures that included Defendant, and, pursuant to a sequestration order, Greene was excluded from the courtroom until it was time for her to testify. Therefore, the first time Greene saw Defendant after the shooting was when she entered the courtroom to testify.

When Greene saw Defendant in court, she immediately said "That's him right there. That's the guy that shot [Reyes.]" Defendant moved to suppress her in-court identification on the grounds that it was based on the impermissibly suggestive circumstance of seeing Defendant in court, and did not have an independent origin. After conducting a *voir dire* hearing, the trial court ruled that Greene's identification was admissible.

Defendant argues on appeal that Greene's identification of Defendant was "equivalent to a pretrial 'show-up' and violated his due process rights. A "show-up" refers to "the practice of showing suspects singly to witnesses for purposes of identification[.]" *State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982). Although show-ups "have been criticized as an identification procedure," they "are not *per se* violative of a defendant's due process rights." *Id.*

"Whether an identification procedure is unduly suggestive depends on the totality of the circumstances[:]

> A due process analysis requires a two-part inquiry. "First, the Court must determine whether the identification procedures

> were impermissibly suggestive." If so, "the Court must then determine whether the [suggestive] procedures created a substantial likelihood of irreparable misidentification."

State v. Rogers, 355 N.C. 420, 432, 562 S.E.2d 859, 868 (2002) (quoting *State v. Fowler*, 353 N.C. 599, 617, 548 S.E.2d 684, 698 (2001)) (citations omitted).

After determining whether a witness's identification should be suppressed, the trial court is required by N.C. Gen. Stat. § 15A-977(f) (2005) to enter an order stating its findings of fact and conclusions of law. On appeal, "[o]ur review of a denial of a motion to suppress by the trial court is 'limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.' " *State v. Barden*, 356 N.C. 316, 340, 572 S.E.2d 108, 125 (2002) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)).

In the instant case, the trial court dictated a proposed order during jury deliberations. The transcript includes the court's proposed findings of fact, but the Record on Appeal does not include a formal written order filed with the Clerk. However, this does not necessarily invalidate the trial court's ruling:

> In *State v. Jacobs*, [(2005)] . . . this Court determined that the trial court did not err when it failed to enter written findings because "the trial court did provide its rationale from the bench." The *Jacobs* Court further relied on a prior decision from our Supreme Court that determined "[i]f there is no material conflict in the evidence on voir dire, it is not error to admit the challenged evidence without making specific findings of fact. . . . In that event, the necessary findings are implied from the admission of the challenged evidence." In this case, as in *Jacobs*, the trial court provided its rationale from the bench and there were no material conflicts in the evidence.

State v. Shelly, 181 N.C. App. 196, 204-05, 638 S.E.2d 516, 523 (2007) (quoting *State v. Phillips*, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980) and citing *State v. Jacobs*, 174 N.C. App. 1, 7-8, 620 S.E.2d 204, 209 (2005), *disc. review denied*, 361 N.C. 565, 640 S.E.2d 389 (2006)), *disc. review denied*, 361 N.C. 367, 646 S.E.2d 768 (2007).

In the case *sub judice*, there was no conflict in the evidence, as Greene was the only *voir dire* witness on the issue of the admissibil-

ity of her identification. She testified, *inter alia*, that she was able to see Defendant clearly in the small hotel room, and that she had no doubt that he was the person who had shot Reyes. Greene also said that, although she did not know Defendant's name at the time of the shooting, she knew she had seen him before in Charlotte.

The court stated its rationale when it dictated its proposed findings of fact, including, in pertinent part, the following:

> 3. That just prior to the suppression motion being made, the witness Greene was called into the courtroom to be the next witness for the State after the lunch recess.
>
> 4. That the State's witnesses were under a sequestration order, and Paula Greene had not been in the court prior to [that]. . . .
>
> 5. That the witness Greene, was sitting [in] the back of the courtroom . . . when the Defendant, who is in the custody of the Sheriff, was brought into the courtroom.
>
> 6. As Defendant walked by Paula Greene, she stated "Oh my God. That's the guy who shot [Reyes]."
>
> 7. That prior to Paula Greene seeing the Defendant in the courtroom . . . no one had suggested in any way that Paula Greene should identify anyone in the court.
>
> 8. That . . . [in an] interview with law enforcement officers, Ms. Greene said that she had seen the person in the area before, but did not know his name. And that information was made available to the Defendant as discovery.
>
> . . . .
>
> 12. That in the hearing before the undersigned . . . Paula Greene identified the Defendant as the man that came into the victim's room, demanded money, shot the victim and then fled from the room.
>
> 13. That Ms. Greene testified she had seen the Defendant on prior occasions around the area where the shooting occurred, but did not know his name.
>
> 14. That Ms. Greene had good opportunity to see and hear the person that shot the victim.

"On a motion to suppress evidence, the trial court's findings of fact are conclusive on appeal if supported by competent evidence."

State v. Campbell, 359 N.C. 644, 661, 617 S.E.2d 1, 12 (2005) (citations omitted). We conclude that the trial court's findings, as announced in court and implied from its admission of Greene's identification of Defendant, were supported by Greene's testimony. "Therefore, the scope of our inquiry is limited to the superior court's conclusions of law, which 'are fully reviewable on appeal.' " *State v. Sinapi*, 359 N.C. 394, 398, 610 S.E.2d 362, 365 (2005) (quoting *State v. Smith*, 346 N.C. 794, 797, 488 S.E.2d 210, 212 (1997)). Based on its findings, the trial court dictated its conclusions:

> 1. That the witness Paula Greene's in-court identification of the Defendant is based on her observations of the shooting at the time that the victim was shot in May of 2003.
>
> 2. That Ms. Greene had ample opportunity to see the shooter and reason to closely observe that person.
>
> 3. That Ms. Greene had seen the shooter before, and recognized him at the time of the shooting.
>
> 4. That no pretrial identification procedure with Ms. Greene involving the Defendant or Defendant's photograph, was conducted prior to Paula Greene recognizing the Defendant in the courtroom.
>
> 5. That no law enforcement officer, prosecutor, or other representative of the State, did anything to suggest Paula Greene should identify the Defendant.
>
> 6. That Paula Greene's in-court identification of the Defendant is based on having seen the shooting of the victim in May of 2003. And is not based on any improperly suggestive action by any representative of the State.

We conclude that the trial court's conclusions were supported by its findings of fact, and that the trial court did not err by denying Defendant's suppression motion. This assignment of error is overruled.

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[2] Defendant made two continuance motions during trial, on the grounds that he needed additional time to prepare for cross-examination of two State's witnesses, Paula Greene and Eric Sloan. In his next two arguments, Defendant asserts that the trial court erred by denying his motions. We disagree.

" 'It is well settled that a motion for continuance is addressed to the discretion of the trial judge and we will not disturb that ruling

absent an abuse of that discretion.' " *State v. Collins*, 160 N.C. App. 310, 319, 585 S.E.2d 481, 488 (2003), *aff'd*, 358 N.C. 135, 591 S.E.2d 518 (2004) (quoting *State v. Wilfong*, 101 N.C. App. 221, 223, 398 S.E.2d 668, 670 (1990)). On appeal, Defendant argues that the denial of his continuance motions was a violation of his due process rights under the state and federal constitutions. However, Defendant made no constitutional argument to the trial court regarding either Greene or Sloan. "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) (citations omitted). Accordingly, we review the trial court's rulings for abuse of discretion.

As discussed above, Greene entered the courtroom shortly before she was scheduled to testify and identified Defendant as the person whom she saw shoot Reyes on 24 May 2003. Upon learning of Greene's positive identification of Defendant, defense counsel asked the court to recess until after lunch, so he could conduct legal research on the admissibility of Greene's identification.

Because the State did not conduct any pretrial identification procedures giving Greene the chance to identify Defendant, neither the State nor Defendant could be certain before trial that Greene would identify Defendant in court as the shooter. On appeal, Defendant contends that he needed additional time to prepare to cross-examine Greene about her identifying him as the shooter. However, the record establishes the following:

> Defendant was informed that Greene was the only eyewitness to the shooting.
>
> Defendant was informed that Greene told law enforcement officers that she had seen the shooter before, and that she would be able to identify him if she saw him again.
>
> The trial was held almost three years after the shooting.

Defendant had almost three years to prepare for the possibility that Greene, the only eyewitness, might identify him as the shooter. We conclude that this was ample time to prepare for cross-examination. We also note that Defendant vigorously cross-examined Greene at trial. On cross-examination, Greene admitted that in May 2003 she was a drug user and prostitute with a criminal record, that she'd smoked crack cocaine before the shooting, that the shooting happened very quickly, and that she was frightened during the incident.

We conclude that the trial court did not abuse its discretion by denying Defendant's motion for a continuance of two or three hours to conduct further legal research. This assignment of error is overruled.

[3] We next consider Defendant's request for a continuance before Sloan testified. It is undisputed that Defendant and Sloan had been close friends for many years, and that Sloan continued to reside in Charlotte after the shooting. Shortly before trial, the State offered Sloan immunity in exchange for his truthful testimony at trial, and Sloan gave a short statement. Defense counsel conceded in court that "I was aware, obviously, that Mr. Sloan was on [the State's] witness list. He is supposedly somebody that was present, and was driving the car, and all those types of things." However, Defendant asked the court for a continuance in order to "see if there is any investigation that we need to do, before Mr. Sloan is on the stand and testifies." We note again that the trial took place almost three years after the shooting. We conclude that Defendant had ample time to anticipate Sloan's testimony or to conduct any necessary investigation.

Moreover, Sloan's testimony was largely cumulative. Sloan testified that: he, Defendant, and Queen drove to the Howard Johnson; although they were there to get some money, he had not heard anyone talk about robbery; Defendant had a gun when they went to the Howard Johnson; Queen and Defendant got out of the car at the Howard Johnson and Queen returned first, followed by Defendant; and that Defendant did not do or say anything unusual upon his return. Notably, Sloan did not testify to Defendant's participation in any criminal activity other than drug use. We conclude that the trial court did not abuse its discretion by denying Defendant's motion to continue the case. This assignment of error is overruled.

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[4] Finally, Defendant asks this Court to "review sealed mental health records to determine whether they include favorable and material evidence for the defense."

"Defendant has a constitutional right to the disclosure of exculpatory or favorable evidence." *State v. Soyars*, 332 N.C. 47, 63, 418 S.E.2d 480, 490 (1992) (citing *United States v. Bagley*, 473 U.S. 667, 676, 87 L. Ed. 2d 481, 490 (1985) and *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963)). Consequently, "[t]he prosecution is required to turn over to a defendant favorable evidence that is material to the guilt or punishment of the defendant. Evidence is considered 'material' if there is a 'reasonable probability' of a different

result had the evidence been disclosed." *State v. Berry*, 356 N.C. 490, 517, 573 S.E.2d 132, 149 (2002) (citations omitted).

"Impeachment evidence . . . falls within the *Brady* rule." *Bagley*, 473 U.S. at 676, 87 L. Ed. 2d at 490. "Moreover, such impeachment evidence may include evidence that a witness suffers from a serious psychiatric or mental illness. The rationale behind allowing impeachment by evidence of prior treatment for psychiatric problems is that although 'instances of . . . mental instability are not directly probative of truthfulness, they may bear upon credibility in other ways, such as to cast doubt upon the capacity of a witness to observe, recollect, and recount[.]' " *State v. Lynn*, 157 N.C. App. 217, 220-21, 578 S.E.2d 628, 630 (2003) (quoting *State v. Williams*, 330 N.C. 711, 719, 412 S.E.2d 359, 364 (1992)) (internal citation omitted). " 'The State, however, is under a duty to disclose only those matters in its possession and is not required to conduct an independent investigation to locate evidence favorable to a defendant.' " *Lynn*, 157 N.C. App. at 221-22, 578 S.E.2d at 632 (quoting *State v. Chavis*, 141 N.C. App. 553, 561, 540 S.E.2d 404, 411 (2000)) (internal quotation marks and citation omitted).

As regards potentially exculpatory information contained in personal treatment records, "[a] defendant's right to exculpatory evidence often must be balanced against the privacy rights of witnesses. In such situations, 'a defendant's due process rights are adequately protected by an *in camera* review of the files of the government agency, after which the trial court must order the disclosure of any information discovered which is material to the defendant's guilt or innocence.' " *Lynn*, 157 N.C. App. at 223-24, 578 S.E.2d at 633 (quoting *State v. Johnson*, 145 N.C. App. 51, 55, 549 S.E.2d 574, 577 (2001)) (citation omitted).

"On appeal the appellate court is required to examine the sealed records to determine whether they contain information that is favorable and material to an accused's guilt or punishment." *State v. Thaggard*, 168 N.C. App. 263, 280, 608 S.E.2d 774, 785 (2005) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 94 L. Ed. 2d 40, 57 (1987)).

In the instant case, Defendant filed pretrial motions seeking *in camera* review of mental health, substance abuse, or treatment records for Queen in the possession of either the Charlotte-Mecklenburg County jail or of "Exodus House," a substance abuse treatment center. Defendant also sought review of the results of a private psychological examination conducted at the request of Queen's

counsel. On 15 March 2006 Judge Timothy L. Patti ordered both the Mecklenburg County Jail and the director of Exodus House to provide copies of Queen's treatment records for the court's review. Judge Patti entered an order on 13 April 2006 stating that the court had conducted an *in camera* review of "most of" those records, and that discoverable materials would be released to the Defendant for use at trial. The order stated further that:

> [A] psychological evaluation of [Queen] represented by Attorney Susan Weigand was done at Attorney Weigand's request and the psychological report is not in the possession of the State of North Carolina . . . the Court will not . . . [give] the Defendant the psychological evaluation of [Queen.]

Certain records from Exodus House that were not reviewed before trial were therefore reviewed by Judge Caudill, who presided over the trial. Excerpts from these Exodus House records were given to Defendant. After the trial, the court entered an order stating that it had sealed the Exodus House records in four envelopes: three envelopes containing all the records provided to the court, and a fourth envelope containing the materials that the court had deemed discoverable and had given Defendant. These four envelopes are the only records requested by defense counsel on appeal, and are the only records included in the Record on Appeal. We have reviewed these records and conclude that they contain no material favorable evidence. This assignment of error is overruled.

[5] On appeal, Defendant also discusses his right to discoverable material from the jail records and from the results of a psychological evaluation conducted privately at the request of Queen's attorney. We conclude that Defendant has not preserved either of these issues for appellate review. Regarding the jail records, the record includes neither the jail records nor any request for same. Therefore, we are unable to review this issue. Additionally, the basis asserted by Defendant for access to the psychological report arranged by Queen's attorney was his right to disclosure by the State of favorable evidence in its possession. We agree with the trial court that this record was not in the State's possession.

For the reasons discussed above, we conclude that the Defendant had a fair trial, free of reversible error.

No error.

Judges CALABRIA and STEPHENS concur.

ELEANOR S. PEGG v. ERVIN JONES AND JOHN DOES 2-10 AND JANE DOE 1-10

No. COA07-147

(Filed 4 December 2007)

1. Adverse Possession— fee simple title—hostility

The trial court did not err by awarding plaintiff fee simple title to the pertinent two-acre tract of property even though defendant contends he owned the property by virtue of adverse possession, because: (1) even if it is assumed that defendant's parents were holding the property adversely on 3 June 1965 and that the altercation with the shotgun occurred on 31 December 1965, the trial court's finding of fact that there was no adverse possession from the shotgun incident until 1994 necessarily defeated defendant's claim of adverse possession; (2) the finding that defendant and/or his predecessors did not meet the hostility requirement for adverse possession after the 1965 shotgun incident until 1994 was supported by competent evidence when the deed granted defendant's parents a life estate in the property, plaintiff submitted an affidavit to the trial court that stated defendant himself had never asserted to her that he owned the property or was holding it adversely at any point, and defendant's parents acknowledged their limited life interest in the real estate in January 1986 and December 1992 on two separate deeds of trust and on a deed of easement in November 1992 with all three documents being notarized; (3) while the evidence with the shotgun was some evidence as to hostility, the evidence was competent to support the trial court's finding of fact that defendant's parents were not holding the property adversely against plaintiff in 1965; and (4) the payment of taxes by defendant and his family does not provide any evidence as to hostility since life tenants have the obligation to list and pay taxes on the property.

2. Appeal and Error— preservation of issues—unnecessary to determine issue based on prior ruling

The issue of whether the trial court erred in determining that neither defendant nor his predecessors in interest held the property under known and visible lines and boundaries does not need to be determined because the Court of Appeals already concluded that the trial court did not err by concluding that defend-

ant and his predecessors in interest did not hold the property adversely for the requisite twenty years.

Judge TYSON dissenting.

Appeal by defendant Ervin Jones from judgment entered 6 October 2006 by Judge Dennis J. Winner in Orange County Superior Court. Heard in the Court of Appeals 12 September 2007.

Alexander & Miller, LLP, by Sydenham B. Alexander, Jr. and Meg K. Howes, for plaintiff-appellee.

Levine & Stewart, by John T. Stewart and James E. Tanner III, for defendant-appellant.

HUNTER, Judge.

Ervin Jones ("defendant") appeals the trial court's order determining that Eleanor S. Pegg ("plaintiff") is the fee simple owner of a two-acre tract of property in Orange County, North Carolina. After careful consideration, we affirm the ruling of the trial court.

This is the second appeal to this Court regarding a property dispute between plaintiff and defendant. *See Pegg v. Doe*, 178 N.C. App. 742, 632 S.E.2d 600 (2006) (unpublished) (vacating and remanding the trial court's order for further findings of fact). On 11 May 2004, plaintiff filed a complaint against defendant to quiet title and for summary ejectment. Plaintiff asserted she was the fee simple owner of fifty acres in Orange County, North Carolina ("the property"). On 7 July 2004, defendant answered and counterclaimed he owned a two-acre tract of the property through adverse possession.

On 13 June 2005, the matter was heard before the trial court. The evidence tended to show defendant's grandparents, Ed and Lourinda Jones ("Ed and Lourinda"), owned the property prior to 1914. Ed and Lourinda orally promised to give each of their ten children five acres of the fifty-acre tract. Cecil and Alease Jones ("Cecil and Alease"), defendant's father and mother and Ed and Lourinda's son and daughter-in-law, lived on a portion of the property. Cecil built a small home on a two-to-five acre tract in 1940.

In January 1954, Ed and Lourinda deeded the property by general warranty deed to Cecil's brother and defendant's uncle, Paschall B. Jones ("Paschall"). The deed to Paschall reserved a life estate for Ed and Lourinda. In January 1958, Ed and Lourinda deeded their life

interest to Paschall by warranty deed. Each conveyance was properly recorded. There was no evidence of whether or not Cecil and Alease had Paschall's permission to live on the property after Paschall acquired title.

On 3 June 1965, Paschall and his wife transferred their entire interest in the property to Carl and Eleanor Pegg ("the Peggs") by a duly recorded warranty deed. On 23 September 1965, the Peggs executed a deed to Cecil and Alease. The deed was recorded on 28 September 1965 and purported to convey a life estate in a two-acre tract of the property to "Cecil Jones and wife."

At some point thereafter in 1965, Carl Pegg ("Carl") came over to Cecil and Alease's home to discuss this arrangement. Cecil retrieved a loaded shotgun, pointed it at Carl, and ordered him to leave the property. Carl left behind a recorded copy of the deed purportedly granting Cecil and Alease a life estate in the two-acre tract the Peggs had surveyed out of the fifty-acre tract.

Thereafter, Cecil and Alease continuously lived upon, paid taxes, and raised their children on the property until their deaths in 1993 and 1994 respectfully. In 1986, Cecil and Alease added a mobile home to the property to replace the residence they had built in 1940.

Since Alease's death in 1994, defendant has continuously occupied the two acres described in the survey and the life estate deed from the Peggs. The trial court found as a fact that defendant has held the two-acre tract adversely to plaintiff since 1994. Defendant's family paid taxes on the property from 1994 through 2000, and defendant paid the taxes on the two-acre tract in 1998, 1999, and 2000. Sometime after 19 March 2001, plaintiff learned of the deaths of Cecil and Alease and also began paying taxes on the property. Plaintiff filed this action on 11 May 2004.

On 21 June 2005, the trial court entered an order, which contained a conclusion of law stating "[t]he [d]efendant, Ervin Jones, has occupied the property without the consent or permission of the [p]laintiff since that time, but has not satisfied the statutory time period sufficient to acquire title by virtue of adverse possession[]" and decreed (1) plaintiff "has and is hereby recognized to have, fee simple title to the two acre tract in question in this litigation[]" and (2) defendant "and any and all other parties unnamed and unknown who may occupy the property are hereby ordered to vacate the property forthwith." Defendant appealed to this Court.

In an unpublished opinion entered 1 August 2006, this Court vacated the trial court's order and remanded the matter for further findings of fact. *Pegg v. Doe*, 178 N.C. App. 742, 632 S.E.2d 600. This Court mandated that the trial court make specific findings of fact on:

> (1) whether Cecil and Alease began adversely possessing the tract at issue on or before the date upon which the Peggs received title to the tract at issue, and (2) whether Cecil and Alease rejected the Peggs' attempt to convey a life estate by forcing Carl Pegg to leave the property.

Id. (slip op. 6-7). Upon remand, the trial court concluded that plaintiff was the fee simple owner of the property.

Defendant, in essence, presents one issue for this Court's review: Whether the trial court erred in determining that defendant had not established fee simple ownership in a two-acre tract of land by adverse possession.

"The standard of review on appeal from a judgment entered after a non-jury trial is 'whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (2002) (quoting *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001)). "The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary." *Resort Realty of the Outer Banks, Inc. v. Brandt*, 163 N.C. App. 114, 116, 593 S.E.2d 404, 408 (2004). Simply stated, where the trial court's findings of fact are supported by competent evidence, and the findings of fact, in turn, support the trial court's conclusions of law, the decision of the trial court will be affirmed. This Court will not reweigh the evidence.

I.

[1] Defendant argues that the trial court erred in concluding that he was not the fee simple holder of a two-acre tract of land in Orange County, North Carolina, by way of adverse possession. We disagree.

Generally,

> no action to recover possession of real property may be maintained when the party in possession, the defendant[] in the action, or those under whom the defendant claims has been in possession of the property under known and visible lines and boundaries *adverse to all other parties for 20 years*.

Kennedy v. Whaley, 55 N.C. App. 321, 326, 285 S.E.2d 621, 624 (1982) (emphasis added); *see also* N.C. Gen. Stat. § 1-40 (2005). If the property had been possessed under color of title, however, the statutory time limit is only seven (7) years. N.C. Gen. Stat. § 1-38 (2005). Here, defendant makes no argument that he took the property under color of title, so the provisions of N.C. Gen. Stat. § 1-40 are applicable.

In the instant case, the trial court stated in its judgment that there was no evidence presented as to one of the two questions on which this Court remanded for findings of fact.[1] The trial court did not specifically state on which of those two questions it lacked evidence to make findings of fact. Our review of the judgment, however, makes it clear that the trial court was referring to the first question.[2] Due to this lack of finding, the dissent would vacate a judgment and remand for further proceedings to make findings of fact on an issue for which no evidence had been presented. Because a finding of fact on that issue is not necessary to the outcome of this case, we disagree with the dissent's reasoning and affirm the ruling of the trial court.

As to the first question, the date on which the Peggs took title to the property was 3 June 1965. The dissent is correct that the trial court made no specific finding as to whether Cecil and Alease began adversely possessing the tract on or before that date. However, the trial court made a finding of fact that defendant presented no evidence that he or his predecessors ever adversely possessed the property before 3 June 1965. Specifically, the trial court stated: "There is no evidence that Cecil Jones ever occupied the property hostilely or adversely to the interest of his parents or adversely to Paschell Jones after he had been deeded the property." Although the finding does not specify the 3 June 1965 date, Paschell Jones and Cecil's parents were the owners of the property up until 3 June 1965, so if the property was never held adversely against Jones or Cecil's parents it necessarily means that it was not held adversely before 3 June 1965.

Additionally, the trial court made a finding of fact that there was no adverse possession after the incident in which Cecil pointed a

1. Specifically, the trial court ruled that "one of the two questions which the Court of Appeals stated did not have sufficient findings of fact and mandated the [c]ourt to find facts with said issue even though there was no evidence presented during trial which related to that issue the [c]ourt therefore FINDS THE FOLLOWING FACTS from the evidence or from the absence of evidence as the case may be[.]"

2. The trial court made a specific finding of fact as to the second question: "This [c]ourt does not infer that the act of pointing a gun and telling Carl Pegg to get out means that Cecil Jones considered that he owned any property in fee simple or that that message was communicated to Dr. Pegg."

loaded shotgun at Carl Pegg in 1965. Specifically, the trial court stated that it did "not infer that the act of pointing a gun and telling Carl Pegg to get out means that Cecil Jones considered that he owned any property in fee simple or that that message was communicated to Dr. Pegg." Therefore, under the facts found by the trial court, the longest defendant and his predecessors could have held the property adversely would have been from 3 June 1965 up until the gun incident occurring later in 1965. Thus, at most, defendant's predecessors could have held the property adversely for less than one year. Under N.C. Gen. Stat. § 1-40, the statutory time period for adverse possession is twenty (20) years.

Accordingly, even if we assume that Cecil and Alease were holding the property adversely on 3 June 1965, and that the altercation with the shotgun occurred on 31 December 1965, the trial court's finding of fact that there was no adverse possession from the shotgun incident until 1994 necessarily defeats defendant's claim of adverse possession.

The finding that defendant and/or his predecessors did not meet the hostility requirement for adverse possession after the 1965 shotgun incident until 1994 is also supported by competent evidence. Sometime after the incident, defendant's mother, Alease, expressed an interest in having others look at the deed left by Carl Pegg. Yet there is no evidence that defendant's parents thereafter communicated with the Peggs to disclaim the life tenancy or otherwise gave notice that they were rejecting the Peggs' permission to possess the two-acre tract. The deed granting defendant's parents a life estate in the property was also recorded in Book 203 at Page 788 of the Orange County Registry on or about 28 September 1965. Additionally, plaintiff submitted an affidavit to the trial court that stated that defendant himself had never asserted to her that he owned the property or was holding it adversely at any point. Moreover, Cecil and Alease acknowledged their limited life interest in the real estate in January 1986 and December 1992 on two separate deeds of trust and on a deed of easement in November 1992. All three documents were notarized.

The dissent attempts to use these documents to support a conclusion that Cecil and Alease were "actually, continuously, and exclusively" occupying the land in question. The document executed in January 1986, however, states that Cecil and Alease have "[a] life estate for the lives of the parties[.]" The December 1992 document states that their interest "consist[s] of a life interest[.]" Finally, the November 1992 document recognizes that Cecil and Alease "are the

owners of a life estate" in the property. Accordingly, this evidence fails to aid defendant's efforts to establish adverse possession.

While the incident with the shotgun is some evidence as to hostility, the evidence discussed above is competent to support the trial court's finding of fact that defendant's parents were not holding the property adversely against plaintiff in 1965. Finally, the payment of taxes by defendant and his family does not provide any evidence as to hostility in this case because "life tenant[s] ha[ve] the obligation to list and pay taxes on the property." *Thompson v. Watkins*, 285 N.C. 616, 620, 207 S.E.2d 740, 743 (1974) (citing N.C. Gen. Stat. §§ 105-302(c)(8); 105-384). Accordingly, that finding of fact is binding on appeal. *Brandt*, 163 N.C. App. at 116, 593 S.E.2d at 408.

After a determination that the findings of fact are binding on this Court, we look only to determine whether those findings support the trial court's conclusions of law. *Id.* In this case, the trial court made a conclusion of law that defendant did not adversely possess the property in question. In order to obtain property by adverse possession, the party making such a claim must be "adverse[] to all other persons[.]" N.C. Gen. Stat. § 1-40. Thus, the trial court's conclusive finding of fact that neither defendant nor his predecessors were adverse from before 1965 until 1994 defeats any claim of adverse possession regardless of whether the property was held adversely from 3 June 1965 until 31 December 1965.

II.

[2] Because we have already held that the trial court did not err in concluding that defendant nor his predecessors in interest held the property adversely for the requisite twenty (20) years, we need not determine whether the trial court erred in determining that neither defendant nor his predecessors in interest held the property under known and visible lines and boundaries.

III.

In summary, we hold that the trial court did not err in awarding plaintiff fee simple title of the property in question. The trial court's order is affirmed.

Affirmed.

Judge McGEE concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge dissenting.

The majority's opinion holds the trial court made sufficient findings of fact to support the conclusion that neither defendant nor his predecessors-in-interest held the property adversely for the requisite twenty years pursuant to N.C. Gen. Stat. § 1-40. I disagree and vote to vacate and remand for additional findings of fact and conclusions of law concerning defendant's adverse possession claim as previously mandated by this Court. I respectfully dissent.

I. Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is 'whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (quoting *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163, *disc. rev. denied*, 354 N.C. 365, 556 S.E.2d 577 (2001)), *disc. rev. denied*, 356 N.C. 434, 572 S.E.2d 428 (2002).

"The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary." *Resort Realty of the Outer Banks, Inc. v. Brandt*, 163 N.C. App. 114, 116, 593 S.E.2d 404, 408, *appeal dismissed and disc. rev. denied*, 358 N.C. 236, 595 S.E.2d 154 (2004) (citations and quotations omitted). "When competent evidence supports the trial court's findings of fact and the findings of fact support its conclusions of law, the judgment should be affirmed in the absence of an error of law." *Id*. The trial court's conclusions of law drawn from the findings of fact are reviewable *de novo*. *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980).

II. Insufficient Findings and Conclusions on Remand

Defendant asserts the trial court failed on prior remand to make required findings of fact or conclusions of law previously mandated by this Court to address whether Cecil and Alease began adversely possessing the property "on or before" the Peggs received title from Paschall on 3 June 1965. Defendant more specifically argues the trial court failed to address or enter any findings of fact or conclusions of law on whether Cecil and Alease were adversely possessing the property *on the date* the Peggs received title and prior to the preparation of the survey or the recordation of the deed which purported to convey a life estate. I agree.

On remand, the trial court made two findings of fact on the issue of whether Cecil and Alease began adversely possessing the tract at issue *before* the Peggs received title:

> 9. There is no evidence presented that Cecil Jones ever occupied the property hostilely or adversely to the interest of his parents or adversely to Paschall Jones after he had been deeded the property.
>
> 10. The Court draws the logical inference from the fact that Ed and Lourinda were living on the property from 1940 until the time of their death and from the fact that they had promised Cecil and the children 5 acre tracts and orally had given Cecil 5 acres that Cecil lived on the property with the permission of Ed and Lourinda while they owned it. There is no evidence as to whether or not Cecil had the permission of Paschall Jones to live on the property when Paschall owned it.

The trial court's order is devoid of any findings regarding whether Cecil and Alease began adversely possessing the property *on 3 June 1965*, the date Paschall deeded the property to the Peggs, or the nature and extent of their claim to the property on this date and thereafter.

The majority's opinion states "the trial court's conclusive finding of fact that neither defendant, nor his predecessors, were adverse before 1965 until 1994 defeats any claim of adverse possession regardless of whether the property was held adversely from 3 June 1965 until 31 December 1965." If Cecil and Alease began adversely possessing the property on 3 June 1965, the date the Peggs took title, the issue becomes what is the effect, if any, of the subsequent survey by the Peggs or their subsequent recordation of a purported life estate on the operation of the twenty year statute of limitations required to adversely possess the property under N.C. Gen. Stat. § 1-40.

> While no North Carolina cases have directly addressed this issue, it seems clear that if the life tenant repudiates the life tenancy, or otherwise takes action which would be the equivalent of an ouster of a fellow tenant in a concurrent ownership situation, he could adversely possess against the remainderman.

James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 14-19, at 668 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999). "For example, in *Morehead v. Harris*, it seems clear that our [Supreme] [C]ourt is recognizing the ability of a life tenant to

adversely possess against the remainderman if notice to the remainderman is present." *Id.* (citing 262 N.C. 330, 137 S.E.2d 174 (1964)).

The supreme courts of sister jurisdictions have addressed this issue:

> It is well established that adverse possession does not run against a remainderman until the death of the life tenant. Similarly, presumption of grant will not be acquired against a remainderman who is unable to assert his rights until an intervening life estate is extinguished and the remainderman is entitled to possession. *However, once the statute of limitations has commenced to run, no subsequent disability will arrest it.*
>
> In *Kubiszyn v. Bradley*, 292 Ala. 570, 298 So.2d 9 (1974), the Alabama Supreme Court held that *once the statutory period for adverse possession commences to run against a landowner, the running of the statutory period is not suspended by the subsequent creation of a life estate and remainders in the property.*
>
> . . . .
>
> Accordingly, we hold that *once the statutory period for adverse possession is activated, the subsequent creation of a life estate will not suspend the running of such period.*

Miller v. Leaird, 307 S.C. 56, 62-63, 413 S.E.2d 841, 844-45 (S.C. 1992) (internal citations omitted) (emphasis supplied). If Cecil and Alease began to adversely possess the property on or after the date the Peggs received title, the subsequent survey and creation of a life estate by the Peggs was not a "subsequent disability to arrest" or toll the running of the statutory period pursuant to N.C. Gen. Stat. § 1-40. *Id.* The majority's opinion wholly fails to address this persuasive authority from sister jurisdictions on the effect of the later filed life estate deed.

The majority's opinion also states "the finding that defendant and/or his predecessors did not adversely possess the property after the 1965 shotgun incident until 1994 is [] supported by competent evidence" and "there is no evidence that defendant's parents thereafter communicated with the Peggs to disclaim the life tenancy or otherwise gave notice that they were rejecting the Pegg's permission to possess the two-acre tract."

Defendant offered substantial evidence tending to show Cecil and Alease adversely possessed the property from 1965 to 1994. It is well-established in North Carolina that adverse possession:

> consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner.

Locklear v. Savage, 159 N.C. 236, 237-38, 74 S.E. 347, 348 (1912). "[O]ccupying land for a residence, fencing it, farming or making permanent improvements on land are ideal methods of showing actual possession . . . " Webster, *supra* § 14-4, at 641. Here, evidence shows defendant and his parents performed many of these acts and more.

Actual Possession becomes hostile when the "use [of the property is] of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim of right." *Dulin v. Faires*, 266 N.C. 257, 261, 145 S.E.2d 873, 875 (1966).

On 3 June 1965, Paschall deeded the property to the Peggs. Defendant's evidence showed Cecil and Alease had made permanent improvements and were living on the property as their sole residence to the exclusion of everyone else. The Peggs did not record the deed purporting to convey a life estate to Cecil and Alease in a 2.08 acre tract the Peggs had surveyed out of the property until 28 September 1965, nearly four months after they acquired title.

This evidence tends to show the Peggs recognized Cecil and Alease had and were asserting an interest in the property and the Peggs' unilateral actions attempted to restrict and confine that interest from a five-acre fee interest to a life estate in a 2.08 acre tract. Cecil and Alease neither signed the survey nor the deed purporting to convey the life estate. Further, when the Peggs attempted to deliver this deed to Cecil and Alease, Cecil retrieved a loaded shotgun, pointed it at Carl Pegg, and stated, "he didn't want to hear nothing [Pegg] had to say, to get out of *his house* or otherwise [Cecil] was going to shoot him." (Emphasis supplied). The Peggs never returned to the property after this incident, did nothing to assert or protect their record ownership in the property, or seek to remove Cecil and Alease from the property.

Cecil and Alease actually, continuously, and exclusively occupied the land as their principle residence. In January 1986, Cecil and Alease borrowed $7,000.00 through a line of credit deed of trust to make improvements to the property and to buy a mobile home as a replacement residence. In 1992, Cecil and Alease borrowed an additional $15,000.00 for the purpose of making improvements to their new residence purchased in 1986. These improvements included adding a permanent room onto the mobile home. Finally, Cecil, Alease, and defendant paid the taxes associated with the 2.08 acre tract of property.

Upon remand, the trial court utterly failed to address and adjudicate this evidence which could support a finding and conclusion that Cecil and Alease exercised continuous, open, exclusive, actual, and notorious "acts of dominion over the land" from 1965 to 1994. *Locklear*, 159 N.C. at 237-38, 74 S.E. at 348. The trial court's order is devoid of any findings of fact or conclusions of law regarding the evidence concerning events that occurred during this time period other than the "shotgun" incident.

"[S]uccessive adverse users in privity with prior adverse users can tack successive adverse possessions of land so as to aggregate the prescriptive period of twenty years." *Dickinson v. Pake*, 284 N.C. 576, 585, 201 S.E.2d 897, 903 (1974) (citation omitted). "There is [] privity of possession between an initial adverse possessor who lived upon land with his family and the members of his family who continued to occupy the land after his death by descent." Webster, *supra* § 14-9, at 654 (citing *Vanderbilt v. Chapman*, 172 N.C. 809, 90 S.E. 993 (1916)).

The trial court's conclusion numbered 3 states, "[defendant] has occupied the two acre tract adversely since the death of his mother in 1994 he has had no color of title and has not adversely possessed said property for a sufficient time to gain title by adverse possession." If the trial court finds that Cecil and Alease adversely possessed the property on or after the date the Peggs received title and the running of the statutory period was not suspended by the subsequent survey and purported creation by the Peggs of a life estate, defendant presented sufficient evidence of tacking to satisfy the requisite statutory period of twenty years for adverse possession.

The trial court made no findings of fact and conclusions of law regarding a dispositive issue on prior remand: whether Cecil and Alease adversely possessed the property *on the date* the Peggs

received title, and their status on the property for nearly four months prior to the recordation of a deed purporting to grant them a life estate in the more than two acres the Peggs had surveyed out of the parent tract. Defendant presented substantial evidence and argument on this issue. This issue was previously mandated to the trial court to address on remand, and should be again.

V. Conclusion

The trial court failed to address and make required findings of fact and conclusions of law on whether Cecil and Alease were adversely possessing the property on the date the Peggs received title and failed to adjudicate and resolve factual issues raised by the evidence. The trial court's 6 October 2006 order should be vacated and remanded once again for additional findings of fact and conclusions of law concerning defendant's adverse possession claim in accordance with the previous unanimous opinion of this Court and this opinion. I respectfully dissent.

STATE OF NORTH CAROLINA v. MICHAEL SCOTT KIRBY, DEFENDANT

No. COA06-1593

(Filed 4 December 2007)

1. Constitutional Law— effective assistance of counsel—failure to renew objection

The defendant in a first-degree murder prosecution could not show ineffective assistance of counsel from his counsel's failure to renew his objection to inculpatory testimony from his wife after his motion in limine was denied. The testimony was admissible in that it related a statement made by defendant in the presence of a third party and was thus not a confidential statement.

2. Homicide— sufficiency of evidence—specific intent to kill

The trial court did not err by denying defendant's motion to dismiss a first-degree murder charge for insufficient evidence of the specific intent to kill. Proof of premeditation and deliberation is also proof of intent to kill, and the State presented evidence of most of the circumstances for proving premeditation and deliberation by circumstantial evidence.

3. Criminal Law— prosecutor's closing argument—charges against accessory—argument accurate

There was no plain error in a prosecution for first-degree murder where the trial court did not intervene during the State's closing argument that an alleged accessory would be tried on another day and needed to be held just as responsible as defendant. The statements in the argument were accurate.

4. Criminal Law— prosecutor's closing argument—testimony from accessory—not personal opinion

There was no plain error in a first-degree murder prosecution where the trial court did not intervene in the prosecutor's closing argument concerning an accessory. Although defendant contended that the prosecutor's statements amounted to personal opinion, the prosecutor simply asked the jurors to take into account their observations of the physical characteristics and courtroom behavior of defendant and the accessory in determining the credibility of defendant's contention that the accessory was the ringleader.

Appeal by defendant from judgment entered 7 June 2006 by Judge C. Phillip Ginn in Rutherford County Superior Court. Heard in the Court of Appeals 22 August 2007.

Attorney General Roy Cooper, by Assistant Attorney General Steven F. Bryant, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for defendant-appellant.

GEER, Judge.

Defendant Michael Scott Kirby appeals from a conviction of first degree murder. On appeal, defendant primarily argues that he was denied effective assistance of counsel when his trial counsel—although having made a motion *in limine*—failed to object to the admissibility, under N.C. Gen. Stat. § 8-57 (2005), of testimony from defendant's wife. We hold that this testimony did not involve a confidential communication since it was made within the hearing of a third person. Therefore, this testimony was admissible, and defendant was not denied effective assistance of counsel.

Facts

The State's evidence tended to show the following facts. The 54-year-old victim, Bobby Dean Kirby, also known as "Buster," lived with defendant and defendant's wife, Wendy Kirby, from mid-2004 until his death on 3 February 2005. Defendant and his wife had an 18-month-old child and also cared for defendant's 15-year-old nephew, D.K. In February 2005, defendant and his wife also allowed Cecil Henson to stay with them for a few weeks.

On 3 February 2005, Wendy drove defendant, Cecil, and Buster in her van to pick up some of Cecil's clothes from his home. Defendant sat in the front passenger seat, while Cecil and Buster sat in the middle row behind Wendy and defendant. Each of the three men was drinking alcohol and became increasingly intoxicated as the night progressed.

During the ride, defendant described an incident in which Buster had taken advantage of a woman while she was sleeping. Cecil became upset by this story, and Cecil and defendant both hit Buster. Subsequently, defendant and Cecil continued to hit Buster because he kept falling asleep and, as a result, was "wast[ing] good liquor."

Sometime between 4:00 and 5:00 a.m., the group returned to defendant's home. When the group arrived home, defendant's nephew, who had been watching the baby, began getting ready for school. As D.K. was leaving for school, defendant told him to "[t]ell Buster bye, he won't be here when you get home from school this afternoon."

Wendy took the baby into her bedroom, which was adjacent to the living room, leaving defendant, Cecil, and Buster in the living room. She heard defendant telling Buster to say his prayers and then heard "gasping sounds" coming from the living room. Soon after, defendant "flung" open the bedroom door and, standing just inside the opened door, "yell[ed]" to Wendy, "Get up, I think I've killed him." Wendy entered the living room and found Buster lying dead on the floor. She told defendant that he should call the police, but defendant refused, stating: "I can't, I've stabbed him. I can't call the law. I've stabbed him in the leg."

At this point, defendant and Cecil agreed not to call the police. Defendant threatened to harm Wendy if she called the police and told Cecil to keep an eye on her. Defendant then directed Wendy and Cecil to take Buster's body across the street and bury it in the woods.

Defendant went to distract a neighbor so that they could drag the body across the street unnoticed. In accordance with the plan, Wendy and Cecil grabbed shovels, took the body across the street, and buried Buster's corpse. Defendant then instructed everyone to burn their clothing. At a later date, however, Cecil turned himself into the police and told law enforcement that defendant had killed Buster. Wendy subsequently admitted helping to bury the body.

On 14 February 2005, Dr. Amy Tharp conducted an autopsy of Buster's body and noted that Buster had injuries consistent with being struck by a blunt instrument, including a fist or a boot. He had also sustained bleeding and swelling of the brain and a fractured Adam's apple. In her opinion, the cause of death was due to "a combination of blunt trauma to the head and the abdomen as well as strangulation injuries to the neck."

On 28 March 2005, defendant was indicted for first degree murder. Following a trial in the Rutherford County Superior Court, a jury found defendant guilty of that charge. The trial court imposed a sentence of life imprisonment without parole, and defendant timely appealed to this Court. Defendant has also filed a motion for appropriate relief in this Court, asserting a claim of ineffective assistance of counsel.

I

[1] Defendant first argues that the trial court erred in admitting Wendy's testimony regarding defendant's statement to her: "Get up, I think I've killed him." Defendant contends that this testimony should have been excluded under N.C. Gen. Stat. § 8-57(c), which provides: "No husband or wife shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage."

Defendant's trial counsel filed a motion *in limine* seeking to exclude Wendy's testimony under the marital privilege. After conducting a voir dire hearing, the trial court denied the motion. At trial, defendant did not renew his objection during Wendy's testimony regarding the challenged statement. Although the affidavit of defendant's trial counsel, filed in support of the motion for appropriate relief, indicates that counsel was relying upon amended N.C.R. Evid. 103 when not renewing his objection,[1] this Court held

1. Rule 103(a)(2) states: "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."

in *State v. Tutt*, 171 N.C. App. 518, 521, 615 S.E.2d 688, 690-91 (2005), that the amendment to Rule 103 constituted a violation of the Separation of Powers Doctrine because it conflicts with N.C.R. App. P. 10(b)(1). Our Supreme Court has recently adopted the reasoning of *Tutt*, with the result that the rule continues to be "that a trial court's evidentiary ruling on a pretrial motion is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial." *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007).

Defendant acknowledges that the issue was not properly preserved and argues in his motion for appropriate relief that the failure to renew the objection constituted ineffective assistance of counsel. Alternatively, defendant asks this Court to invoke Rule 2 of the Rules of Appellate Procedure to review this issue. Defendant did not assign or argue plain error.

In order to prevail on an ineffective assistance of counsel claim,

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

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (emphasis omitted) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984)). Because we conclude that the trial court properly admitted Wendy's testimony, defendant cannot show that he was prejudiced by trial counsel's error in failing to renew his objection.

As noted previously by this Court, "our Supreme Court has interpreted section 8-57 to mean that a [sic] 'spouses shall be incompetent to testify against one another in a criminal proceeding *only if the substance of the testimony concerns a* "confidential communication" between the marriage partners made during the duration of their marriage.' " *State v. Hammonds*, 141 N.C. App. 152, 169-70, 541 S.E.2d 166, 179 (2000) (quoting *State v. Freeman*, 302 N.C. 591, 596, 276 S.E.2d 450, 453 (1981)), *appeal dismissed and disc. review denied in part*, 353 N.C. 529, 549 S.E.2d 860, *aff'd in part*, 354 N.C. 353, 554

S.E.2d 645 (2001), *cert. denied*, 536 U.S. 907, 153 L. Ed. 2d 184, 122 S. Ct. 2363 (2002). This rule "allows marriage partners to speak freely to each other in confidence without fear of being thereafter confronted with the confession in litigation. However, by confining the spousal disqualification to testimony involving 'confidential communications' within the marriage, we prohibit the accused spouse from employing the common law rule solely to inhibit the administration of justice." *Freeman*, 302 N.C. at 596, 276 S.E.2d at 453-54.

Because of the requirement of confidentiality, it is well established that the marital privilege does not apply to communications made within the known hearing of a third party. *See*, *e.g.*, *State v. Gladden*, 168 N.C. App. 548, 553, 608 S.E.2d 93, 96 ("[D]efendant was informed prior to making the phone call that all calls made to outside parties were subject to recording and monitoring. Under these circumstances, the conversation between defendant and his wife was not confidential."), *appeal dismissed and disc. review denied*, 359 N.C. 638, 614 S.E.2d 312 (2005); *State v. Carter*, 156 N.C. App. 446, 457-58, 577 S.E.2d 640, 647 (2003) (" 'The [marital] privilege is waived in criminal cases where the conversation is overheard by a third person.' " (quoting *State v. Harvell*, 45 N.C. App. 243, 249, 262 S.E.2d 850, 854, *appeal dismissed and disc. review denied*, 300 N.C. 200, 269 S.E.2d 626 (1980))), *cert. denied*, 358 N.C. 547 (2004), *cert. denied*, 543 U.S. 1058, 160 L. Ed. 2d 784, 125 S. Ct. 868 (2005); *State v. Setzer*, 42 N.C. App. 98, 104, 256 S.E.2d 485, 489 (holding that "communication here was not confidential, since it was made within the hearing of a third party"), *cert. denied*, 298 N.C. 571, 261 S.E.2d 127 (1979).

In this case, Wendy testified that she was in her bedroom with the door closed. She described the circumstances of the communication as follows: "And then [defendant] comes in, flings the door open and yells at me, 'Get up, I think I've killed him.' " She described her husband's tone of voice as "a loud one." She testified that because defendant was "that loud," someone in the living room could have heard defendant. She specified that "[h]e yelled loud enough to where anyone in the house could have heard him." It is undisputed that Cecil Henson was in the living room at the time of the statement. Wendy confirmed that Cecil was in a position to have heard the statement.

Although defendant states that "it is clear that [he] intended to speak to his wife in confidence," we find this assertion untenable in light of the evidence that defendant "yell[ed]" or "hollered" the statement while standing in the bedroom's open doorway right next to

the living room. Defendant's volume in conjunction with his undisputed knowledge that Cecil was within easy hearing distance establishes a lack of confidentiality that supports the trial court's determination that the communication was not privileged. *See State v. McMorrow*, 314 N.W.2d 287, 292 (N.D. 1982) (holding that trial court properly concluded that marital privilege did not apply when it determined that defendant "could not have reasonably believed that the conversation between his wife and himself would not be overheard by [the third party]" given that statement was made in a voice that could be easily heard by third party, and defendant had knowledge of third party's presence).

Defendant further argues, however, that only the third party—Cecil Henson—and not the spouse could testify as to the statement. Defendant's sole authority for this proposition are cases decided in 1918 and 1929—decisions rendered at a time when spouses were deemed incompetent to testify against each other in a criminal proceeding. *Freeman*, decided in 1981, modified the common law rule so that "spouses shall be incompetent to testify against one another in a criminal proceeding *only if* the substance of the testimony concerns a 'confidential communication' between the marriage partners made during the duration of their marriage." *Freeman*, 302 N.C. at 596, 276 S.E.2d at 453 (emphasis added). Indeed, *Freeman* specifically held that testimony *by the spouse* regarding communications made in the presence of the spouse's brother involved "no confidential communication which would render [the testimony] incompetent under the rule established in this case." *Id.* at 598, 276 S.E.2d at 454-55. Based on *Freeman*, Wendy was competent to testify regarding defendant's statement since it was not made confidentially. *Compare State v. Holmes*, 330 N.C. 826, 835, 412 S.E.2d 660, 665 (1992) (holding that trial court erred in allowing wife to testify as to defendant's intent to kill victim when evidence—that defendant instructed two other men with him to go outside the house because he wanted to talk to his wife—showed that defendant's statements, "made only in the presence of his wife, were induced by the confidence of the martial relationship").

We, therefore, hold that the trial court did not err in admitting Wendy's testimony regarding defendant's statement made in the bedroom doorway. Because there was no error, any failure to object by trial counsel did not prejudice defendant and, as a result, he was not denied effective assistance of counsel. *See State v. Brewton*, 173 N.C. App. 323, 333, 618 S.E.2d 850, 858 ("[B]ecause we find no error in the

instructions, defendant's claim for ineffective assistance of counsel [based on counsel's failure to object to the instructions] must also be rejected."), *disc. review denied*, 360 N.C. 177 (2005), *cert. denied*, —— N.C. ——, 636 S.E.2d 812 (2006).

II

[2] Defendant next argues that the trial court erred in denying his motion to dismiss because the State presented insufficient evidence to support a finding that defendant had the specific intent to kill. In ruling on a defendant's motion to dismiss, the trial court must determine whether the State presented substantial evidence (1) of each essential element of the offense and (2) of the defendant's being the perpetrator. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404, 123 S. Ct. 488 (2002). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). When deciding a motion to dismiss, the trial court must view all of the evidence presented "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818, 115 S. Ct. 2565 (1995).

Our Supreme Court has observed that "[s]pecific intent to kill is an essential element of first degree murder, but it is also a necessary constituent of the elements of premeditation and deliberation." *State v. Jones*, 303 N.C. 500, 505, 279 S.E.2d 835, 838 (1981). As a result, proof of premeditation and deliberation is also proof of intent to kill. *State v. Chapman*, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005). Premeditation and deliberation ordinarily must be proven by circumstantial evidence:

> Among other circumstances from which premeditation and deliberation may be inferred are (1) lack of provocation on the part of the deceased, (2) the conduct and statements of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill-will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

State v. Keel, 337 N.C. 469, 489, 447 S.E.2d 748, 759 (1994) (internal quotation marks omitted), *cert. denied*, 513 U.S. 1198, 131 L. Ed. 2d 147, 115 S. Ct. 1270 (1995).

In this case, the State offered evidence relating to most of these circumstances. Wendy testified to a history of defendant's beating Buster. On the morning Buster was killed, defendant, without provocation, again began hitting Buster while they were driving in the van. When they returned home, defendant told his nephew to tell Buster good-bye because Buster would not be there when the nephew returned from school. Before the nephew left for school, he witnessed defendant again hitting and kicking Buster. Wendy then heard defendant tell Buster to "say [his] prayers," which was immediately followed by gasping noises. According to the medical examiner, Buster's cause of death was a combination of strangulation injuries to the neck, as well as blunt trauma to the head and abdomen. After the killing, defendant orchestrated a scheme to conceal Buster's body and evidence related to his killing.

When this evidence is viewed in the light most favorable to the State, it is sufficient to allow a jury to conclude that defendant had the specific intent to kill the victim. *See State v. Dawkins*, 162 N.C. App. 231, 240, 590 S.E.2d 324, 331 (sufficient evidence of premeditation and deliberation existed when State presented evidence of prior fighting and conflict between defendant and victim; prior to victim's death, defendant threatened to kill the victim; and following the killing, defendant engaged in an "elaborate process of concealing the body"), *disc. review denied*, 358 N.C. 237, 595 S.E.2d 439 (2004). The trial court, therefore, properly denied defendant's motion to dismiss.

III

[3] Finally, defendant argues that the prosecutor made two sets of improper statements in his closing argument. Because defendant did not object, the standard of review is whether the argument was "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*, 538 U.S. 1040, 155 L. Ed. 2d 1074, 123 S. Ct. 2087 (2003). The question this Court must answer is whether the State's argument "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 . . . ." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002).

Defendant first challenges the following assertion by the prosecutor:

> Remember, Cecil is not on trial here. Cecil may have a trial. It's not today and it's not with you as the jury. His trial is down the road somewhere. So don't go back there and say we have to do this because of Cecil. No. Cecil's trial is for another day. Cecil needs to be held just as responsible as the defendant.

In contending that the prosecutor's argument was improper because he knew that Cecil would not be held just as accountable as defendant, defendant points to the indictment of Cecil Henson for accessory after the fact to murder.

Although the record on appeal contains a copy of Cecil Henson's indictment dated 28 March 2005, our review of the record does not indicate that the indictment was ever provided to the court. Inclusion of the indictment in the record on appeal, therefore, violated the Rules of Appellate Procedure. *See* N.C.R. App. P. 9(a)(3) and 11(c). "The role of an appellate court is to review the rulings of the lower court, not to consider new evidence or matters that were not before the trial court." *Citifinancial, Inc. v. Messer*, 167 N.C. App. 742, 748, 606 S.E.2d 453, 457 (Steelman, J., concurring), *appeal dismissed and disc. review denied*, 359 N.C. 410, 612 S.E.2d 317 (2005).

Nevertheless, immediately prior to Cecil Henson's being called by defendant as a witness, the trial court asked whether the charges against Henson were the same or different from those against defendant. The prosecutor responded: "*At this point* it's accessory after the fact of murder." (Emphasis added.) Based on that pending charge, the prosecutor's statements in the closing argument regarding Henson's going to trial were not inaccurate. With respect to the assertion that "Cecil needs to be held just as accountable as the defendant," the record contains no indication—and defendant does not argue on appeal—that the State was in any way precluded from seeking an indictment against Henson for additional charges. As the prosecutor's answer to the trial court indicated, the charge of accessory after the fact was simply the only charge pending *at that point*. We do not, therefore, believe that the prosecutor's statement was so grossly improper as to require the court to intervene *ex mero motu*.

[4] Defendant also asserts that the trial court should have intervened during the following portions of the State's closing argument:

> One thing to remember in all of this is that the Defense is trying to make Cecil stand out. And as I said Cecil's trial is another day. It's not today. But they are trying to make Cecil look like really the bad guy. Well, you saw Cecil when he walked up here. You saw Cecil when he was back at the back the first day when he was asleep in the back. And he is trying to say that Cecil is the ring leader of this and Cecil is the real problem.
>
> Cecil doesn't have the personality to be the real problem in this. This defendant does, not Cecil. Cecil is an old man. You saw him walk up there. And he is the man that they are trying to say is responsible for this. No. The defendant is a young man. The defendant could have stopped it at any point.

According to defendant, these statements amounted to the prosecutor's personal opinion and were not based on evidence that was properly admitted at trial. We disagree.

A prosecutor's closing argument must "(1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passion or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial." *Jones*, 355 N.C. at 135, 558 S.E.2d at 108. Here, the prosecutor was not interjecting his personal opinion or relying upon matters outside the evidence.

The jurors had an opportunity to observe both Cecil Henson and defendant. In the closing argument, the prosecutor simply asked the jurors to take into account those observations regarding physical characteristics and courtroom behavior in determining the credibility of defendant's contention that Cecil Henson was the ring leader. Observing the parties and the witnesses in order to assess credibility and determine the weight to give to the evidence is part of the jury's responsibility. *See State v. Allen*, 360 N.C. 297, 307-08, 626 S.E.2d 271, 281 (holding that prosecutor could properly argue that it "would be hard to imagine" third person shooting the victim because of her size), *cert. denied*, —— U.S. ——, 166 L. Ed. 2d 116, 127 S. Ct. 164 (2006); *State v. Brown*, 320 N.C. 179, 199, 358 S.E.2d 1, 15 ("Urging the jurors to observe defendant's demeanor for themselves does not inject the prosecutor's own opinions into his argument, but calls to the jurors' attention the fact that evidence is not only what they hear on the stand but what they witness in the courtroom."), *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406, 108 S. Ct. 467 (1987). We, therefore,

hold that the trial court did not err in failing to intervene as to this portion of the State's closing argument.

No error.

Judges CALABRIA and JACKSON concur.

C. WAYNE CRAWFORD AND LYNN P. CRAWFORD, PLAINTIFFS v. COLON S. MINTZ, JR., WILLIAM R. OWENS, AND BFD PROPERTIES, INC. D/B/A RE/MAX PROPERTY ASSOCIATES, DEFENDANTS

No. COA07-141

(Filed 4 December 2007)

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

Although plaintiffs contend the trial court erred by granting defendants' summary judgment motion as to plaintiffs' unfair and deceptive trade practices case, this argument is dismissed because plaintiffs failed to argue this assignment of error and thus it is deemed abandoned.

2. Fraud— negligent misrepresentation—reliance—MLS listing for sale of home missing disclaimer

The trial court erred by denying defendant real estate brokers' motion for a directed verdict on plaintiff buyers' claim of negligent misrepresentation arising from information defendants listed on the Multiple Listing Service (MLS) system for the sale of a home stating the pertinent house was connected to the city sewer when in fact it was connected to a septic tank, because: (1) at the time defendants entered information into the MLS system and the time when plaintiffs received that information from plaintiff's real estate agent, an important disclaimer stating that the information was deemed reliable but not guaranteed was somehow omitted; (2) the omission of the disclaimer was a material change in the transmitted information since the accuracy of representations made in MLS listings can be fully understood only when considered alongside any accompanying disclaimers; and (3) a buyer cannot demonstrate reliance on a representation

made in an MLS listing unless that buyer relied on a version of the MLS listing containing the same qualifying language as was originally entered by the listing agent.

Judge STEELMAN dissenting.

Appeal by Plaintiffs from order dated 18 July 2003 by Judge Alice Stubbs in District Court, Wake County; from order dated 22 December 2004 by Judge Jane Gray in District Court, Wake County; and from order dated 11 May 2006 by Judge James R. Fullwood in District Court, Wake County. Appeal by Defendants from order entered 11 May 2006 *nunc pro tunc* 25 July 2005 by Judge James R. Fullwood in District Court, Wake County; and from judgment entered 11 May 2006 by Judge James R. Fullwood in District Court, Wake County. Heard in the Court of Appeals 12 September 2007.

Everett, Gaskins, Hancock & Stevens, LLP, by E.D. Gaskins, Jr. and Michael J. Tadych, for Plaintiffs.

McDaniel & Anderson, LLP, by John M. Kirby and William E. Anderson, for Defendants.

McGEE, Judge.

Thomas Proctor (Mr. Proctor) and Lois Proctor (Ms. Proctor) (collectively, the Proctors) owned a house in Raleigh, North Carolina. The Proctors decided to sell their house in 1997 and contacted Re/Max Property Associates (Defendant Re/Max) for assistance in selling the house. Re/Max agent Colon S. "Semi" Mintz, Jr. (Defendant Mintz) listed the house for the Proctors. William R. Owens (Defendant Owens) was the supervising broker in charge of the Re/Max office.

To assist the Proctors in finding a buyer for their house, Defendant Mintz entered information about the house into a database known as the Multiple Listing Service (MLS). At trial, Defendant Owens described the purpose of the MLS:

> [W]e produce MLS sheets as an invitation for other agents. It's information that is put into the local MLS. They—our associates, if we list something, they—they put all the information in that they can in order to attract another agent to hopefully find it an acceptable offering for their buyer. If their buyers are out there searching for a three-bedroom, two-and-a-half-bath ranch or something like that, that information goes in, and that's basically

> what it is. "Here's an invitation, come take a look at it, see if you like it." And it's just a presentation to the other agents.

Among information Defendant Mintz entered into the MLS was a statement that the Proctors' house was connected to the city sewer. In fact, the Proctors' house was connected to a septic tank. It was not clear why Defendant Mintz thought the house was connected to the city sewer. At trial, Mr. Proctor testified that he could not recall Defendant Mintz ever having asked him if the house was on the city sewer system or on a septic tank. In addition to the sewage system representation, the MLS report for the Proctors' house included the following disclaimer, set off by asterisks: "Information deemed RELIABLE but not GUARANTEED." The MLS report also included a notation stating that the listing was "[p]repared by Judy & Semi Mintz on October 16, 1997."

Wayne Crawford (Mr. Crawford) and Lynn Crawford (Ms. Crawford) (collectively, Plaintiffs) were interested in purchasing a house in Raleigh to rent to their daughter and her roommates. In late 1997 or early 1998, Plaintiffs retained real estate agent Lou Garrabrant (Ms. Garrabrant) to assist them in finding an appropriate house to purchase. Ms. Garrabrant obtained information from Plaintiffs regarding the type of house in which they were interested, and entered the information into the MLS database. Ms. Garrabrant shared the results of her search with Plaintiffs, but Plaintiffs did not develop an interest in any of the properties found through Ms. Garrabrant's initial MLS search. In addition to searching through MLS listings, Plaintiffs drove through certain neighborhoods looking for "for sale" properties. Plaintiffs originally became interested in the Proctors' house after driving by the house and viewing it from the street. Plaintiffs informed Ms. Garrabrant of their interest in the Proctors' house. Ms. Garrabrant accessed the MLS listing for the Proctors' house and printed out a copy of the MLS report for Plaintiffs. However, the version of the listing Plaintiffs received from Ms. Garrabrant was different in two relevant respects from the original MLS listing prepared by Defendant Mintz. First, the printout of the MLS report contained a notation stating that it was "[p]repared by: Lou Garrabrant on January 26, 1998," rather than by Defendant Mintz. Second, the printout of the MLS report did not contain the "Information deemed RELIABLE but not GUARANTEED" disclaimer.

After viewing the MLS listing, Plaintiffs performed an initial visual inspection of the Proctors' house and property. During that inspection, Mr. Crawford entered the crawlspace of the house and

observed the sewage plumbing pipes. Plaintiffs later hired a professional inspector to go over the property. The inspector performed a basic examination of the sewage system, and determined that the sewage system and plumbing functioned properly. However, Plaintiffs and the inspector never discussed whether the Proctors' house had a septic tank. Rather, Plaintiffs continued to believe that the house was connected to the city sewer, as noted in the MLS report.

The Proctors and Plaintiffs entered into an "Offer to Purchase and Contract" agreement on or around 2 February 1998. The Proctors conveyed the property to Plaintiffs on or around 20 March 1998. By the closing date, Plaintiffs had inspected the Proctors' house multiple times. Ms. Crawford admitted at trial that she never asked the Proctors—or any other person—whether the house had a septic tank or whether it was connected to the city sewer.

After purchasing the property, Plaintiffs rented the house to their daughter and her roommates, including a woman named Beverly Bowles (Ms. Bowles). While mowing the lawn one day in March 2000, Ms. Bowles discovered that a portion of the yard was covered in raw sewage. Mr. Crawford hired a plumber to repair what he assumed was a damaged sewer pipe. The plumber informed Mr. Crawford that, in fact, the house was connected to a septic tank, and a leak in the septic system had caused the problem. Plaintiffs hired a septic tank service company to pump out the tank. Plaintiffs also contacted Defendant Mintz and requested that Defendant Re/Max pay for the cost of repairing the septic tank, as well as the cost of connecting the house to the city sewer. While Plaintiffs and Defendant Mintz were negotiating a solution, the septic tank overflowed again in September 2000 and Plaintiffs had the tank pumped out a second time. Plaintiffs hired an attorney and contacted the Proctors for help in resolving the situation. Eventually, Plaintiffs themselves paid to repair the septic tank and to connect to the city sewer.

[1] Plaintiffs filed a claim for negligent misrepresentation against the Proctors and Defendants on 13 November 2001. Plaintiffs also filed a claim against Defendants for unfair and deceptive trade practices. Plaintiffs' complaint included a request for attorneys' fees. The trial court granted summary judgment against Plaintiffs on the question of attorneys' fees on 18 July 2003. Plaintiffs later dismissed their claim against the Proctors on 29 October 2004. The trial court granted Defendants' summary judgment motion as to Plaintiffs' unfair and deceptive trade practices claim on 29 December 2004. Plaintiffs then proceeded to trial on their remaining negligent misrepresentation

claim against Defendants on 31 October 2005. At the close of Plaintiffs' evidence, Defendants moved for a directed verdict. The trial court denied Defendants' motion. The jury subsequently found Defendants liable to Plaintiffs in the amount of $7,278.00, a sum roughly equal to Plaintiffs' cost of repairing the septic tank and connecting the house to the city sewer. Plaintiffs renewed their motion for attorneys' fees, but the trial court denied Plaintiffs' motion. Plaintiffs appeal the trial court's denial of their original and renewed motions for attorneys' fees. Plaintiffs also appeal the trial court's granting of Defendants' summary judgment motion as to Plaintiffs' unfair and deceptive trade practices claim; however, Plaintiffs failed to argue this assignment of error and it is therefore deemed abandoned. *See* N.C.R. App. P. 28(b)(6). Defendants appeal the final judgment against them.

[2] We first consider Defendants' argument that the trial court erred in denying Defendants' motion for a directed verdict. When ruling on a motion for a directed verdict, a trial court "must view the evidence in the light most favorable to the nonmovant, resolving all conflicts in his favor and giving him the benefit of every inference that could reasonably be drawn from the evidence in his favor." *West v. Slick*, 313 N.C. 33, 40, 326 S.E.2d 601, 605 (1985). The trial court may only grant the motion if "the evidence, when so considered, is insufficient to support a verdict in the nonmovant's favor." *Id.* at 40, 326 S.E.2d at 606. We apply de novo review to a trial court's denial of a motion for a directed verdict. *Denson v. Richmond Cty.*, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003).

A party establishes a claim for negligent misrepresentation when that party: "[(1)] justifiably relies [(2)] to his detriment [(3)] on information prepared without reasonable care [(4)] by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988). Defendants contend, *inter alia*, that Plaintiffs failed to present sufficient evidence of element one. Specifically, Defendants argue that although the information they entered into the MLS database was inaccurate, Plaintiffs never received the actual version of the MLS report prepared by Defendants. Rather, Defendants claim that the information they entered was altered and transmitted to Plaintiffs by a third party such that Plaintiffs received a materially different version of the MLS report than the version originally prepared by Defendants. Therefore, according to Defendants, Plaintiffs cannot claim they directly relied on information provided by Defendants.

Defendants rely on *Raritan* for the proposition that a claim for negligent misrepresentation will not lie if the complaining party did not directly rely on information provided by the defendant. In *Raritan*, the plaintiff steel company (Raritan) sued an accounting firm for losses it incurred when it allegedly relied on inaccurate information contained in an audit report. According to Raritan's complaint, the Intercontinental Metals Corporation (IMC) had previously hired the accounting firm to prepare an audit of IMC's financial statements. *Raritan*, 322 N.C. at 203, 367 S.E.2d at 611. The accounting firm completed and published its report. *Id.* at 204, 367 S.E.2d at 612. A number of months later, IMC ordered a large quantity of raw steel from Raritan on an open credit account. *Id.* at 205, 367 S.E.2d at 612. In order to determine whether to extend this credit to IMC, Raritan investigated IMC's financial position. As part of its investigation, Raritan allegedly relied on a Dun & Bradstreet report describing IMC's net worth. *Id.* The Dun & Bradstreet report specifically referenced the accounting firm's published audit as the source for this information. *Id.* Satisfied with IMC's financial status, Raritan extended over two million dollars of credit to IMC. *Id.* However, Raritan later incurred losses as a result of this transaction. It sued the accounting firm, claiming that the firm had negligently misrepresented IMC's net worth to Raritan. *Id.* at 203, 367 S.E.2d at 611.

At trial, the defendant accounting firm brought a motion to dismiss Raritan's claim under N.C.R. Civ. P. 12(b)(6). According to the defendant, Raritan's complaint failed to state a proper claim for negligent misrepresentation because Raritan admitted to having relied not on the defendant's actual audit, but rather on the Dun & Bradstreet report that referenced the defendant's published audit. *Id.* at 204, 367 S.E.2d at 611. The trial court granted the defendant's motion to dismiss, and Raritan appealed. *Id.* Our Supreme Court affirmed the trial court's ruling:

> Raritan alleges that it got the financial information upon which it relied, essentially IMC's net worth, not from the audited statements themselves, but from information contained in Dun & Bradstreet. This allegation, we conclude, defeats Raritan's claim for negligent misrepresentation so as to render it dismissible under Rule 12(b)(6).
>
> . . . We conclude that a party cannot show justifiable reliance on information contained in audited financial statements without showing that he relied upon the actual financial statements themselves to obtain this information.

Id. at 205-06, 367 S.E.2d at 612. The Court specifically stressed that when a party relies on an isolated piece of data not presented in its original form, there is a danger that the party may be relying on incomplete information:

> Isolated statements in the [audit] report, particularly the net worth figure, do not meaningfully stand alone; rather, they are interdependent and can be fully understood and justifiably relied on only when considered in the context of the entire report, including any qualifications of the auditor's opinion and any explanatory footnotes included in the statements.

Id. at 207, 367 S.E.2d at 613. The *Raritan* Court limited its holding to cases involving audited financial statements. It did not address reliance issues involving other types of documents, such as MLS reports. Nonetheless, the Court's reasoning in *Raritan* informs our decision in the case before us today.

The *Raritan* Court was chiefly concerned with two aspects of the alleged reliance in that case. First, the plaintiff did not rely on information received directly from the defendant. Second, the manner in which the information prepared by the defendant was disseminated to the plaintiff raised concerns regarding the reliability of the information.

Both of these concerns are present in the case before us. First, Plaintiffs did not receive the MLS report directly from Defendants. Rather, Defendants posted certain information into an online database, and Plaintiffs accessed this information through the help of two additional intermediaries: the MLS system and Plaintiffs' real estate agent, Ms. Garrabrant. Indeed, Plaintiffs' copy of the MLS report clearly states that it was prepared by Ms. Garrabrant, rather than by Defendants. We recognize that third-party dissemination alone is not always sufficient to negate a claim of negligent misrepresentation. Where the third party acts as a passive intermediary between the party making the representation and the intended recipient, it cannot be said that the mere existence of the third party destroys the possibility of reliance. However, as *Raritan* suggests, the existence of a third-party intermediary may destroy the possibility of reliance when the intermediary's involvement has a material effect on the reliability or completeness of the information being transferred.

In this case, the information Defendants transmitted passed through two intermediaries—the MLS system, and Ms. Garrabrant—

before Plaintiffs obtained it. There was no evidence that Ms. Garrabrant intended for her involvement to affect the reliability of the information contained in the MLS listing. Likewise, there was no evidence that one purpose of the MLS service was to alter the information it stored. In fact, the opposite is true: the MLS system appears to have been designed to pass unaltered information to buyers' agents exactly as that information was entered by sellers' agents. In theory, then, these two intermediaries should have had no material effect on the information Defendants transmitted to Plaintiffs.

The evidence suggests, however, that at some point between the time when Defendants entered the information into the MLS system and the time when Plaintiffs received that information from Ms. Garrabrant, an important disclaimer was somehow omitted. Defendants' copy of the MLS listing for the Proctors' house included the following language: "Information deemed RELIABLE but not GUARANTEED." Plaintiffs' copy of the same MLS listing does not contain this disclaimer. The record is unclear as to why the copy of the MLS listing printed by Ms. Garrabrant did not contain this language. Defendant Owens testified at trial that he believed a similar disclaimer appeared "on most every company's [listings] in the MLS. So if you look at an MLS sheet and it's not on there, I would be very surprised." Ms. Garrabrant testified that when she printed the MLS listing, the disclaimer might have printed onto a second page that was not attached to the copy Plaintiffs received. Ms. Garrabrant could not recall whether she had ever shared that disclaimer with Plaintiffs.

The omission of the disclaimer was clearly a material change in the transmitted information. The *Raritan* Court stressed that certain types of information "can be fully understood and justifiably relied on only when considered in the context of . . . any qualifications . . . and any explanatory footnotes." *Raritan*, 322 N.C. at 207, 367 S.E.2d at 613. Our Courts have not addressed whether representations made in MLS listings can likewise be fully understood only when considered in light of accompanying disclaimers. A decision from one of our neighboring jurisdictions, however, suggests an affirmative answer to this question, at least with regard to square-footage representations. In *Schnellmann v. Roettger*, 627 S.E.2d 742 (S.C. App. 2006), *aff'd by* 645 S.E.2d 239 (S.C. 2007), a South Carolina real estate listing agent advertised a certain house through a local MLS system. The agent listed the square footage of the house as 3,350 square feet. *Id.* at 744. The MLS report also included a disclaimer stating that the square

footage listed was "deemed reliable but not guaranteed," and advised that "IF EXACT SQUARE FOOTAGE IS IMPORTANT TO YOU, MEASURE, MEASURE!" *Id.* Prospective buyers obtained the MLS report for the property and subsequently purchased the house. They later discovered that the actual square footage of the house was closer to 3,000 square feet, *id.*, and filed a claim against the listing agent for negligent misrepresentation. The South Carolina Court of Appeals rejected the buyers' claim. Noting that the buyers "were informed via the MLS listing that the measurements were not precise," the court held that "if the [buyers] relied on the approximation of the square footage contained in the listing, such reliance was unreasonable as a matter of law." *Id.* at 745.

We need not decide whether the existence of a disclaimer in an MLS listing negates the justifiable reliance element of a claim for negligent misrepresentation in North Carolina. It is sufficient for us to recognize that such disclaimers are material provisions in MLS listings that may have important consequences for the legal rights and responsibilities of real estate purchasers, sellers, and their agents. The accuracy of representations made in MLS listings can be fully understood only when considered alongside any accompanying disclaimers. Therefore, we hold that a buyer cannot demonstrate reliance on a representation made in an MLS listing unless that buyer relied on a version of the MLS listing containing the same qualifying language as was originally entered by the listing agent. Plaintiffs have thus failed to satisfy a requisite element of a claim for negligent misrepresentation. The trial court therefore erred in denying Defendants' motion for a directed verdict at the close of Plaintiffs' evidence.

In light of the foregoing, we do not address the parties' remaining assignments of error.

Reversed.

Judge ELMORE concurs.

Judge STEELMAN dissents with a separate opinion.

STEELMAN, Judge, dissenting.

I must respectfully dissent from the majority opinion that reverses the jury verdict based upon its interpretation of the Supreme Court decision in *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 367 S.E.2d 609 (1988).

The majority opinion, based upon *Raritan*, cites two concerns as to plaintiffs' reliance upon the MLS report: (1) the information was not received directly from defendants by plaintiffs; and (2) the manner of the dissemination of the information raised concerns about its reliability.

Raritan involved a suit by creditors against debtor's certified public accountant for negligent misrepresentation of the net worth of the debtor. One of the creditors, Raritan River Steel Company, did not rely directly upon the accountant's audited financial statement, but rather upon a Dun & Bradstreet report that referenced the accountants as the source of its information. The Supreme Court held that the trial court properly dismissed Raritan's claim against the accountants, stating:

> Our holding that reliance on the audited financial statements is required in these kinds of cases stems in part from an understanding of the audit report. An audit report represents the auditor's opinion of the accuracy of the client's financial statements at a given period of time. *See generally* R. Gormley, *The Law of Accountants and Auditors 1-26* (1981). The financial statements themselves are the representations of management, not the auditor. B. Ferst, *Basic Accounting for Lawyers* 11 (3d ed. 1975). Isolated statements in the report, particularly the net worth figure, do not meaningfully stand alone; rather, they are interdependent and can be fully understood and justifiably relied on only when considered in the context of the entire report, including any qualifications of the auditor's opinion and any explanatory footnotes included in the statements.

Raritan at 207, 367 S.E.2d at 613.

The representation in the MLS report that the Proctors' house was connected to city sewer is in no manner interconnected with any of the other representations in the report. Rather, this representation stands completely alone.

The instant case is procedurally in a different posture than *Raritan*. The complaint in *Raritan* affirmatively stated that Raritan Steel had relied upon representations of net worth contained in the Dun & Bradstreet report, not the accountant's report. There was nothing in the record showing that the information in the Dun & Bradstreet report was the same as that contained in the accountant's report. In the instant case, this court is reviewing the trial court's denial of defendants' motion for a directed verdict. As noted by the

majority, we are required to view the evidence presented in the light most favorable to the plaintiffs, and can only overturn the trial court's decision if the evidence was insufficient to support a verdict in favor of plaintiffs.

In the instant case, the evidence was uncontroverted that the Proctors' agent, Mintz, entered into the MLS listing that the property was served by city sewer. It is also uncontroverted that this information was false. There was evidence that plaintiffs' real estate agent, Garrabrant, printed out a copy of the MLS listing, and that this printout failed to contain the language "Information deemed RELIABLE but not guaranteed." However, this evidence does not change the fundamental fact that the express representation of the sewer connection was false, and that the actions of Garrabrant in no way altered this representation.

Thus, based upon the unaltered state of the representation that the property was not served by city sewer, and that this representation was not interconnected with other representations in the MLS report, the rationale of *Raritan* is not applicable.

There was evidence presented at trial that plaintiffs relied upon this representation in purchasing the property. I would hold that the evidence pertaining to the printing of the MLS listing by Garrabrant does not support the dismissal of plaintiffs' claims, but rather goes to the question of whether the plaintiffs relied upon the MLS listing, and whether any reliance was justifiable. It was for the jury to determine the credibility of the witnesses, and the weight to be given to the evidence. The trial court properly submitted the issue of justifiable reliance to the jury. I would hold that no error was committed by the trial court in denying defendants' motion for directed verdict.

IN THE MATTER OF: D.D.F.

No. COA07-798

(Filed 4 December 2007)

1. Termination of Parental Rights— juvenile petition signed by caseworker—no jurisdictional deficit

The trial court had jurisdiction to enter a termination of parental rights order despite respondent's contention that the juvenile petition was not properly signed. The petition and the

record before the trial court clearly demonstrated the petitioning caseworker's status and respondent has never raised any question as to the caseworker's authority; the fact that the petition did not explicitly state that the caseworker who signed the petition was an authorized representative of the director of social services does not create a jurisdictional defect.

2. Termination of Parental Rights— juvenile petition—verified by caseworker—jurisdiction conferred

A juvenile petition was properly verified and conferred jurisdiction on the trial court where the caseworker signed the verification but did not sign the signature line itself. Respondent did not argue that the caseworker was not an authorized representative of the Director of the county DSS, that she exceeded the scope of her authority, or that respondent was prejudiced in any way.

3. Termination of Parental Rights— standing to file petition—custody of juvenile

DSS had custody of a juvenile under an order from a court of competent jurisdiction, so that DSS had standing to file a petition to terminate parental rights under N.C.G.S. § 7B-1104. The petition was signed and verified in accordance with N.C.G.S. § 7B-1104.

4. Termination of Parental Rights— jurisdiction—signature on petition

An order awarding custody of a minor child to DSS was an order from a court of competent jurisdiction, despite respondent's contention concerning the signature on the juvenile petition, and DSS had standing to file a petition for termination of parental rights.

Appeal by respondent-father from order entered 1 May 2007 by Judge Regan A. Miller in District Court, Mecklenburg County. Heard in the Court of Appeals 5 November 2007.

Mecklenburg County Attorney's Office, by Tyrone C. Wade, for petitioner-appellee.

Janet K. Ledbetter, for respondent-appellant.

STROUD, Judge.

Respondent appeals the 1 May 2007 order entered in District Court, Mecklenburg County by Judge Regan A. Miller terminating his parental rights. Respondent argues: (1) the trial court lacked subject matter jurisdiction over the case due to petitioner failing to state specifically in the petition that she was signing as DSS director or an authorized representative thereof, and (2) petitioner lacked standing to file the petition to terminate respondent's parental rights, also due to the improperly signed juvenile petition. We disagree and affirm the 1 May 2007 order of the trial court.

I. Background

On 22 August 2000, petitioner Maureen Geier ("Geier"), a Mecklenburg County Department of Social Services ("DSS") caseworker, filed a juvenile petition pursuant to N.C. Gen. Stat. § 7B-403 alleging that D.D.F. was a dependent juvenile as defined by N.C. Gen. Stat. § 7B-101(9). The petition stated, "Maureen Geier, Petitioner, ha[s] sufficient knowledge or information to believe that a case has arisen which invokes the juvenile jurisdiction of the Court." The record indicates that Geier was a social worker assigned to D.D.F.'s case. The petition's signature line was left blank, but the address line was filled in as "Youth and Family Services." Also, directly under the signature and address line was the verification section of the petition.

The verification section provides that "[t]he undersigned Petitioner, being duly sworn, says that the Petition hereon is true to his own knowledge, except as to those matters alleged on information and belief, and as to those matters, he believes it to be true." This verification was signed by Geier as "petitioner-affiant" and properly notarized. In addition, as required by N.C. Gen. Stat. § 7B-402(b), an "Affidavit as to of Status of Minor Child" ("affidavit") was also verified by Geier and was attached to the petition. The affidavit stated, "Maureen J. Geier, Mecklenburg County Department of Social Services, Youth and Family Services, 720 East Fourth Street, Charlotte, N.C. 28202 . . . is the [p]etitioner in this action."

The first adjudicatory hearing was held on 13 September 2000. Counsel was present for both parents. Although respondent-father ("respondent") was served on 25 August 2000, he was not present. Geier was present and was identified by the adjudicatory hearing order entered on 14 September 2000 as the "social worker" for the case. The 14 September 2000 order granted custody of D.D.F. to Mecklenburg County Youth and Family Services.

Respondent began supervised visitation with D.D.F. in January 2001. By the 9 March 2001 review hearing, respondent's paternity of D.D.F. had been confirmed by paternity testing, although he did not attend this review hearing. As of the 25 September 2001 review hearing, respondent's visitation had been terminated due to missing several visits and failing to contact DSS to cancel. As of 20 September 2001, respondent was incarcerated on charges of robbery with a dangerous weapon, two kidnapping charges, and larceny with a car. He was convicted of robbery with a dangerous weapon in May 2002 and sentenced to an eight year term. Although both parents were represented by counsel at all times since the inception of the case in 2000, neither respondent nor the child's mother ever filed any response to the petition or any motion to strike or to dismiss the petition.

On 8 November 2006, DSS filed a petition to terminate respondent's parental rights. The petition was signed by Kathleen A. Widelski, attorney for petitioner DSS, and was verified by Leslie Buras, a DSS Youth and Family Services division social worker assigned to the case of D.D.F. In an order entered 1 May 2007, following a termination hearing at which respondent was represented by counsel, the district court terminated respondent's parental rights on four grounds: (1) neglecting the child, (2) willfully leaving the minor child in foster care for more than twelve months without making reasonable progress to correct the conditions that led to the child's removal from the home, (3) willfully failing to pay a reasonable cost of the minor child's care while in custody of Youth and Family Services, and (4) willfully abandoning the minor child for at least six months immediately preceding the filing of the petition to terminate parental rights. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (a)(2), (a)(3), and (a)(7) (2005). Respondent appeals.

On appeal respondent argues only two issues: (1) whether the trial court lacked subject matter jurisdiction over the case due to petitioner's failure to state explicitly in the petition that she was signing as DSS director or an "authorized representative" thereof, and (2) whether petitioner had standing to file the petition to terminate respondent's parental rights. We affirm the trial court's order terminating respondent's parental rights.

II. Subject Matter Jurisdiction

[1] Respondent first argues that the trial court lacked subject matter jurisdiction to enter the termination order because the 22 August 2000 juvenile petition was not signed by the director of DSS or an

"authorized representative" of DSS. *See* N.C. Gen. Stat. §§ 7B-101(10), -403(a) (2005). Respondent acknowledges that the petition was verified by Geier and that she was a Mecklenburg County social worker who was assigned to D.D.F.'s case. However, respondent contends that the petition was not signed or verified by the director of DSS or an "authorized representative," because the petition does not state that Geier is an "authorized representative" of the DSS director.

[W]hether a trial court has subject matter jurisdiction is a question of law, which is reviewable on appeal *de novo*." *Ales v. T.A. Loving Co.*, 163 N.C. App. 350, 352, 593 S.E.2d 453, 455 (2004).

> A court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking.
>
> The provisions of our Juvenile Code establish one continuous juvenile case with several interrelated stages. A trial court's subject matter jurisdiction over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified petition. [V]erification of the petition in an abuse, neglect, or dependency action as required by N.C.G.S. § 7B-403 is a vital link in the chain of proceedings carefully designed to protect children at risk on one hand while avoiding undue interference with family rights on the other. [I]n the absence of a verification [. . .] a trial court's order is void *ab initio*.
>
> A petition to terminate parental rights may only be filed by a person or agency given standing by section 7B-1103(a) of our General Statutes. One such agency is any county department of social services [. . .] to whom custody of the juvenile has been given by a court of competent jurisdiction. Standing is jurisdictional in nature and consequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of the case are judicially resolved.

In re S.E.P. & L.U.E., 184 N.C. App. 381, 487, 646 S.E.2d 617, 621 (2007) (internal citations and internal quotations omitted).

A. "Authorized representative" of the Director

Juvenile petitions must be "drawn by the director [of DSS], verified before an official authorized to administer oaths, and filed by the clerk, recording the date of filing." N.C. Gen. Stat. § 7B-403(a). N.C. Gen. Stat. § 7B-101(10) provides that the word "director" as used in

N.C. Gen. Stat. § 7B-403 includes "the director's representative as authorized in G.S. 108A-14." N.C. Gen. Stat. § 7B-101(10). N.C. Gen. Stat. § 108A-14(11) gives the "director" the duty and responsibility "[t]o assess reports of child abuse and neglect and to take appropriate action to protect such children pursuant to the Child Abuse Reporting Law, Article 3 of Chapter 7B of the General Statutes." N.C. Gen. Stat. § 108A-14(a)(11) (2005). N.C. Gen. Stat. § 108A-14(b) provides that "[t]he director may delegate to one or more members of his staff the authority to act as his representative. The director may limit the delegated authority of his representative to specific tasks or areas of expertise." N.C. Gen. Stat. § 108A-14(b) (2005). In light of the role of social services caseworkers as specifically designated by statute, where the record demonstrates that a DSS caseworker is assigned to the child's case and there is no indication whatsoever that the caseworker was not an "authorized representative" of the director or that she was acting outside of her authority, the DSS caseworker is an "authorized representative" of the director for purposes of filing a petition under N.C. Gen. Stat. § 7B-403. *See* N.C. Gen. Stat. §§ 7B-101(10), -403(a), 108A-14(a)(11), (b).

The record demonstrates that Geier is the DSS caseworker who was assigned to D.D.F.'s case at its inception, and as such, she was charged with the duty and responsibility under N.C. Gen. Stat. § 108A-14(a)(11) to investigate the allegations of neglect of D.D.F. and "to take appropriate action to protect such [child] pursuant to the Child Abuse Reporting Law, Article 3 of Chapter 7B." N.C. Gen. Stat. § 108A-14(a)(11). Such "action" would properly include the filing of a petition for adjudication if needed to protect the child. *Id.* The petition and record before the trial court clearly demonstrate the petitioning caseworker's status and respondent has never raised any question as to the caseworker's authority to file a petition for adjudication. Therefore, based upon the statutory duties assigned to the DSS director, which are executed by the caseworkers, Geier was an "authorized representative" of the director who could verify a petition pursuant to N.C. Gen. Stat. § 7B-403. The fact that the petition did not explicitly state that she was an "authorized representative" of the director does not create a jurisdictional defect. *See* N.C. Gen. Stat. §§ 7B-101(10), -403(a), -108A-14(a)(11).

This Court held in *In Re Dj.L., D.L. & S.L.* that a juvenile petition that was signed and verified by the social worker as the "petitioner" and listed the social worker's address as "Youth and Family Services," contained sufficient information from which the trial court could

determine that the social worker had standing to initiate the action under N.C. Gen. Stat. § 7B-403. In Re *Dj.L.*, *D.L. & S.L.* 184 N.C. App. 76, 79, 646 S.E.2d 134, 137 (2007). Both *In Re Dj.L.*, *D.L. & S.L.* and the present case originated in Mecklenburg County and both used exactly the same juvenile petition form. *See In re Dj.L.*, *D.L. & S.L.*, 184 N.C. App. 76, 646 S.E.2d 134. The only potentially significant difference between the petitions is that there was a signature by the social worker, Betty Hooper, on the petition as well as the verification in *In re Dj.L.*, *D.L. & S.L.*, whereas Geier's signature is missing from the petition herein. *Id.* We held in *In re Dj.L.*, *D.L. & S.L.*, that the juvenile petition

> contained sufficient information from which the trial court could determine that [the DSS social worker] had standing to initiate an action under section 7B-403(a). In so holding, we construe[d] the juvenile petition "as to do substantial justice." N.C. Gen. Stat. § 1A-1, Rule 8 (2005) ("All pleadings shall be so construed as to do substantial justice.").

Id. at 80, 646 S.E.2d at 137. We also emphasized in *In re Dj.L.*, *D.L. & S.L.*, and we do here as well, that "respondent has never argued, and does not now argue" that the DSS social worker who signed the verification was "not an authorized representative of the Director of the Mecklenburg County Department of Social Services or that she exceeded the scope of her authority by filing the juvenile petition, *id.* at 80, 646 S.E.2d at 137, but rather respondent argues only that the petition does not explicitly state that Geier is an "authorized representative" of the DSS director.

This case can be distinguished from *In re Dj.L.*, *D.L. & S.L.* only by the fact that in the present case petitioner failed to sign on the petition's signature line and signed only the "petitioner-affiant" signature line about three inches below the petition's signature line, in the verification portion of the petition. *See id.*, 184 N.C. App. 82, 646 S.E.2d 134. However, respondent's argument was not focused on the blank line, but, just as in *In re Dj.L.*, *D.L. & S.L.* respondent argued that the petition failed because it was not signed and verified by the director of DSS or an "authorized representative." *See id.* at 82, 646 S.E.2d at 137. The issue as to Geier's authority to verify the petition is controlled by *In Re Dj.L.*, *D.L. & S.L. See id.* 184 N.C. App. 76, 646 S.E.2d 134. We deem the petition sufficient in light of our decision in *In re Dj.L.*, *D.L. & S.L.*, and thus Geier "had standing to initiate an action under section 7B-403(a)." *See id.* at 82, 646 S.E.2d at 137. Again we stress that "the best practice is to include a distinct statement that the

petitioner is the director of the county department of social services or is an authorized representative of the director." *Id.* at 82, 646 S.E.2d at 137.

B. Failure to Sign Juvenile Petition

[2] In the present case, we have an additional issue which did not arise in *In re Dj.L.*, *D.L. & S.L.*, as Geier did not sign the signature line on the petition itself, although she did sign the verification. *See id.*, 184 N.C. App. 76, 646 S.E.2d 134. We must therefore consider whether the petitioner's signature on the petition's signature line is an additional jurisdictional requirement under N.C. Gen. Stat. § 7B-403 where the petition is properly verified. *See* N.C. Gen. Stat. § 7B-403. N.C. Gen. Stat. § 7B-403(a) requires that the juvenile petition be "drawn by the director, verified before an official authorized to administer oaths, and filed by the clerk." *Id.* N.C. Gen. Stat. § 7B-403(a) does not specifically provide that the petition must be signed in addition to the signature on the verification. *Id.*

We can find no case addressing what it means for the petition under N.C. Gen. Stat. § 7B-403(a) to be "drawn by the director," although the cases citing this statute seem to be using the terms "drawn by" as synonymous with "signed by" the director. *See*, *e.g.*, *In re T.R.P.*, 360 N.C. 588, 636 S.E.2d 787 (2006). North Carolina's reported cases which address the issue of the trial court's jurisdiction where a petition has an alleged deficiency in its signing and verification under N.C. Gen. Stat. § 7B-403(a) have dealt with petitions which were not verified or which were neither signed nor verified. The common element in all of the cases is the absence of a proper *verification*, which our Supreme Court held to be a jurisdictional requirement in *In re T.R.P. See*, *e.g.*, *id.*, 360 N.C. 588, 636 S.E.2d 787. The holding in *In re T.R.P.* was specifically that "the district court could not exercise subject matter jurisdiction here in the absence of the *verification*" of the petition, where the petition was "*neither signed nor verified* by the Director of WCDSS or any authorized representative thereof." *Id.* at 589, 636 S.E.2d at 789 (emphasis added).[1]

1. N.C. Gen. Stat. § 1A-1, Rule 11(a) deals with the "signing" of pleadings and provides that

> [e]very pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified . . . ."

N.C. Gen. Stat. § 1A-1, Rule 11(a) (2005).

Respondent has not argued that Geier is not an authorized representative of the Director of the Mecklenburg County DSS, that she exceeded the scope of her authority by filing the juvenile petition, or that the lack of her signature on a line approximately three inches above the line upon which she did sign for purposes of the verification has prejudiced respondent in any way. We hold that pursuant to *In re T.R.P.*, the petition was properly verified and it does confer jurisdiction on the trial court. See *id.*, 360 N.C. 588, 636 S.E.2d 787.

We also note that the state of North Carolina's standard form entitled "Juvenile Petition (Abuse/Neglect/Dependency)," form AOC-J-130 (New 7/99) does not have a separate line for the petitioner's signature but rather has a blank for the petitioner to sign once, only within the verification portion of the form. We will not now make the failure to sign the petition on a separate signature line which was added by petitioner herein a jurisdictional requirement, where the verification is properly signed. *See, e.g.*, *State v. Sanford Video & News, Inc.*, 146 N.C. App. 554, 560-61, 553 S.E.2d 217, 221 (2001), *disc. rev. denied*, 355 N.C. 221, 560 S.E.2d 359 (2002) (holding that where form AOC-CR-305 provided two blanks for "the judge's signature, one directly underneath the judgment, and the other located at the bottom of the form below the section giving notice of appeal" and the "judge signed the second signature area at the bottom of the form, this was sufficient to constitute signing the judgment and that defendant was not prejudiced thereby").

Despite our holding, we do not condone petitioner's failure to sign on the signature line for petitioner upon its own form and suggest that consistent and careful use of the AOC's standard juvenile forms may help avoid problems with the execution of petitions in the future. We recognize the contributions of the DSS employees who

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Rule 11(a) also provides for the consequences of the failure of a party to "sign" a pleading: "If a pleading, motion, or other paper is not *signed*, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant." *Id.* (emphasis added). Rule 11(a) contemplates the omission of a signature as a simple oversight, which can be easily corrected when pointed out, and then the case may proceed on its course, dealing with the substantive issues raised by the pleadings. Only if the pleading is not signed "promptly" even after omission is pointed out does Rule 11(a) provide for the pleading to be stricken. *See id.* The juvenile code would not prevent this type of minor amendment to a petition, as N.C. Gen. Stat. § 7B-800 provides that "[t]he court may permit a petition to be amended when the amendment does not change the nature of the conditions upon which the petition is based." N.C. Gen. Stat. § 7B-800 (2005). We cannot imagine how the addition of the petitioner's signature in compliance with N.C. Gen. Stat. § 1A-1, Rule 11(a) would "change the nature of the conditions upon which the petition is based." *See* N.C. Gen. Stat. §§ 1A-1, Rule 11(a), 7B-800.

work on these difficult cases, some of which, just as this case, last for many years. However, we reiterate our suggestion as stated in *In re S.E.P. & L.U.E.*, with a slight modification: "We take this opportunity to suggest that properly [signing and] verifying a petition is likely to be the easiest part of DSS's job." *In re S.E.P. & L.U.E.* at 488, 646 S.E.2d at 622. Likewise, we appreciate the work of the trial judges, but we also suggest that checking the petition to make sure that it is both signed, if the petition has a separate signature line, and verified before proceeding with an adjudication hearing is likely to be the easiest part of the trial court's job. This assignment of error is overruled.

C. Petition to Terminate Parental Rights

[3] Respondent also contends the petition to terminate parental rights is deficient because it was not verified by a person who is specifically identified as an "authorized representative of the Director of MCDSS". Respondent concedes that the petition to terminate parental rights was signed by the attorney for DSS, who "may be considered an authorized representative of MCDSS," but argues that the case *sub judice* is "directly on point" with *In Re S.E.P. & L.U.E.*, in which we held that the trial court lacked subject matter jurisdiction for the adjudication order and we therefore also vacated the orders terminating parental rights. *See In Re S.E.P. & L.U.E.*, 184 N.C. App. 481, 646 S.E.2d 617.

However, we have already held above that the original adjudication petition did confer jurisdiction upon the trial court. In *In Re S.E.P. & L.U.E.*, we held that the trial court did not have jurisdiction because the petitions were not properly verified. *Id.* This case is therefore not "directly on point" with *In Re S.E.P. & L.U.E. See id.*

Petitions to terminate parental rights are governed by N.C. Gen. Stat. § 7B-1104, which states that the "petitioner or movant" shall verify the petition. N.C. Gen. Stat. § 7B-1104 (2005). N.C. Gen. Stat. § 7B-1103 provides that "[a]ny county department of social services . . . to whom custody of the juvenile has been given by a court of competent jurisdiction" may file a petition to terminate parental rights. N.C. Gen. Stat. § 7B-1103(a)(3) (2005). Unlike N.C. Gen. Stat. § 7B-403(a), sections 7B-1103 and 7B-1104 do not require a termination petition to be signed or verified by the director of DSS or an "authorized representative." *See* N.C. Gen. Stat. §§ 7B-403(a); -1103, -1104.

We held above that DSS had custody of the juvenile under an order from a court of competent jurisdiction, so that the "county

department of social services" had standing to file a petition under N.C. Gen. Stat. § 7B-1104. *See* N.C. Gen. Stat. § 7B-1103, -1104. The petition to terminate respondent's parental rights filed on 8 November 2006 was signed and verified, in accordance with N.C. Gen. Stat. § 7B-1104. *See id.* Therefore, this assignment of error is overruled.

III. Standing

[4] In respondent's second assignment of error, he contends the petitioner did not have standing to file a petition to terminate parental rights pursuant to N.C. Gen. Stat. § 7B-1103(a)(3) because the trial court did not have jurisdiction to grant DSS custody since the juvenile petition was invalid. In other words, defendant argues that because the juvenile petition did not expressly state it was signed by the DSS director or an "authorized representative" thereof, the court did not have jurisdiction to enter the custody order and D.D.F. was thus not placed into DSS's custody "by a court of competent jurisdiction." *See* N.C. Gen. Stat. §§ 7B-1103(a)(3), -1104.

We have already determined above that the 2000 juvenile petition was sufficient to invoke the subject matter jurisdiction of the trial court. Therefore, the order dated 14 September 2000 awarding custody of the minor child to DSS was an order from a "court of competent jurisdiction." *See id.* Pursuant to N.C. Gen. Stat. § 7B-1103(a)(3), DSS is a "county department of social services . . . to whom custody of the juvenile has been given by a court of competent jurisdiction," and therefore DSS had standing to file a petition for termination of respondent's parental rights. *See* N.C. Gen. Stat. § 7B-1103(a)(3). This assignment of error is overruled.

IV. Conclusion

Respondent has not argued his remaining assignments of error and they are therefore deemed abandoned. N.C.R. App. P. 28(b)(6). For the foregoing reasons, the order of the trial court terminating respondent's parental rights is affirmed.

AFFIRMED.

Judges WYNN and ELMORE concur.

SHIRLEY D. PILES, PLAINTIFF v. ALLSTATE INSURANCE COMPANY AND RICKY MCGHEE, DEFENDANTS

No. COA06-1543

(Filed 4 December 2007)

1. Insurance; Statutes of Limitation and Repose— automobile insurance—UIM coverage—forged rejection—fraud and negligence claims

The trial court erred by dismissing as time barred claims by plaintiff insured whose signature on a UIM rejection form was allegedly forged against defendant automobile insurer and its agent to recover for negligence, fraud, constructive fraud, breach of covenant of good faith and fair dealing with punitive damages, unfair and deceptive trade practices, and breach of fiduciary duty because: (1) the issue of whether a claim is barred by the statute of limitations should be submitted to the jury when the evidence is sufficient to support an inference that the limitations period has not expired; (2) plaintiff asserted facts in her complaint sufficient to support an inference that the limitations periods for her claims had not expired; and (3) the date that plaintiff discovered or should have discovered the alleged fraud and negligence by defendants was a question of fact for the jury.

2. Fraud— actual and constructive fraud—motion to dismiss—requirement to plead with sufficient particularity

The trial court erred by dismissing plaintiff's claims for fraud and constructive fraud for failure to plead with sufficient particularity, because: (1) plaintiff was required to show the existence of a fiduciary duty and a breach of that duty; and (2) the facts and circumstances were alleged with sufficient particularity to support each required element of the claims when plaintiff outlined the fiduciary relationship she had with her insurance agent, as well as with Allstate through the insurance agent, and put forward allegations of forgery and deception that culminated in no UIM coverage from Allstate for plaintiff.

Judge HUNTER concurring in a separate opinion.

Appeal by plaintiff from order entered 13 July 1006 by Judge Orlando F. Hudson, Jr. in Superior Court, Durham County. Heard in the Court of Appeals 21 August 2007.

The Law Office of James Scott Farrin, by Marie D. Lang and Kenneth M. Gondek, for plaintiff-appellant.

Larcade, Heiskell & Askew, PLLC, by Roger A. Askew and Margaret P. Eagles, for defendants-appellees.

WYNN, Judge.

The issue of whether a cause of action is barred by the statute of limitations should be submitted to a jury "[w]hen the evidence is sufficient to support an inference that the limitations period has not expired[.]"[1] Here, the plaintiff alleges fraud and negligence on the part of the defendants, the discovery of which would begin the accrual of her causes of action. Because we find that the date of her discovery is a question of fact for a jury, we reverse the trial court's dismissal of her claims as time-barred as a matter of law.

Plaintiff Shirley Piles alleges, *inter alia*, that Defendant Ricky McGhee, an Allstate Insurance agent, or someone acting on his behalf and with his authority, impermissibly signed Ms. Piles's name in July 1998 to a Selection/Rejection Form for Uninsured Motorist (UM) Coverage or Combined Uninsured/Underinsured Motorist (UM/UIM) Coverage for her insurance policy. The allegedly forged form rejected combined UM/UIM coverage and selected only UM coverage in the amount of $100,000 per person and $300,000 per accident. As a result, Allstate Insurance issued a car insurance policy to Ms. Piles and her husband on 10 July 1998, which offered liability coverage in the amount of $100,000 per person and $300,000 per accident and UM coverage in the amount of $100,000 per person and $300,000 per accident but did not, on its face, provide UIM coverage.

On 27 October 2000, while driving one of the vehicles covered by her Allstate Insurance policy, Ms. Piles was involved in a car accident; she was not at fault in the accident but did suffer personal injuries as a result. Debra Murray, the party responsible for the accident, carried liability coverage through Nationwide Insurance Company in the amount of $50,000 per person and $100,000 per accident.

In February 2003, Ms. Piles contacted Mr. McGhee to determine whether her Allstate Insurance policy contained UIM coverage and was told that it did not. Nonetheless, on 20 February 2003, Ms. Piles

1. *Everts v. Parkinson*, 147 N.C. App. 315, 319, 555 S.E.2d 667, 670 (2001) (citing *Little v. Rose*, 285 N.C. 724, 727, 208 S.E.2d 666, 668 (1974)).

notified Allstate Insurance that she intended to pursue a claim for UIM coverage. On 3 March 2003, Allstate Insurance provided Ms. Piles's attorney with a copy of the Selection/Rejection Form that Ms. Piles alleges was forged.

On 27 October 2003, Ms. Piles filed suit against Ms. Murray in connection with the injuries she suffered in the accident. Her attorney also forwarded a copy of the complaint against Ms. Murray to Allstate Insurance, stating Ms. Piles's belief that the UIM Selection/Rejection Form was forged and that she intended to pursue a claim for UIM coverage. Allstate Insurance advised Ms. Piles on 18 December 2003 that it maintained its position that she did not have UIM coverage under her policy.

On 21 June 2004, Ms. Piles informed Allstate Insurance of her scheduled mediation in the lawsuit against Ms. Murray. She also provided Allstate Insurance with copies of her signature, reiterating her claim that the signature on the UIM Selection/Rejection Form was forged. On 4 November 2004, Nationwide agreed to tender its limits of $50,000 under Ms. Murray's insurance policy to Ms. Piles. On 9 November 2004, Ms. Piles's attorney forwarded Nationwide's letter tendering its limits to Allstate Insurance and requested arbitration with respect to Ms. Piles's claim for UIM coverage of $50,000. Allstate Insurance again asserted that Ms. Piles did not have UIM coverage as part of her insurance policy and denied coverage.

After providing Allstate Insurance with a written report from a handwriting expert stating his belief that the signature on the Selection-Rejection Form was a forgery, Ms. Piles was again denied coverage by Allstate Insurance. She then filed suit against Allstate Insurance and Mr. McGhee on 22 November 2005, alleging fraud, constructive fraud, breach of fiduciary duty, and negligence by Mr. McGhee; and breach of contract, breach of covenant of good faith and fair dealing with punitive damages, fraud, constructive fraud, unfair and deceptive trade practices, negligent infliction of emotional distress, breach of fiduciary duty, and negligence by Allstate Insurance. On 30 January 2006, Allstate Insurance and Mr. McGhee filed an answer and motion to dismiss for failure to state a claim for which relief may be granted and for failure to comport with the statutory pleading requirements for the claims of fraud and constructive fraud. Among other defenses, Allstate Insurance and Mr. McGhee asserted that Ms. Piles should be barred from suit by the applicable statutes of limitations.

The trial court heard arguments on the motion to dismiss on 10 July 2006 and entered an order granting the motion on 13 July 2006, stating in relevant part:

> . . . [T]he court, having carefully reviewed the plaintiff's complaint and having considered the applicable [case law], the applicable statutes of limitations as well as N.C. Rule of Civil Procedure 9(b) with regard to plaintiff's claims for fraud and constructive fraud, and the court finds that plaintiff's complaint fails to state claims upon which relief may be granted and the Motion to [dismiss] should be GRANTED[.]

Ms. Piles now appeals, arguing that the trial court erred in (I) dismissing each of the claims for relief in her complaint as not timely filed and barred by the statute of limitations; and (II) dismissing the claims for fraud and constructive fraud for failure to plead with sufficient particularity. In the alternative, Ms. Piles contends that Allstate Insurance and Mr. McGhee should be equitably estopped from asserting the statute of limitations as a defense.

We note at the outset that "appellate review of the dismissal of an action under North Carolina Rule of Civil Procedure 12(b)(6) is subject to more stringent rules than other procedural postures that come before us." *Okuma Am. Corp. v. Bowers*, 181 N.C. App. 85, 88, 638 S.E.2d 617, 619 (2007); *see also* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2005). We consider only the question of whether, as a matter of law, the allegations of the complaint are sufficient to state a claim upon which relief can be granted under some legal theory. *See id.* Thus, we accept as true the well-pleaded factual allegations of the complaint and review the case *de novo* "to test the law of the claim, not the facts which support it." *White v. White*, 296 N.C. 661, 667, 252 S.E.2d 698, 702 (1979) (quotation and citation omitted); *see also Locklear v. Lanuti*, 176 N.C. App. 380, 383, 626 S.E.2d 711, 714 (2006).

I.

[1] Ms. Piles first argues that the trial court erred in dismissing the claims for relief in her complaint as untimely filed and therefore barred by the statutes of limitations.[2] We agree.

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2. Ms. Piles argued each of the claims asserted in her complaint in her brief to this Court, except for her claim for negligent infliction of emotional distress (NIED) against Allstate Insurance. Although she cited the relevant assignment of error in her brief, she failed to offer any argument in support of her contention that the claim for NIED should not have been dismissed. We therefore deem it abandoned. *See* N.C. R.

According to our state Supreme Court:

> The application of any statutory or contractual time limit requires an initial determination of when that limitations period begins to run. A cause of action generally accrues when the right to institute and maintain a suit arises. Thus, a statutory limitations period on a cause of action necessarily cannot begin to run before a party acquires a right to maintain a lawsuit.

Register v. White, 358 N.C. 691, 697, 599 S.E.2d 549, 554 (2004) (internal citations and quotations omitted); *see also Raftery v. Wm. C. Vick Constr. Co.*, 291 N.C. 180, 186-87, 230 S.E.2d 405, 408 (1976) (holding that, until there is a legal right to maintain the underlying action, "the statute of limitations cannot run"). Although it is well established that "[w]hether a cause of action is barred by the statute of limitations is a mixed question of law and fact[,]" *Jack H. Winslow Farms, Inc. v. Dedmon*, 171 N.C. App. 754, 756, 615 S.E.2d 41, 43, *disc. review denied*, 360 N.C. 64, 621 S.E.2d 625 (2005), we have also noted that "[w]hen the evidence is sufficient to support an inference that the limitations period has not expired, the issue should be submitted to the jury." *Everts v. Parkinson*, 147 N.C. App. 315, 319, 555 S.E.2d 667, 670 (2001) (citing *Little v. Rose*, 285 N.C. 724, 727, 208 S.E.2d 666, 668 (1974)).

With the exception of constructive fraud, which is governed by a ten-year statute of limitations, *see* N.C. Gen. Stat. § 1-56 (2005), each of Ms. Piles's claims is subject to either a three- or four-year statute of limitations. *See id.* § 1-52(1) (three years for an action "[u]pon a contract, obligation or liability arising out of a contract, express or implied"); § 1-52(5) (three years "for any other injury to the person or right of another, not arising on contract and not hereafter enumerated"); § 1-52(9) (three years for "relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."); § 75-16.2 (four years for actions brought under the Unfair and Deceptive Trade Practices Act).

Additionally, with respect to a claim for fraud, we have defined "discovery" within N.C. Gen. Stat. § 1-52(9) as "actual discovery or the time when the fraud should have been discovered in the exercise of due diligence." *Spears v. Moore*, 145 N.C. App. 706, 708, 551 S.E.2d

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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.").

483, 485 (2001). Our Supreme Court recently reiterated that accrual begins "at the time of discovery regardless of the length of time between the fraudulent act or mistake and plaintiff's discovery of it." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 386 (2007) (quoting *Feibus & Co. v. Godley Constr. Co.*, 301 N.C. 294, 304, 271 S.E.2d 385, 392 (1980), *reh'g denied*, 301 N.C. 727, 274 S.E.2d 228 (1981)). Most significantly, "[o]rdinarily, a jury must decide when fraud should have been discovered in the exercise of reasonable diligence under the circumstances." *Id.* Nevertheless,

> When, as here, the fraud is allegedly committed by the superior party to a confidential or fiduciary relationship, the aggrieved party's lack of reasonable diligence may be excused. This principle of leniency does not apply, however, when an event occurs to "excite [the aggrieved party's] suspicion or put her on such inquiry as should have led, in the exercise of due diligence, to a discovery of the fraud."

Id. at 525, 649 S.E.2d at 386 (internal citations omitted).

In the instant case, Ms. Piles does not directly assert a UIM claim against Allstate Insurance in her complaint; rather, she argues that she has no UIM claim to assert due to their fraud and negligence, committed in breach of their fiduciary duty to her. Further, she points to North Carolina General Statutes § 20-279.21(b)(4) (2005), which makes UIM coverage a default provision of all automobile insurance unless explicitly rejected by the insured, to support her breach of contract claim, contending that she did not explicitly reject UIM coverage so Allstate Insurance breached the default provision of the contract by denying her UIM coverage.

As such, the critical dates at issue in Ms. Piles's complaint are when she discovered or reasonably should have discovered the alleged fraud or negligence committed by Allstate Insurance and Mr. McGhee, and when she was denied UIM coverage by Allstate Insurance. Ms. Piles signed her insurance policy in 1998, was injured in the car accident in October 2000, settled with the other driver's insurance company, exhausting those policy limits, in November 2004, and subsequently filed this suit in November 2005. Ms. Piles claims that she had no knowledge that her policy did not include UIM coverage until she was first informed of that fact by Allstate Insurance in February 2003. Additionally, she would not have acquired any contractual right to such coverage—if indeed it should have existed—until November 2004, when she exhausted the other

driver's policy. *See Register*, 358 N.C. at 698, 599 S.E.2d at 555 ("[A]n insured's contractual right to UIM coverage is expressly conditioned on the exhaustion of the liability carrier's policy limits. Exhaustion occurs when the liability carrier has tendered the limits of its policy in a settlement offer or in satisfaction of a judgment." (citations omitted)).

Likewise, according to the facts alleged in her complaint, Ms. Piles's claims for breach of covenant of good faith and fair dealing with punitive damages and unfair and deceptive trade practices are premised at least in part on Allstate Insurance's actions in response to the claim she filed for UIM coverage. As such, they would have accrued in November 2004, when she was denied UIM coverage. Morever, the basis of the constructive fraud claims clearly falls within ten years of the complaint, regardless of what dates are used. The breach of fiduciary duty claims also accrued when Ms. Piles allegedly discovered that her policy did not include UIM coverage. *See State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 551, 589 S.E.2d 391, 398 (2003) (finding that an insured was excused from discovering the terms of her insurance policy by relying on representations made by her fiduciary insurance agent), *disc. review denied and dismissed*, 358 N.C. 241, 594 S.E.2d 194 (2004).

Thus, Ms. Piles has asserted facts in her complaint "sufficient to support an inference that the limitations period has not expired," *Everts*, 147 N.C. App. at 319, 555 S.E.2d at 670; therefore, we find that the trial court erred by finding as a matter of law that her claims are time-barred by the relevant statutes of limitations. The date of Ms. Piles's discovery of the alleged fraud or negligence—or whether she should have discovered it earlier through reasonable diligence—is a question of fact for a jury, not an appellate court. We therefore reverse the trial court's dismissal on statute of limitations grounds of Ms. Piles's claims for negligence, fraud, constructive fraud, breach of contract, breach of covenant of good faith and fair dealing with punitive damages, unfair and deceptive trade practices, and breach of fiduciary duty.

II.

[2] Next, Ms. Piles argues that the trial court erred in dismissing her claims for fraud and constructive fraud for failure to plead with sufficient particularity. We agree.

North Carolina Rule of Civil Procedure 9(b) provides that a complaint alleging fraud must state the relevant circumstances "with par-

ticularity." N.C. Gen. Stat. § 1A-1, Rule 9(b) (2005); *see also Carver v. Roberts*, 78 N.C. App. 511, 513, 337 S.E.2d 126, 128 (1985) ("In order to survive a motion to dismiss pursuant to Rule 12(b)(6), a complaint for fraud must allege with particularity all material facts and circumstances constituting the fraud."). Nevertheless,"[i]t is sufficient if, upon a liberal construction of the whole pleading, the charge of fraud might be supported by proof of the alleged constitutive facts." *Id.* (quoting *Brooks Equip. & Mfg. Co. v. Taylor*, 230 N.C. 680, 686, 55 S.E.2d 311, 315 (1949)).

The elements of fraud are (1) a false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party. *Id.* Similarly, to prove constructive fraud, a claimant must allege facts and circumstances "(1) which created the relation of trust and confidence, and (2) 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." *State ex rel. Long v. Petree Stockton, L.L.P.*, 129 N.C. App. 432, 445, 499 S.E.2d 790, 798 (quoting *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950)), *disc. review dismissed*, 349 N.C. 240, 558 S.E.2d 190 (1998). "Further, an essential element of constructive fraud is that 'defendants sought to benefit themselves' in the transaction." *Id.* (quoting *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 667, 488 S.E.2d 215, 224 (1997)). Indeed, "[p]ut simply, a plaintiff must show (1) the existence of a fiduciary duty, and (2) a breach of that duty." *Keener Lumber Co. v. Perry*, 149 N.C. App. 19, 28, 560 S.E.2d 817, 823, *disc. review dismissed and denied*, 356 N.C. 164, 568 S.E.2d 196 (2002).

After a careful review of Ms. Piles's complaint, and bearing in mind the directive to give it a "liberal construction" upon a Rule 12(b)(6) motion to dismiss, we conclude that the facts and circumstances are alleged with sufficient particularity to support each required element of the claims of fraud and constructive fraud. Ms. Piles outlined the fiduciary relationship she had with Mr. McGhee, her insurance agent, as well as with Allstate Insurance through him, and put forward allegations of forgery and deception that culminated in no UIM coverage from Allstate Insurance for Ms. Piles. These facts are sufficient to withstand a motion to dismiss. We therefore reverse the trial court and reinstate Ms. Piles's claims for fraud and constructive fraud.

Reversed.

Judge HUNTER concurs by separate opinion.

Judge BRYANT concurs.

HUNTER, Judge, concurring.

While I concur with the majority that the ruling of the trial court should be reversed for the reasons stated therein, I write separately to clarify when the statute of limitations began to run against Ms. Piles on her claims of fraud and constructive fraud.

I agree that "the critical dates at issue in Ms. Piles's complaint are when she discovered or reasonably should have discovered the alleged fraud or negligence committed by Allstate Insurance and Mr. McGhee[.]" I disagree, however, that the dates are material as to when she exhausted the policy limits of the other motorist's insurance company.

As the majority correctly notes, this is not "a UIM claim against Allstate Insurance[,]" but is an action alleging, *inter alia*, fraud and constructive fraud. The statute of limitations on actions based on fraud begins to toll when the party actually discovers the fraud "or the time when the fraud should have been discovered in the exercise of due diligence." *Spears v. Moore*, 145 N.C. App. 706, 708, 551 S.E.2d 483, 485 (2001). In this case, Ms. Piles alleged that she discovered the fraud on 3 March 2003, when she received a copy of the Selection/Rejection Form related to UIM. Accordingly, were the jury to agree with her that she should have discovered the fraud on that date and not before, Ms. Piles would have had three years from 3 March 2003 in which to file a suit for fraud and ten years for filing her action on constructive fraud. *See* N.C. Gen. Stat. § 1-52(9) (2005) (party may file action on fraud within three years of discovering the facts constituting the fraud); *Adams v. Moore*, 96 N.C. App. 359, 362, 385 S.E.2d 799, 801 (1989) (aggrieved party has ten years in which to file an action for constructive fraud). She filed her actions within both applicable statutes of limitation in November 2005. Her claims on fraud, therefore, should not have been dismissed for failure to bring a cause of action within the statutory time frame.

Because this is not a UIM action, Ms. Piles was not required to exhaust the policy limitations on the other motorist's liability coverage before bringing her actions for fraud. Were that the case, Ms. Piles

would have three years to file her action for fraud from November 2004, the date on which the policy limits were exhausted. This is not the standard to determine when a claim of fraud begins to toll. Accordingly, I disagree with the majority insofar as they hold that Ms. Piles can wait to exhaust the policy limitations before the statute of limitations starts to run in the present action.

HODGSON CONSTRUCTION, INC., PLAINTIFF v. RONALD WALLACE HOWARD AND WIFE, SHIRLEY ANN HOWARD, DEFENDANTS

No. COA06-1414

(Filed 4 December 2007)

Construction Claims— limited contractor's license—multiple contracts for one building—judgment notwithstanding the verdict

The trial court erred when it concluded that the question in this case was exclusively a matter of law and granted judgment notwithstanding the verdict for defendants. Taking all of the evidence which supports the claim as true, and drawing all reasonable inferences in plaintiff's favor, plaintiff did not exceed the scope of its limited general contractor's license in the construction of defendants' house.

Appeal by plaintiff from judgment entered 23 May 2006 by Judge Catherine C. Eagles in Superior Court, Wilkes County. Heard in the Court of Appeals 7 June 2007.

Vannoy, Colvard, Triplett & Vannoy, P.L.L.C., by Daniel S. Johnson, for plaintiff-appellant.

McElwee Firm, PLLC, by John M. Logsdon, for defendant-appellees.

STROUD, Judge.

Plaintiff appeals from judgment notwithstanding the verdict (JNOV) granted in favor of defendants on the grounds that plaintiff entered into a contract to construct a house for defendants which exceeded the scope of plaintiff's limited general contractor's license.

Because we conclude that the value of the construction of defendants' home did not exceed the scope of plaintiff's limited general contractor's license, we remand for reinstatement of the jury verdict for plaintiff, and entry of judgment for plaintiff.

I. Background

On 14 March 2005, plaintiff filed a complaint against defendants seeking judgment in the sum of $70,315.92, plus interest accruing after 27 September 2004, as well as costs, expenses, and attorney's fees pursuant to Chapter 44A of the North Carolina General Statutes. Plaintiff also filed a claim of lien upon defendants' real property pursuant to Chapter 44A of the North Carolina General Statutes.

The complaint alleged that plaintiff had entered into three contracts with defendants for the construction of a house upon defendants' real property: (1) a cost-plus contract for the construction of a house foundation ("foundation contract"), (2) a cost-plus contract for installation of framing, trusses, and windows in the same house ("window contract"), and (3) a contract dated 31 May 2004 for construction of the house ("house contract").

The house contract provided for plaintiff to construct a "three level house" with heated space of 3472 square feet, with plaintiff to "furnish material and labor—complete in accordance with the above specifications, for the sum of Three hundred fifty nine thousand, six hundred twenty dollars ($359,620.00)." This stated contract price expressly excluded the foundation work, which had already been completed by plaintiff pursuant to the foundation contract, and "floor and roof trusses, rock labor and rock material, elevator, windows and exterior doors" which defendants were to provide. The house contract also identified various "allowances" in specific amounts and items which were to be "furnished" or "provided by owner."

The complaint finally alleged that plaintiff constructed the house as required by the three contracts but defendants failed to pay all sums owed. Plaintiff sought outstanding balances owed of $61,587.93 on the house contract and of $8,727.99 for the foundation and installation of framing, trusses, and windows, a total of $70,315.92, plus interest and various litigation costs.

On 12 April 2005, defendants filed a motion to dismiss plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), alleging that plaintiff did not possess an intermediate contractor's license as

was required by North Carolina law to be able to enforce the contract to construct defendants' house. On 31 May 2005, plaintiff filed an amended complaint, which contained essentially the same allegations as the original complaint, but also alleged that the house contract provided for allowances of $79,389.00 to be paid for by defendants, making the "actual contract price upon which plaintiff would recover . . . $280,231.00[,]" and seeking the same amounts of damages under each portion of the contract as in the original complaint. On 20 June 2005 the trial court denied the motion to dismiss. Defendants filed their answer on 25 July 2005, alleging that the window contract never existed, and alleging by way of counterclaim that plaintiff had breached the house contract by failing to perform the work in a proper manner and by abandoning construction of the home before completion.[1]

Jury trial began on 8 May 2006 and concluded on 11 May 2006. The jury found that defendants did not breach the foundation contract, but that they did breach the house contract and that plaintiff was entitled to recover damages of $51,000.00. On defendants' counterclaim, the jury found that plaintiff did not breach the contract.

Defendants moved in open court for judgment notwithstanding the verdict pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(b). On 23 May 2006, the trial court entered an order granting defendants' motion for JNOV, finding that the house contract was unenforceable by plaintiff because "the plaintiff acted as a general contractor for a single project with a value in excess of three hundred fifty thousand dollars ($350,000), a project for which the plaintiff was unlicensed" under N.C. Gen. Stat. § 87-10(a). The trial court therefore set aside the jury's verdict as to the $51,000.00 awarded as damages to plaintiff. Plaintiff filed notice of appeal from the order granting judgment notwithstanding the verdict.

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1. Defendants' answer did not plead plaintiff's limited license as an affirmative defense, and "[f]ailure to be properly licensed is an affirmative defense which ordinarily must be specifically pleaded." *Barrett, Robert & Woods v. Armi*, 59 N.C. App. 134, 137, 296 S.E.2d 10, 13, *disc. review denied*, 307 N.C. 269, 299 S.E.2d 214 (1982). However, defendants did raise this defense in their motion to dismiss, and because defendants submitted affidavits in support of the motion to dismiss, the motion was actually treated as a motion for summary judgment. *Helms v. Holland*, 124 N.C. App. 629, 633, 478 S.E.2d 513, 516 (1996). "[T]he nature of summary judgment procedure (G.S. 1A-1, Rule 56), coupled with our generally liberal rules relating to amendment of pleadings, require that unpleaded affirmative defenses be deemed part of the pleadings where such defenses are raised in a hearing on motion for summary judgment." 59 N.C. App. at 137, 296 S.E.2d at 13 (citation and quotation marks omitted). Therefore defendants' affirmative defense was properly raised to the trial court.

II. Standard of review

Plaintiff argues that the standard of review for a JNOV is *de novo*. Defendant, citing *Carter v. Foster*, 103 N.C. App. 110, 404 S.E.2d 484 (1991) (holding that the trial court's findings of fact which were supported by competent evidence were conclusive on appeal when the parties waived trial by jury in favor of a bench trial), urges us to consider the trial court's ruling on the JNOV as if it was made at a bench trial and accord deference to factual findings of the trial court which are supported by evidence in the record.

> A motion for judgment notwithstanding the verdict
>
> is essentially a renewal of an earlier motion for directed verdict. Accordingly, if the motion for directed verdict could have been properly granted, then the subsequent motion for judgment notwithstanding the verdict should also be granted. In considering any motion for directed verdict [or JNOV], the trial court must view all the evidence that supports the non-movant's claim *as being true* and that evidence must be considered in the light most favorable to the non-movant, giving to the non-movant the benefit of every reasonable inference that may legitimately be drawn from the evidence with contradictions, conflicts, and inconsistencies being resolved in the non-movant's favor. This Court has also held that a motion for judgment notwithstanding the verdict is cautiously and sparingly granted.

Bryant v. Nationwide Mut. Fire Ins. Co., 313 N.C. 362, 368-69, 329 S.E.2d 333, 337-38 (1985) (internal citations and quotation marks omitted) (emphasis added). "When a judge decides that a directed verdict [or JNOV] is appropriate, actually he is deciding that the question has become one exclusively of law and that the jury has no function to serve." N.C. Gen. Stat. § 1A-1, Rule 50, comment. However, "a genuine issue of fact must be tried by a jury unless this right is waived." *In re Will of Jarvis*, 334 N.C. 140, 143, 430 S.E.2d 922, 923 (1993) (stating the standard of review for a directed verdict).

Since plaintiff did not waive its right to a jury trial, defendants have misplaced their reliance on *Carter* for the proposition that deference is due the trial court's findings of fact in the case *sub judice*. Rather, the trial court's findings of fact and conclusions of law have no legal significance in an order granting JNOV. *Kelly v. Harvester Co.*, 278 N.C. 153, 157, 179 S.E.2d 396, 397 (1971). While findings of fact in a JNOV order may assist this Court in understanding the

reason that the trial judge granted JNOV, *see People's Center, Inc. v. Anderson*, 32 N.C. App. 746, 233 S.E.2d 694 (1977), "our review of [a] motion for judgment notwithstanding the verdict is *de novo* . . . ." *N.C. Indus. Capital, LLC v. Clayton*, 185 N.C. App. 356, 370, 649 S.E.2d 14, 25 (2007). Therefore, "we consider the matter anew and . . . freely substitute our judgment for that of the trial court regardless of whether the trial court made findings of fact and conclusions of law." 185 N.C. App. at 371, 649 S.E.2d at 25 (internal brackets and quotation marks omitted).

In fact, "[t]he standard is high for the party seeking a JNOV: the motion should be denied if there is more than a scintilla of evidence to support the plaintiff's *prima facie* case." *Cox v. Steffes*, 161 N.C. App. 237, 243, 587 S.E.2d 908, 912-13 (2003) (citation, quotation marks and emphasis omitted), *disc. review denied*, 358 N.C. 233, 595 S.E.2d 148 (2004). Furthermore, where as here, a JNOV is granted to the defendants on the grounds of an affirmative defense, it "will be more closely scrutinized." *Bryant*, 313 N.C. at 369, 329 S.E.2d at 338.

In sum, our task is to determine if the trial court correctly concluded that this case is exclusively a matter of law, by which defendants were entitled to prevail. In making this determination, we presume that all evidence supporting plaintiff's claim is true, and draw all inferences arising from the evidence in plaintiff's favor.

III. Analysis

Plaintiff contends that the trial court erred in granting defendants' motion for JNOV on the grounds that plaintiff was barred from recovery because the stated contract price exceeded $350,000.00, the maximum allowed by plaintiff's limited general contractor's license. Specifically, plaintiff argues that although the stated contract price for which plaintiff agreed to construct defendants' house was $359,620.00, that amount must be reduced by $79,389.00,[2] the sum of the allowances over which defendants retained control and paid for. Plaintiff contends the value of the project was the *net* of the stated contract price and the allowances, $280,231.00, an amount within the scope of plaintiff's limited general contractor's license. Alternatively, plaintiff argues that even if the value of the contract exceeded its license limit, it is still entitled to enforce the contract up to the amount of its limited license. Defendants respond that the value of the project includes the house contract, including allowances, of

2. Our careful scrutiny of the contract reveals only $61,624.00 in allowances, but both sides agree in their respective briefs that the allowances totaled $79,389.00.

$359,620.00; the amount paid pursuant to the foundation contract, $30,492.19; and the value of windows, doors, and floor and roof trusses paid for directly by defendants, $49,671.66. Adding those figures together, defendants contend that the value of the project was $439,783.85, an amount well in excess of plaintiff's limited general contractor's license at the time the house contract was executed and at all relevant times thereafter. Defendants, citing *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E.2d 507 (1968), concludes that plaintiff may therefore not enforce the house contract at all.

Because defendants alleged that more than one contract was included in a single project—the house—we must first determine the meaning of "value of a *single* project" for purposes of applying N.C. Gen. Stat. § 87-10.[3] In interpreting the language of N.C. Gen. Stat. § 87-10, as with any statute, we presume "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) (citation omitted).

Our case law is not entirely clear on the meaning of "value of a single project," but it appears to have the same meaning as "cost of [an] undertaking," the operative language of N.C. Gen. Stat. § 87-1.[4] *See generally Sample v. Morgan*, 311 N.C. 717, 723, 319 S.E.2d 607, 611 (1984); *Spivey and Self v. Highview Farms*, 110 N.C. App. 719, 431 S.E.2d 535, *disc. review denied*, 334 N.C. 623, 435 S.E.2d 342 (1993); *Furniture Mart v. Burns*, 31 N.C. App. 626, 632-33, 230 S.E.2d 609, 612-13 (1976); *see also Webster's Third New Internationl Dictionary* 1813 (1968) (defining "project" as "a planned undertaking"). The cost of an undertaking is generally the value of the construction to the owner upon completion, which is again generally the same as the stated contract price for the building or other construction. *Fulton v. Rice*, 12 N.C. App. 669, 672, 184 S.E.2d 421, 423 (1971).

However, the value of the completed construction or the stated contract price are not necessarily determinative as to the cost of the

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3. "[T]he holder of a limited license shall be entitled to act as general contractor for any single project with a value of up to three hundred fifty thousand dollars ($350,000) . . . ." N.C. Gen. Stat. § 87-10(a) (2005).

4. "[A]ny person or firm or corporation who . . . undertakes to . . . construct . . . any building . . . where the cost of the undertaking is thirty thousand dollars ($30,000) or more . . . shall be deemed to be a 'general contractor' engaged in the business of general contracting in the State of North Carolina." N.C. Gen. Stat. § 87-1 (2005).

contractor's undertaking, particularly when the value of the completed construction includes items over which the contractor had no control. *Id.*; *Helms v. Dawkins*, 32 N.C. App. 453, 232 S.E.2d 710 (1977) (reversing summary judgment in homeowners' favor even though the evidence showed that the value of the completed home was more than the limit of the contractor's license, because the written contract was ambiguous as to the degree of control to be exercised by the contractor), *overruled on other grounds*, *Sample v. Morgan*, 311 N.C. 717, 723, 319 S.E.2d 607, 611 (1984); *Furniture Mart v. Burns*, 31 N.C. App. 626, 632, 230 S.E.2d 609, 612-13 (1976) (reversing summary judgment in favor of owner, even though the value of the completed building totaled $325,000.00 and the contractor's license was limited to $75,000.00, because genuine issues of material fact existed as to the contractor's control over the undertaking where the owner "selected and purchased building material, and directly employed subcontractors"). Furthermore,

> [t]he provisions of a written contract may be modified or waived by a subsequent parol agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived, . . . this principle has been sustained even where the instrument provides for any modification of the contract to be in writing.

Camp v. Leonard, 133 N.C. App. 554, 562, 515 S.E.2d 909, 914 (1999) (citation, internal brackets and quotation marks omitted).

First, we agree with defendants that the presence of multiple contracts for different phases of a building is not necessarily determinative as to the question of what constitutes a "single" project. To hold otherwise would tend to allow general contractors to circumvent the consumer protections of Chapter 87 by stringing together piecemeal contracts for different phases of the construction of a single building. While we can envision scenarios where the existence of multiple contracts for different phases of the construction of a building might be relevant, the existence of separate contractual documents for the construction of the foundation and the construction of the rest of the house in the case *sub judice* is not determinative.

Assuming all evidence in support of plaintiff's claim is true and drawing all inferences in plaintiff's favor, as we must in reviewing the JNOV granted for defendants, *Bryant*, 313 N.C. at 368-69, 329 S.E.2d at 337-38, the evidence in the instant case tends to show that even before the foundation was started, plaintiff was intended as the gen-

eral contractor for the entire house. The foundation was constructed by plaintiff according to the plan for the entire house, rather than according to a separate foundation plan. The evidence further shows plaintiff started framing the house before he had been fully paid for the foundation and before the contract for construction of the rest of the house had been negotiated or executed. We therefore conclude that the foundation contract must be included with the house contract in determining the value of the single project for the purpose of applying N.C. Gen. Stat. § 87-10.

We next consider the cost of the windows, doors, and frame and roof trusses, which defendants also assert to be part of the single project. Although defendant Shirley Howard testified that plaintiff controlled the purchase and installation of the windows, doors and trusses, the record does not contain a copy of the purported window contract. Furthermore, plaintiff's testimony that he did not control this part of the construction of the house must be taken as true in reviewing the order granting JNOV, and we therefore conclude that the cost of the windows, doors and trusses paid by defendant is not to be included to determine the value of the single project.

Next, we must add the value of the house contract and the value of the foundation contract in order to derive the value of the single project. The value of the foundation contract was disputed. The face of the foundation contract is a cost-plus contract for an estimated cost of $42,410.00 plus 12%, a total of $47,499.20. However, plaintiff testified that defendants sought to modify the contract after it had been initially agreed to, first by reducing the amount of the percentage to 10% before construction had begun, then by hiring the block mason and his crew, without regard to plaintiff, after construction had begun. As a result, plaintiff's evidence was that the value of the foundation work which it controlled was $39,220.18.

The amount of the house contract was also disputed. On its face the value of the house contract is $359,620.00. However, plaintiff's evidence was that, after deducting allowances of $79,389.00, plaintiff controlled only $280,231.00 worth of the work on the house.

Taking all evidence which supports plaintiff's claim as true, and drawing all reasonable inferences in plaintiff's favor, the amounts over which plaintiff had control in the construction of the house were: (1) on the foundation contract, $39,220.18, and (2) on the house contract, $280,231.00. The sum of those numbers, $319,451.18, is the value of the single project for the purpose of applying N.C. Gen. Stat.

§ 87-10(a). This amount was within the $350,000.00 limit of plaintiff's general contractor's license.

Taking all evidence which supports plaintiff's claim as true, and drawing all reasonable inferences in plaintiff's favor, we conclude that plaintiff did not exceed the scope of its limited general contractor's license in the construction of defendants' house. Therefore the trial court erred when it concluded that the question in this case was exclusively a matter of law which entitled defendants to prevail, and set aside the jury verdict in plaintiff's favor. Accordingly, this case is remanded for reinstatement of the jury verdict for plaintiff, and entry of judgment for plaintiff.

Remanded for entry of judgment on the verdict.

Judges ELMORE and STEELMAN concur.

IN THE MATTER OF: S.D.W. AND H.E.W., MINOR CHILDREN, R.D.W., PLAINTIFF-APPELLANT v. J.B.W., DEFENDANT-APPELLEE

No. COA07-650

(Filed 4 December 2007)

Termination of Parental Rights— subject matter jurisdiction— counterclaim an improper method of filing petition

The trial court lacked subject matter jurisdiction in a child visitation case over defendant mother's counterclaim for termination of plaintiff father's parental rights, and the order for termination of parental rights is vacated without prejudice to defendant's right to file a proper petition in the trial court, because: (1) where the juvenile code sets forth specific procedures governing termination actions, those procedures apply to the exclusion of the Rules of Civil Procedure, and the Rules of Civil Procedure will fill the procedural gaps that Chapter 7B, Article 11 leaves open; (2) given both the statement of legislative intent in N.C.G.S. § 7B-1100(1) and the specificity of the Article 11 procedures, Article 11 provides the exclusive procedures to be used, and therefore defendant cannot rely on N.C.G.S. § 1A-1, Rule 13 as the basis for her counterclaim as the General Assembly has otherwise provided for procedures governing commence-

ment of termination actions; (3) Article 11 provides that a proper party may commence a termination of parental rights action by either filing a termination motion in a pending abuse, neglect, or dependency action under N.C.G.S. § 7B-1102, or by filing a termination petition under N.C.G.S. §§ 7B-1103 or -1104; and (4) Article 11 does not provide a party with the right to seek termination of parental rights in a counterclaim.

Appeal by Plaintiff from order entered 16 March 2007 by Judge Laura Powell in District Court, McDowell County. Heard in the Court of Appeals 14 November, 2007.

David A. Perez, for Plaintiff-Appellant.

C. Gary Triggs, P.A., by C. Gary Triggs, for Defendant-Appellee.

McGEE, Judge.

R.D.W. (Plaintiff) and J.B.W. (Defendant) are the father and mother, respectively, of minor children S.D.W. and H.E.W. (the children). Plaintiff and Defendant married in 1995 and divorced on 17 December 2001. The terms of the divorce did not resolve the issue of custody of the children. Plaintiff had no contact with Defendant or the children over the next four years. The children continued to reside with Defendant during this time.

Plaintiff filed a complaint for child visitation in McDowell County District Court on 18 January 2006. Defendant filed a "Motion to Dismiss, Answer and Counterclaim" on 27 March 2006. In her counterclaim, Defendant: (1) alleged that Plaintiff had abandoned the children and was incapable of providing proper care for, and supervision of, the children; and (2) asked the trial court to terminate Plaintiff's parental rights. The trial court was uncertain as to whether Defendant, in her answer and counterclaim, could properly request termination of Plaintiff's parental rights. The trial court therefore instructed Defendant to issue a "Termination of Rights Summons" to Plaintiff. A summons was issued to Plaintiff on behalf of each of the children on 27 July 2006.

Plaintiff replied to Defendant's counterclaim on 24 August 2006 and denied the allegations therein. Defendant then filed a motion for leave to amend her answer and counterclaim. Plaintiff filed a motion on 27 December 2006 opposing Defendant's request for leave to amend and seeking dismissal of Defendant's counterclaim. In his

motion to dismiss, Plaintiff argued that "it is procedurally improper to assert a petition to terminate parental rights in a counterclaim to a complaint for child visitation, as was done in this case." The trial court granted Defendant's motion to amend on 29 December 2006 and deferred a ruling on Plaintiff's motion to dismiss until trial. Defendant then filed her Amended Answer and Counterclaim alleging additional grounds for terminating Plaintiff's parental rights.

The case was tried on 22 and 23 January 2007. The trial court issued an order on 16 March 2007 terminating Plaintiff's parental rights as to the children. Plaintiff appeals and argues, *inter alia*, that it was procedurally improper for Defendant to seek termination of Plaintiff's parental rights in Defendant's counterclaim. Plaintiff contends that as a result of this improper procedure, the trial court lacked subject matter jurisdiction over Defendant's request for termination of Plaintiff's parental rights.

A.

Article 11 of Chapter 7B of the General Statutes governs termination of parental rights actions. Article 11 contemplates two different procedures for filing an action to terminate a parent's parental rights. First, N.C. Gen. Stat. § 7B-1102(a) (2005) permits certain persons or agencies to file a motion in district court for termination in a pending abuse, neglect, or dependency proceeding concerning the juvenile. Second, if there is no such action pending, the person or agency may file a separate petition to terminate parental rights. *See* N.C. Gen. Stat. § 7B-1103 (2005) (describing the persons or agencies who may file a motion or petition); N.C. Gen. Stat. § 7B-1104 (2005) (describing the requirements of a valid motion or petition). The motion or petition must be entitled "In Re (last name of juvenile), a minor juvenile." N.C.G.S. § 7B-1104. It shall also allege "[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist." N.C. Gen. Stat. § 7B-1104(6) (2005). *See* N.C. Gen. Stat. § 7B-1111(a) (2005) (listing the various findings that may serve as grounds for terminating parental rights). After a person or agency files a termination petition, the trial court "shall cause a summons to be issued" to all respondents in the action, including the juvenile, the juvenile's parents, and the juvenile's guardian or custodian. N.C. Gen. Stat. § 7B-1106(a) (2005). The parent against whom termination is sought may file an answer to a termi-nation petition or a response to a termination motion. N.C. Gen. Stat. § 7B-1108(a) (2005). The trial court must then hold an adjudi-catory hearing, *see* N.C. Gen. Stat. § 7B-1109 (2005),

and may terminate the parent's rights if it finds that (1) grounds for termination exist, and (2) termination is in the best interests of the juvenile. *See* N.C. Gen. Stat. § 7B-1110 (2005).

Plaintiff correctly recognizes that no abuse, neglect, or dependency action involving the children had been filed prior to the time Plaintiff filed his complaint for visitation. Therefore, according to Plaintiff, Defendant could only have initiated termination proceedings against Plaintiff by filing a petition pursuant to Article 11. While Article 11 does allow one parent to file a petition to terminate the parental rights of another parent, *see* N.C. Gen. Stat. § 7B-1103(a)(1) (2005), it does not expressly provide that a request for termination may be made through a counterclaim. Plaintiff argues that the procedure set out in Article 11 is the exclusive procedure to be followed in termination cases. Therefore, since Defendant did not follow the proper procedure for bringing a termination action, the trial court lacked subject matter jurisdiction over Defendant's counterclaim. *See In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003) ("jurisdiction is dependent upon the existence of a valid motion, complaint, petition, or other valid pleading").

Defendant disputes this contention and maintains that her counterclaim complied with the requirements of Article 11. Defendant essentially argues that even though Article 11 does not explicitly allow for a termination action to be brought as a counterclaim, it was nonetheless procedurally proper for her to do so pursuant to N.C. Gen. Stat. § 1A-1, Rule 13 (2005) (providing procedures for parties to assert counterclaims and crossclaims in civil actions).

B.

Our Court has recognized that where the juvenile code sets forth specific procedures governing termination actions, those procedures apply to the exclusion of the Rules of Civil Procedure. We first considered this issue in *In re Peirce*, 53 N.C. App. 373, 281 S.E.2d 198 (1981). In *Peirce*, the Burke County Department of Social Services (DSS) filed a petition to terminate the parental rights of two parents whose child had been determined to be neglected in an earlier proceeding.[1] *Id.* at 375, 281 S.E.2d at 200. The respondent parents filed

1. DSS initiated the termination action in *Peirce* under Chapter 7A, Article 24B of the General Statutes, the precursor to the current termination statutes found in Chapter 7B, Article 11. The General Assembly repealed the former termination statutes in 1998. *See* 1998 N.C. Sess. Laws. ch. 202, §§ 5, 6. Nonetheless, our analysis is the same under both versions of the juvenile code.

an answer to the DSS petition and also asserted a number of counterclaims against DSS. Specifically, the respondent parents claimed that: (1) the child's best interests required that the child be transferred to the respondent parents' new state of residence; (2) DSS should be ordered to initiate such a transfer; (3) DSS made no effort to reunite the child with the respondent parents, as required by the juvenile code; and (4) the respondent parents themselves should be awarded custody of the child. *Id.* at 375-76, 281 S.E.2d at 200. The trial court struck the respondent parents' counterclaims from their answer, *id.* at 376, 281 S.E.2d at 200, and ultimately entered an order terminating their parental rights. *Id.* at 378, 281 S.E.2d at 202. On appeal, the respondent parents acknowledged that the juvenile code "[did] not specifically allow a respondent in [a termination] case to file anything other than an answer to the petition to terminate parental rights." *Id.* at 379, 281 S.E.2d at 202. *See* N.C. Gen. Stat. § 7A-289.29(a) (1981), *repealed by* 1998 N.C. Sess. Laws ch. 202, § 5 ("Any respondent may file a written answer to the petition. The answer shall admit or deny the allegations of the petition[.]"). However, the respondent parents maintained that their counterclaims were permissible under N.C.G.S. § 1A-1, Rule 13. *Peirce*, 53 N.C. App. at 379, 281 S.E.2d at 202.

Our Court first recognized in *Peirce* that the General Assembly had specifically stated that its intent in enacting that portion of the juvenile code was " 'to provide *judicial procedures* for terminating the legal relationship between a child and his or her biological or legal parents.' " *Id.* at 379, 281 S.E.2d at 202 (emphasis in original) (quoting N.C. Gen. Stat. § 7A-289.22 (1981), *repealed by* 1998 N.C. Sess. Laws ch. 202, § 5). Based upon this clear legislative intent, we concluded:

> The sections of Art. 24B comprehensively delineate in detail the judicial procedure to be followed in the termination of parental rights. This article provides for the basic procedural elements which are to be utilized in these cases. . . . Due to the legislature's prefatory statement in G.S. 7A-289.22 with regard to its intent to establish judicial procedures for the termination of parental rights, and due to the specificity of the procedural rules set out in the article, we think the legislative intent was that G.S., Chap. 7A, Art. 24B, exclusively control the procedure to be followed in the termination of parental rights. It was not the intent that the requirements of the basic rules of civil procedure of G.S. 1A-1 be superimposed upon the requirements of G.S., Chap. 7A, Art. 24B.

> Therefore, in this case we need only ascertain whether the trial court correctly followed the procedural rules delineated in the latter.
>
> . . . This statute does not specifically grant the respondent in these cases the right to file a counterclaim, nor does any other section of G.S., Chap. 7A, Art. 24B, grant to respondent such a right. The statutorily established procedure for the termination of parental rights does not include the right to file a counterclaim, and we will not add that right by imputation. Therefore, it was not error for the trial court . . . to strike [respondents' counterclaims].

Id. at 380, 281 S.E.2d at 202-03.

Subsequent cases have reinforced our holding in *Peirce* that N.C.G.S. § 1A-1 does not provide parties in termination actions with procedural rights not explicitly granted by the juvenile code. *See In re Jurga*, 123 N.C. App. 91, 472 S.E.2d 223 (1996) (holding that parents could not execute a "Declaration of Voluntary Termination of Parental Rights" because the juvenile code did not provide procedures for this type of unilateral declaration); *In re Curtis v. Curtis*, 104 N.C. App. 625, 410 S.E.2d 917 (1991) (reversing trial court's grant of summary judgment for the petitioner on the issue of whether the respondent had abused his daughter, because the termination procedures set out in the juvenile code required an adjudicatory hearing on this issue and did not authorize a summary procedure based on N.C. Gen. Stat. § 1A-1, Rule 56). In addition, just as we have "declined to judicially impute procedural rights to parties which are not otherwise authorized by the termination statute," we have likewise "decline[d] to impute judicial limitations to rights plainly given under the termination statutes." *In re D.S.C.*, 168 N.C. App. 168, 173, 607 S.E.2d 43, 47 (2005) (finding that the termination statutes explicitly required the trial court to appoint a guardian ad litem for a disabled respondent parent in a broad range of cases, and rejecting the petitioner's argument that the statute only required the trial court to make such an appointment in a smaller subset of those cases).

This is not to say, however, that the Rules of Civil Procedure will never apply in a termination proceeding. Our Court has also recognized that where the juvenile code does not identify a specific procedure to be used in termination cases, the Rules of Civil Procedure will fill the procedural gaps that Article 11 leaves open. In *In re Triscari Children*, 109 N.C. App. 285, 426 S.E.2d 435 (1993), the trial court entered orders terminating the respondent father's parental rights

with respect to his two minor children. The respondent father argued on appeal that the termination petitions filed by the children's mother were defective because they were not verified, as required by the juvenile code. *See* N.C. Gen. Stat. § 7A-289.25 (1989), *repealed by* 1998 N.C. Sess. Laws. ch. 202, § 5 ("The petition shall be verified by the petitioner[.]"). Therefore, according to the respondent father, the trial court had no subject matter jurisdiction over the action. *Triscari*, 109 N.C. App. at 286-87, 426 S.E.2d at 436. The termination statutes, while requiring a petition to be verified, did not set out the requirements for proper verification. We therefore looked to the Rules of Civil Procedure to determine whether the petitions were properly verified:

> The specific procedure that must be followed in a termination of parental rights case is set forth in Article 24B, chapter 7A of the North Carolina General Statutes. The rules of Civil Procedure set forth in chapter 1A are not to be superimposed upon these cases, but nor should they be ignored. Thus, because the procedure set forth in the termination of parental rights provisions requires a verified petition, and verification is not defined in chapter 7A, the requirements for verification established in chapter 1A, Rule 11(b) should determine whether the pleading has been properly verified.

Id. at 287, 426 S.E.2d at 437 (internal citations omitted). Our Court ultimately determined that the termination petitions did not comply with the Rules of Civil Procedure, and we therefore vacated the trial court's termination orders for lack of subject matter jurisdiction. *Id.* at 287-89, 426 S.E.2d at 437-38.

Likewise, in *In re McKinney*, we applied the Rules of Civil Procedure to determine whether the contents of a motion filed to terminate the respondent's parental rights were sufficient to confer subject matter jurisdiction on the trial court. The Orange County Department of Social Services had filed a purported termination motion in an ongoing neglect and dependency action pursuant to N.C.G.S. § 7B-1102. *McKinney*, 158 N.C. App. at 442-43, 581 S.E.2d at 794. While the motion did contain factual allegations, it did not state that it was a termination motion and it did not request any specific relief from the trial court. *Id.* at 445-46, 581 S.E.2d at 796-97. We first noted that " 'because a termination of parental rights proceeding is civil in nature, it is governed by the Rules of Civil Procedure *unless otherwise provided*.' " *Id.* at 445, 581 S.E.2d at 796 (emphasis added) (quoting and citing *In re Brown*, 141 N.C. App. 550, 551, 539 S.E.2d

366, 368 (2000), *cert. denied*, 353 N.C. 374, 547 S.E.2d 809 (2001); *In re Bullabough*, 89 N.C. App. 171, 179, 365 S.E.2d 642, 646 (1988)). Finding no specific pleading requirements in Article 11, we instead turned to N.C. Gen. Stat. § 1A-1, Rule 7(b)(1) to determine whether the termination motion was sufficient to confer subject matter jurisdiction on the trial court. *Id.* at 444, 581 S.E.2d at 795. Our Court ultimately found that the termination motion did not comply with the Rules of Civil Procedure and vacated the trial court's termination order for lack of subject matter jurisdiction. *Id.* at 448, 581 S.E.2d at 797-98.

C.

In the case before us, we must first determine whether Chapter 7B, Article 11 provides the exclusive procedure to be used when filing a termination of parental rights petition. If so, we must then determine whether the trial court correctly followed that procedure. *See Peirce*, 53 N.C. App. at 380, 281 S.E.2d at 202.

Article 11, like its predecessor, expressly states that the general legislative purpose of the Article "is to provide judicial procedures for terminating the legal relationship between a juvenile and the juvenile's biological or legal parents." N.C. Gen. Stat. § 7B-1100(1) (2005). The statutes that follow this statement of legislative intent set out detailed procedures governing who may file a termination motion or petition, and how that party may bring such an action. Unlike requirements governing proper petition verification and requests for relief, which are found solely in the Rules of Civil Procedure and have no counterpart in the juvenile code, the procedures for commencement of a termination of parental rights action under Article 11 clearly overlap the procedures set out in Chapter 1A-1 for commencement of other civil actions. Given both the statement of legislative intent in N.C.G.S. § 7B-1100(1) and the specificity of the Article 11 procedures, *see Peirce*, 53 N.C. App. at 380, 281 S.E.2d at 203, we find that Article 11 provides the exclusive procedures to be used. Defendant therefore cannot rely on N.C.G.S. § 1A-1, Rule 13 as the basis for her counterclaim, as the General Assembly has "otherwise provided" for procedures governing commencement of termination actions. *Bullabough*, 89 N.C. App. at 179, 365 S.E.2d at 646.

We must next determine whether the trial court followed the procedures provided by Article 11. As noted above, Article 11 sets forth two ways in which a proper party may commence a termination of parental rights action. The first is by filing a termination

motion in a pending abuse, neglect, or dependency action. *See* N.C.G.S. § 7B-1102. The second is by filing a termination petition. *See* N.C.G.S. §§ 7B-1103, -1104. The statutes do not provide a procedure through which a party may counterclaim for termination of parental rights in response to a complaint for child visitation. Rather, Article 11 contemplates that a termination petition should be brought in a separate action. *See*, *e.g.*, N.C.G.S. § 7B-1104 (requiring that a termination petition have its own caption, "In Re (last name of juvenile), a minor juvenile"). Since Article 11 does not provide a party with the right to seek termination of parental rights in a counterclaim, "we will not add that right by imputation." *Peirce*, 53 N.C. App. at 380, 281 S.E.2d at 203. We recognize that the trial court did attempt to rectify the procedural error by causing summonses to be issued to Defendant regarding the termination counterclaim. *See* N.C.G.S. § 7B-1106(a). However, the issuance of a summons alone does not vest a trial court with subject matter jurisdiction over an action when that action was never properly commenced.

We conclude that Defendant did not file a proper petition for termination of Plaintiff's parental rights, and therefore the trial court lacked subject matter jurisdiction over the termination proceeding. Accordingly, the trial court's order for termination of parental rights is vacated without prejudice to Defendant's right to file a proper petition in the trial court.

In light of the foregoing, we do not address Plaintiff's remaining assignments of error.

Vacated.

Judges HUNTER and BRYANT concur.

STATE OF NORTH CAROLINA v. RONALD ALLEN SIMPSON

No. COA07-445

(Filed 4 December 2007)

1. Kidnapping— first-degree—instruction—mental injury beyond normally experienced by other victims not required

The trial court did not err in its instruction to the jury on the element of serious injury for first-degree kidnapping by its failure to instruct the jury that a serious mental injury also must be a

mental injury beyond that normally experienced by other victims of the type of crime charged.

2. Evidence— prior crimes or bad acts—motive—intent—plan—scheme—system—design

The trial court did not abuse its discretion in a first-degree kidnapping and attempted second-degree rape case by admitting over defendant's objection evidence of an incident between defendant and another victim even though defendant contends there were insufficient similarities between the two offenses, because: (1) the two incidents demonstrated many specific similarities, including that both incidents occurred in the early mornings hours, defendant told both victims that his vehicle would not start, defendant told the victim in this case that he would let her live if she stopped struggling and told the other victim he would kill her if she made any noise, defendant told the victim in this case that he was out of his head and told a law enforcement officer that he was not in his right mind after the incident involving the other victim, defendant tried to restrain and silence both victims, and defendant ceased his efforts when the victims forcefully resisted his advances; and (2) in light of the trial court's instruction to the jury limiting its consideration of the evidence to the purposes of showing motive, intent, and plan, scheme, system, or design, any tendency of the evidence to suggest decision on an improper basis was not excessive and does not outweigh the probative value of the evidence.

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

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree kidnapping case even though defendant contends the State failed to present substantial evidence of the required element that the restraint be a separate complete act independent of and apart from the attempted second-degree rape, because the restraint defendant used went beyond the restraint inherent in the crime of attempted second-degree rape when the evidence indicated: (1) defendant straddled the victim on the sofa, hit her, tried to pull up her tank top, and had his pants unzipped, at which time he had completed the crime of attempted second-degree rape; (2) defendant then pulled the victim from the couch and dragged her to the kitchen toward the door; and (3) defendant's acts to restrain the victim while they struggled in the kitchen subjected her to greater danger and vul-

nerability than was inherent in the attempted rape that occurred on the couch.

4. Rape— attempted second-degree—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of attempted second-degree rape, because: (1) the circumstantial evidence in this case was sufficient to create a reasonable inference of guilt and therefore constituted substantial evidence of defendant's intent; and (2) the evidence indicated that defendant straddled the victim and tried to pull up her shirt, and his pants were unzipped thus demonstrating defendant's overt act in furtherance of the crime.

Appeal by defendant from judgments entered 27 September 2005 by Judge Charles P. Ginn in Haywood County Superior Court. Heard in the Court of Appeals 15 October 2007.

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

Michael E. Casterline for defendant-appellant.

MARTIN, Chief Judge.

On 27 September 2005, defendant was convicted of first degree kidnapping and attempted second degree rape of Tracy Payne and was sentenced to a term of 108 to 139 months and a term of 96 to 125 months, to be served consecutively. Defendant appeals from the convictions.

The evidence presented at trial tended to show that Payne lived in Waynesville, North Carolina, and defendant was her next-door neighbor whom she had known casually because they had been classmates in school. Payne had a six-year-old son who sometimes played with defendant's daughter.

On the evening of 4 June 2004, Payne's son was staying with his father. Two friends were visiting Payne that evening, and they left in the early morning hours of 5 June 2004 to get something to eat. Payne fell asleep on the couch watching television until she was awakened by defendant knocking on her door. Defendant explained that his vehicle would not start, and he asked to borrow Payne's telephone. Payne let defendant inside, gave him her cell phone, and returned to the couch. Defendant took the cell phone into Payne's bathroom and

returned a few minutes later. Payne did not hear defendant talking on the cell phone and did not hear the toilet flush.

When defendant came out of the bathroom, he talked to Payne for a few minutes. Suddenly, defendant got on top of Payne and straddled her. Payne screamed and struggled, and defendant hit her in the face and head and told her that if she stopped screaming he would let her live. Defendant tried to put a piece of duct tape over Payne's mouth and pinned her down, trying to lift up her shirt. Payne was wearing a tank top without a bra. Payne told defendant that she expected her friends back soon, and defendant said "we're going over here," and dragged Payne off the couch and toward the kitchen. Payne noticed that defendant's pants were unzipped. Once in the kitchen, defendant opened the door to the outside of the house, and Payne resisted by grabbing the door. In the struggle, defendant pulled Payne's left arm behind her back, then she and defendant fell across the kitchen table, and finally she backed defendant against the wall and hit his mouth with the back of her head. At that point, defendant let go of Payne and apologized, asking her not to call the police. He also said he would go get help and told her he was "out of his head." He returned her cell phone and its battery to her and left.

Payne called the Haywood Sheriff's Department. The deputy who arrived took photographs of Payne's injuries, including bruises on her face, ears, head, arms, and leg, and a lacerated lip. At about six o'clock in the morning, defendant called Payne twice, although she only spoke to him once, and about an hour later defendant returned to Payne's home and knocked on her door. She refused to let him in, and he was arrested outside her home. Sometime after the incident, Payne discovered her dogs chewing on a roll of duct tape in the back yard. A few days after the incident Payne was treated at an urgent care facility for a pulled muscle in her right shoulder that caused her to miss work and lose her job. Payne also had nightmares and felt uncomfortable around men after the incident.

Nancy Farmer testified at the trial concerning another incident, which occurred in June 2004, involving defendant. Farmer testified that she did not know defendant when he approached her in his truck on 24 June 2004 as she was walking to a store to buy cigarettes. Defendant asked Farmer if she would like to "hit some crack," and Farmer responded affirmatively. Defendant and Farmer drove to a parking lot where they smoked crack. Then they drove to a store, bought two beers, and drove to a location near Pigeon River. Defendant parked the truck in a wooded area, and defendant and

Farmer smoked crack and drank beer until daybreak on 25 June 2004. Then they returned to defendant's truck. Farmer was sitting in the passenger seat when defendant told her that the truck would not start. Defendant got out of the truck and went to the passenger side where he threw a towel around Farmer's neck and pulled on the towel. Farmer struggled and tried to hit defendant with a stick. Defendant told her "he was going to [have sex with her], and if [she] made any noise he was going to kill [her]." Farmer managed to get away from defendant and ran toward the road. Defendant threw a rock at her, which hit her face, causing her to need seven stitches. A detective who interviewed defendant after the incident testified that defendant indicated he had expected sex and Farmer did not want to have sex, and that defendant attributed the incident to "drugs, man, that's all it was. I wasn't in my right mind."

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[1] Defendant raises four issues on appeal. First, defendant argues that the trial court erred in its instructions to the jury on the kidnapping charge because it improperly defined the offense. When the court instructed the jury on the element of serious injury for first degree kidnapping, the court stated, over defendant's objection: "Serious injury is defined as injury that causes great pain and suffering. Serious injury may also be defined as mental injury where such mental injury extends for some appreciable time beyond the incidence [sic] which surrounds the crime itself." Defendant assigns error to the court's failure to instruct the jury that a serious mental injury also must be a mental injury beyond that normally experienced by other victims of the type of crime charged. *See State v. Baker*, 336 N.C. 58, 62-63, 441 S.E.2d 551, 554 (1994). Defendant's argument contravenes subsequent case law from this Court and our Supreme Court.

Defendant's argument relies on our Supreme Court's language in *Baker*, stating:

> [I]n order to prove a serious personal injury based on mental or emotional harm, the State must prove that the defendant caused the harm, that it extended for some appreciable period of time beyond the incidents surrounding the crime itself, and that the harm was more than the "*res gestae*" results present in every forcible rape.

Id. This language from *Baker* interpreted language from an earlier Supreme Court case, *State v. Boone*, 307 N.C. 198, 205, 297 S.E.2d 585,

590 (1982), *overruled on other grounds*, *State v. Richmond*, 347 N.C. 412, 430, 495 S.E.2d 677, 687 (1998), which stated:

> We . . . believe that the legislature intended that ordinarily the mental injury inflicted must be more than the *res gestae* results present in every forcible rape and sexual offense. In order to support a jury finding of serious personal injury because of injury to the mind or nervous system, the State must ordinarily offer proof that such injury was not only caused by the defendant but that the injury extended for some appreciable time beyond the incidents surrounding the crime itself.

Id. The discrepancy in the phrasing in these cases has given rise to controversy over whether the State must separately prove that the harm to the victim was more than that normally experienced by victims of the same crime. This Court addressed the issue in *State v. Easterling*:

> We do not read *Boone* as placing an additional burden on the State to show a mental injury must be more than that normally experienced in every forcible rape in addition to showing the mental injury extended for some appreciable time, as defendant suggests. Rather, we read *Boone* as holding that if a mental injury extends for some appreciable time, it is therefore a mental injury beyond that normally experienced in every forcible rape.

119 N.C. App. 22, 40, 457 S.E.2d 913, 923-24, *disc. review denied*, 341 N.C. 422, 461 S.E.2d 762 (1995); *accord State v. Ackerman*, 144 N.C. App. 452, 460-61, 551 S.E.2d 139, 144-45, *cert. denied*, 354 N.C. 221, 554 S.E.2d 344 (2001). This Court's interpretation has been ratified by our Supreme Court in *State v. Finney*, where the Court upheld a jury instruction on serious mental injury which omitted mention of a requirement that the harm be more than that normally experienced by other victims of the same crime. *State v. Finney*, 358 N.C. 79, 89-90, 591 S.E.2d 863, 869-70 (2004). Accordingly, we hold the trial court did not err in its instruction to the jury on the element of serious injury in the present case.

[2] Defendant also argues that the trial court erred in admitting, over his objection, evidence of the incident between defendant and Farmer, contending there was insufficient similarity between the incident with Farmer and the current offense in violation of N.C.G.S. § 8C-1, Rule 404(b), and the evidence was unfairly prejudicial to defendant in violation of N.C.G.S. § 8C-1, Rule 403. "We review a trial court's determination to admit evidence under [Rules] 404(b) and

403, for an abuse of discretion." *State v. Summers*, 177 N.C. App. 691, 697, 629 S.E.2d 902, 907, *disc. review denied*, 360 N.C. 653, 637 S.E.2d 192 (2006).

At trial, in response to defendant's motion *in limine* to exclude Farmer's testimony, the State argued, "we believe they are similar in nature and can show intent, knowledge, scheme or plan." The trial court denied defendant's motion and allowed Farmer to testify about the incident with defendant that occurred twenty days after the incident with Payne. Evidence of a defendant's other crime, wrongs, or acts is admissible under Rule 404(b) for 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). "When evidence of the defendant's prior sex offenses is offered for the proper purpose of showing plan, scheme, system, or design . . . the ultimate test for admissibility has two parts: First, whether the incidents are sufficiently similar; and second, whether the incidents are too remote in time." *State v. Curry*, 153 N.C. App. 260, 264, 569 S.E.2d 691, 694 (2002) (internal quotation marks omitted) (alteration in original).

Defendant contends the trial court erred in admitting Farmer's testimony because the incident with Farmer lacked sufficient similarity to the incident with Payne. However, the two incidents demonstrated many specific similarities, including that both incidents occurred in the early morning hours, defendant told both victims that his vehicle would not start, defendant told Payne he would let her live if she stopped struggling and told Farmer he would kill her if she made any noise, defendant told Payne he was "out of his head" and told a law enforcement officer that he "wasn't in [his] right mind" after the incident involving Farmer, defendant tried to restrain and silence both victims, and defendant ceased his efforts when the victims forcefully resisted his advances. In order to be sufficient, "[s]imilarities need not be bizarre or uncanny; they simply must 'tend to support a *reasonable* inference that the same person committed both the earlier and later acts.' " *State v. Murillo*, 349 N.C. 573, 593, 509 S.E.2d 752, 764 (1998) (quoting *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991)). The similarities in the incidents support such an inference; thus, the trial court did not abuse its discretion in concluding that the similarities were sufficient to admit Farmer's testimony.

"The admissibility of evidence under Rule 404(b) is further subject to the weighing of probative value versus unfair prejudice man-

dated by [N.C. Gen. Stat. § 8C-1,] Rule 403." *Curry*, 153 N.C. App. at 265, 569 S.E.2d at 695 (internal quotation marks omitted) (alteration in original). Thus, defendant also argues that this Court must reverse the trial court's ruling because the prejudicial effect of the testimony substantially outweighed its probative value, in violation of Rule 403. N.C. Gen. Stat. § 8C-1, Rule 403 (2005) ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."). " 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis . . . ." N.C. Gen. Stat. § 8C-1, Rule 403 official commentary. In light of the trial court's instruction to the jury limiting their consideration of the evidence to the purposes of showing motive, intent, and plan, scheme, system, or design, any tendency of the evidence to suggest decision on an improper basis is not excessive and does not outweigh the probative value of the evidence. Accordingly, defendant has not shown that the trial court abused its discretion; therefore, the trial court did not err in admitting evidence of the incident with Farmer.

Defendant ultimately argues that the trial court erred in denying his motion to dismiss the charges of first degree kidnapping and attempted second degree rape. Defendant contends that the State failed to submit substantial evidence of all of the elements of each of the crimes charged. We note:

> In ruling on a motion to dismiss at the close of evidence made pursuant to G.S. § 15A-1227, a trial court must determine whether there is substantial evidence of each essential element of the offenses charged. If, viewed in the light most favorable to the State, the evidence is such that a jury could reasonably infer that defendant is guilty, the motion must be denied.

State v. Williams, 154 N.C. App. 176, 178, 571 S.E.2d 619, 620-21 (2002) (citation omitted). "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).

[3] With regard to the charge of kidnapping, defendant argues that the State failed to present substantial evidence of the required element that the restraint be a separate complete act independent of and apart from the attempted second degree rape. "It is self-evident that certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim." *State v. Fulcher*, 294

N.C. 503, 523, 243 S.E.2d 338, 351 (1978). To support a conviction on charges of both kidnapping and attempted rape, "the restraint, which constitutes the kidnapping, [must be] a separate, complete act, independent of and apart from the other felony." *Id.* at 524, 243 S.E.2d at 352. "[A] person cannot be convicted of kidnapping when the only evidence of restraint is that 'which is an inherent, inevitable feature' of another felony such as armed robbery." *State v. Beatty*, 347 N.C. 555, 559, 495 S.E.2d 367, 369 (1998) (quoting *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351). In determining whether the restraint is sufficient for a kidnapping charge:

> The court may consider whether the defendant's acts place the victim in greater danger than is inherent in the other offense, or subject the victim to the kind of danger and abuse that the kidnapping statute was designed to prevent. The court also considers whether defendant's acts "cause additional restraint of the victim or increase the victim's helplessness and vulnerability."

State v. Key, 180 N.C. App. 286, 290, 636 S.E.2d 816, 820 (2006) (citations omitted), *disc. review denied*, 361 N.C. 433, 649 S.E.2d 399 (2007).

The restraint defendant used in the case before us went beyond the restraint inherent in the crime of attempted second degree rape. The evidence indicated defendant straddled Payne on the sofa, hit her, tried to pull up her tank top, and had his pants unzipped, at which time he had completed the crime of attempted second degree rape. Defendant then pulled Payne from the couch and dragged her to the kitchen, toward the door. Defendant's acts to restrain Payne while they struggled in the kitchen clearly subjected her to greater danger and vulnerability than was inherent in the attempted rape that occurred on the couch. Accordingly, the State presented substantial evidence of the restraint element, and the trial court did not err in denying the motion to dismiss the charge.

[4] With regard to the attempted second degree rape charge, defendant argues that the State failed to present substantial evidence of the elements of the crime.

> To obtain a conviction for attempted second-degree rape, the State must prove beyond a reasonable doubt that (1) the accused had the specific intent to commit rape; and (2) the accused committed an overt act for the purpose, which goes beyond mere preparation, but falls short of the complete offense.

State v. Farmer, 158 N.C. App. 699, 702, 582 S.E.2d 352, 354 (2003). Defendant contends that there was no substantial evidence of either of the required elements.

This Court has held:

> [T]he element of intent as to the offense of attempted rape is established if the evidence shows that defendant, at any time during the incident, had an intent to gratify his passion upon the victim. Intent to rape may be "proved circumstantially by inference, based upon a defendant's actions, words, dress, or demeanor."

State v. Oxendine, 150 N.C. App. 670, 674, 564 S.E.2d 561, 564 (2002) (citations omitted). The circumstantial evidence in this case is sufficient to create a reasonable inference of guilt, and therefore constitutes substantial evidence of defendant's intent. The evidence indicated defendant straddled Payne and tried to pull up her shirt, and his pants were unzipped. This same evidence also demonstrates defendant's overt act in furtherance of the crime; thus, the State presented substantial evidence of both elements of the crime of attempted second degree rape. The trial court did not err in granting the motion to dismiss the charge.

No error.

Judges McCULLOUGH and ELMORE concur.

KENNETH WAYNE VADEN, Plaintiff v. KATHLEEN MARIE DOMBROWSKI and DAVID JOHN DOMBROWSKI, Defendants

No. COA07-51

(Filed 4 December 2007)

1. Appeal and Error— brief—failure to state standard of review—no motion to dismiss appeal

Defendants' failure to file a motion to dismiss an appeal for failure to state a standard of review resulted in the appeal being heard on its merits.

2. Costs— review on appeal—abuse of discretion standard

The trial court's taxing of costs against the plaintiff was reviewed on appeal under an abuse of discretion standard.

3. Costs— deposition—recognized by common law

Deposition costs were not specifically enumerated in the applicable statute, but were recognized by the common law and the trial court did not abuse its discretion in awarding such costs. The court's decision was supported by the common law, an affidavit from defendant's attorney, and numerous invoices and receipts. N.C.G.S. § 7A-305(d).

4. Costs— expert witness fees—common law

Expert witness fees are allowed to be taxed as costs under the common law, and there was no abuse of discretion in this case in taxing plaintiff for the deposition fee for a witness under a subpoena.

5. Costs— travel costs for mediation—not provided by statute or common law

The trial court abused its discretion by awarding as costs travel expenses for mediation. Traveling to a mediation is neither enumerated in N.C.G.S. § 7A-305(d) nor provided for in the common law.

6. Costs— findings—not requested or made—no abuse of discretion

The trial court did not abuse its discretion in the costs taxed to the plaintiff (except for costs for travel to mediation), and the trial court was not required to make findings of fact that such costs were "reasonable and necessary" given the evidence presented and the absence of a request for findings.

Appeal by plaintiff from order entered 23 October 2006 by Judge J.B. Allen, Jr., in Superior Court, Wake County. Heard in the Court of Appeals 10 September 2007.

Culbreth Law Firm, L.L.P., by Stephen E. Culbreth and Ashley Culbreth Council for plaintiff-appellant.

Hall, Rodgers, Gaylord, & Millikan, PLLC, by Kathleen M. Millikan and Daniel M. Gaylord for defendants-appellees.

STROUD, Judge.

Plaintiff appeals the order granting costs to defendants in Superior Court, Wake County after plaintiff voluntarily dismissed the underlying action. The dispositive question before this court is

whether the trial court abused its discretion in taxing certain costs against the plaintiff pursuant to N.C. Gen. Stat. § 7A-305(d). For the following reasons, we affirm in part and reverse in part.

I. Background

On or about 30 January 2004 defendant Kathleen Marie Dombrowski ("Mrs. Dombrowski") was driving defendant David John Dombrowski's 1997 Ford automobile with his permission. Mrs. Dombrowski attempted to make a left-hand turn from Military Cutoff Road onto Wrightsville Avenue when she collided with plaintiff's vehicle on Military Cutoff Road. Defendants admitted in their unverified answer that the accident was caused by Mrs. Dombrowski's negligence. Plaintiff now alleges that as a result of the collision he has painful and permanent injury which prevents him from transacting business and has resulted in a substantial reduction in his earning capacity. Plaintiff also claims he has incurred medical and hospitalization expenses in excess of $29,200.

On 14 February 2005 defendants made an offer of judgment for $45,500, which plaintiff did not accept. On 9 December 2005 defendants subpoenaed Dr. Kevin Scully ("Dr. Scully") and provided notice to plaintiff they would be deposing Dr. Scully on 20 December 2005. On 16 May 2006 defendants' filed a motion for summary judgment. On 19 May 2006 plaintiff filed a motion for continuance. On 22 May 2006 plaintiff took a voluntary dismissal without prejudice pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure.

On 14 June 2006 defendants filed a motion for costs accompanied by an affidavit of defendants' attorney, Daniel M. Gaylord, and several invoices and receipts. On 27 June 2006 plaintiff filed a response to defendants' motion. Plaintiff's response argued only that defendants' motion was premature and that if the trial court determined defendants' motion was timely made, only the mediation fees were permissible costs to be taxed pursuant to North Carolina case law.[1] Plaintiff presented no objection to the amounts, reasonableness or necessity of defendants' costs as alleged in their motion. On 22 October 2005 the trial court granted defendants' motion for costs.

The trial court required plaintiff to pay costs for: (1) mediation cost for the first mediation in the amount of $250.00, (2) mediation costs for the mediation that was reconvened in February of 2006 in

1. Plaintiff failed to argue the issue of the timeliness of defendants' motion on appeal, and thus this argument was abandoned pursuant to N.C.R. App. P. Rule 28(b)(6).

the amount of $125.00, and (3) travel costs/mileage for mediation in February 2006 in the amount of $26.52. The court also found several others costs to be taxable costs which are to be paid only if plaintiff later refiles; those costs included: (4) cost for plaintiff's deposition transcript in the amount of $464.45, (5) deposition traveling cost/mileage for plaintiff's deposition in the amount of $111.94, (6) cost for Dr. Scully's deposition transcript in the amount of $298.15, (7) deposition fee to Dr. Scully in the amount of $500.00, (8) deposition traveling cost/mileage for the deposition of Dr. Scully in the amount of $111.78, (9) cost for Dr. David Esposito's ("Dr. Esposito") deposition transcript in the amount of $47.25, (10) videotape deposition cost of Dr. Esposito in the amount of $26.75, and (11) deposition traveling cost/mileage for the deposition of Dr. Esposito in the amount of $101.46. In summary, Judge Allen ordered plaintiff to pay defendants $401.52 within 30 days of the order and the other costs totaling $1,661.78, within 30 days of refiling the action. The order also stated that plaintiff's failure to comply would result in dismissal of the refiled action with prejudice. Plaintiff appeals.

II. Appellate Rules

[1] Defendants argue this appeal should be dismissed as plaintiff's brief failed to state a standard of review for the first argument in his brief. Defendants correctly note that pursuant to North Carolina Rule of Appellate Procedure 28(b)(6) "argument[s] shall contain a concise statement of the applicable standard(s) of review . . . ." N.C.R. App. P. 28(b)(6). Defendants' brief argues that this appeal should therefore be dismissed because plaintiff has failed to follow a rule of appellate procedure. *See Viar v. North Carolina Dep't of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2005).

However, in *Smithers v. Tru-Pak Moving Sys., Inc.*, defendant requested this Court to dismiss an appeal in its brief. 121 N.C. App. 542, 545, 468 S.E.2d 410, 412, *disc. rev. denied*, 343 N.C. 514, 472 S.E.2d 20 (1996). This Court concluded that "[d]efendant's motion to dismiss plaintiff's appeal is not properly before us. A motion to dismiss an appeal must be filed in accord with Appellate Rule 37, not raised for the first time in the brief as defendant has done here." *Id*; *see also Horton v. New South Ins. Co.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 858, *cert. denied*, 343 N.C. 511, 472 S.E.2d 8 (1996) ("Motions to an appellate court may not be made in a brief but must be made in accordance with N.C.R. App. P. 37").

As defendants have failed to file such a motion we chose to decide this appeal based upon its merits. *See* N.C.R. App. P. 2; *Welch*

Contr'g, Inc. v. N.C. Dep't. of Transp., 175 N.C. App. 45, 49-50, 622 S.E.2d 691, 694 (2005) (exercising discretion to decide case on the merits though there were appellate rule violations).

III. Standard of Review

[2] Prior decisions by this court have been inconsistent as to the proper standard of review for appeals concerning taxing costs.[2] We have reviewed the case law and the majority of cases review a trial court's taxing of costs under an abuse of discretion standard. *See, e.g.*, *Coffman v. Roberson*, 153 N.C. App. 618, 629, 571 S.E.2d 255, 261 (2002), *disc. rev. denied*, 356 N.C. 668, 577 S.E.2d 111 (2003); *Alsup v. Pitman*, 98 N.C. App. 389, 391, 390 S.E.2d 750, 752 (1990). We find the reasoning of the majority of cases pursuant to the language of N.C. Gen. Stat. § 6-20 to be sound, and we therefore review the trial court's taxing of costs against the plaintiff under an abuse of discretion standard. *See Coffman* at 629, 571 S.E.2d at 261; *Alsup* at 391, 390 S.E.2d at 752. "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998).

IV. Awarding of Costs

[3] Plaintiff argues that costs not specifically enumerated under N.C. Gen. Stat. § 7A-305(d) should not be awarded. Specifically plaintiff argues that all costs awarded to defendants were in error, except for the mediation fees. N.C. Gen. Stat. § 7A-305(d) and (e) provides:

> (d) The following expenses, when incurred, are also assessable or recoverable, as the case may be:
>
> (1) Witness fees, as provided by law.
>
> (2) Jail fees, as provided by law.
>
> (3) Counsel fees, as provided by law.

2. We note that some inconsistency of interpretation arises as to N.C. Gen. Stat. § 6-20 which provides that "[i]n other actions, costs may be allowed or not, in the discretion of the court, unless otherwise provided by law" and N.C. Gen. Stat. § 7A-320 which provides that "[t]he costs set forth in this Article are complete and exclusive, and in lieu of any other costs and fees." N.C. Gen. Stat. §§ 6-20, 7A-320 (2003). Some panels of this Court have chosen to use an abuse of discretion standard due to the language of N.C. Gen. Stat. § 6-20 which leaves costs in the discretion of the trial court. *See, e.g.*, *Cosentino v. Weeks*, 160 N.C. App. 511, 516, 586 S.E.2d 787, 789-90 (2003) (reviewing under an abuse of discretion standard). Other panels have reviewed trial court orders taxing costs under a *de novo* standard. *See, e.g.*, *Oakes v. Wooten*, 173 N.C. App. 506, 518, 620 S.E.2d 39, 48 (2005) (reviewing conclusions of law *de novo*).

(4) Expense of service of process by certified mail and by publication.

(5) Costs on appeal to the superior court, or to the appellate division, as the case may be, of the original transcript of testimony, if any, insofar as essential to the appeal.

(6) Fees for personal service and civil process and other sheriff's fees, as provided by law. Fees for personal service by a private process server may be recoverable in an amount equal to the actual cost of such service or fifty dollars ($50.00), whichever is less, unless the court finds that due to difficulty of service a greater amount is appropriate.

(7) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fee of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.

(8) Fees of interpreters, when authorized and approved by the court.

(9) Premiums for surety bonds for prosecution, as authorized by G.S. 1-109.

(e) Nothing in this section shall affect the liability of the respective parties for costs as provided by law.

N.C. Gen. Stat. § 7A-305(d), (e) (2003).

We are aware, as recognized in *Dep't. of Transp. v. Charlotte Area Mfd. Housing Inc.*, that there has been a lack of uniformity in this Court's cases addressing whether certain costs can or should be taxed against a party. 160 N.C. App. 461, 586 S.E.2d 780 (2003).[3]

> In analyzing whether the trial court properly [assessed] cost[s] we must undertake a three-step analysis. *Lord v. Customized Consulting Specialty, Inc.*, 164 N.C. App. 730, 734, 596 S.E.2d

3. Effective 1 August 2007 the General Assembly addressed the inconsistencies within our case law by providing that N.C. Gen. Stat. § 7-305 is a "complete and exclusive . . . limit on the trial court's discretion to tax costs pursuant to G.S. 6-20." *See* 2007-212. no. 3 N.C. Advance Legis. Serv. 162-63. However, the present case is not governed by this newly enacted legislation and thus we must review the costs pursuant to our current case law.

> 891, 895 (2004). First, we must determine whether the cost sought is one enumerated in N.C. Gen. Stat. § 7A-305(d); if so, the trial court is required to assess the item as costs. *Id.* Second, where the cost is not an item listed under N.C. Gen. Stat. § 7A-305(d), we must determine if it is a "common law cost" under the rationale of *Charlotte Area. Id.* (defining " 'common law' costs as being those costs established by case law prior to the enactment of N.C. Gen. Stat. § 7A-320 in 1983.") Third, if the cost sought to be recovered is a "common law cost," we must determine whether the trial court abused its discretion in awarding or denying the cost under N.C. Gen. Stat. § 6-20. *Id.*

Miller v. Forsyth Mem'l Hosp., Inc., 173 N.C. App. 385, 391, 618 S.E.2d 838, 843, *remanded in part*, 174 N.C. App. 619, 625 S.E.2d 115 (2005).

A. Deposition-Related Expenses

Deposition-related expenses are not specifically enumerated in N.C. Gen. Stat. § 7A-305(d) as it applies to this case.[4] *See* N.C. Gen. Stat. § 7A-305(d). However, these expenses have been recognized by the common law. *See, e.g.*, *Dixon, Odom & Co. v. Sledge*, 59 N.C. App. 280, 286, 296 S.E.2d 512, 516 (1982) (stating that "recoverable costs may include deposition expenses unless it appears that the depositions were unnecessary"); *Cloutier v. State*, 57 N.C. App. 239, 248, 291 S.E.2d 362, 368, *cert. denied*, 306 N.C. 555, 294 S.E.2d 222 (1982) (determining that travel expenses of an attorney to take a deposition should be considered part of the deposition costs and taxed pursuant to N.C. Gen. Stat. § 97-80 (addressing costs under the Worker's Compensation Act)).

As this is a "common law cost" we must now determine if the trial court abused its discretion in awarding such costs. *Miller* at 391, 618 S.E.2d at 843. The trial court awarded costs for: (1) plaintiff's deposition transcript, (2) traveling costs for plaintiff's deposition, (3) Dr. Scully's deposition transcript, (4) traveling costs for Dr. Scully's deposition, (5) Dr. Esposito's deposition transcript, (6) costs of videotaping Dr. Esposito's deposition, and (7) traveling costs for Dr. Esposito's deposition. We do not find the trial court abused its discretion in awarding these costs by rendering "a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley at* 547, 501 S.E.2d at 656. The

4. Deposition-related expenses are provided for in the amended version of N.C. Gen. Stat. § 7A-305. 2007-212. no. 3 N.C. Advance Legis. Serv. 162-63.

trial court's decision to award these costs was supported by the common law, defendants' attorney's affidavit, and numerous invoices and receipts. *See, e.g.*, *Dixon, Odom & Co.* at 286, 296 S.E.2d at 516; *Cloutier* at 248, 291 S.E.2d at 368. We also note that plaintiff did not raise any issue as to the reasonableness or necessity of the costs. We affirm the decision of the trial court to award deposition-related expenses.

B. Expert Witness Fee

[4] Expert witness fees are not specifically provided for in N.C. Gen. Stat. § 7A-305(d). *See* N.C. Gen. Stat. § 7A-305(d). However, in *State v. Johnson*, this Court recognized that expert witness fees could be taxed as costs when a witness has been subpoenaed. 282 N.C. 1, 28, 191 S.E.2d 641, 659 (1972).

> Pursuant to N.C. Gen. Stat. § 7A-305(d)(1) witness fees are assessable as costs as provided by law. This refers to the provisions of N.C. Gen. Stat. § 7A-314 which provides for witness fees where the witness is under subpoena. The trial judge only has the authority to award witness fees where the witness was under subpoena.

Miller at 392, 618 S.E.2d at 843 (internal citations and internal quotations omitted). As expert witness fees are allowed to be taxed as costs under the common law, we discern no abuse of discretion in the trial court's order taxing the plaintiff $500.00 for Dr. Scully's deposition fee when Dr. Scully was under a subpoena. *See Miller* at 391-92, 618 S.E.2d at 843; *Johnson* at 28, 191 S.E.2d at 659.

C. Travel Costs to Mediation

[5] Travel expenses are also not specifically enumerated in N.C. Gen. Stat. § 7A-305(d). *See* N.C. Gen. Stat. § 7A-305(d). We also could find no case law before or during 1983 which addresses costs for mediation; therefore it is not a common law cost. *See Miller* at 391, 618 S.E.2d at 843. As traveling to a mediation is neither enumerated in N.C. Gen. Stat. § 7A-305(d) nor provided for in the common law, we conclude that the trial court did abuse its discretion in awarding this cost to defendants. *See Briley at* 547, 501 S.E.2d at 656. We therefore reverse the decision of the trial court to tax plaintiff $26.52 in mediation travel costs.

D. Reasonable and Necessary Costs

[6] Defendant also argues that the trial court abused its discretion because it failed to make any findings of fact that the costs taxed

were reasonable and necessary. "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley at* 547, 501 S.E.2d at 656. Rule 52(a)(2) of the North Carolina Rules of Civil Procedure provides that "[f]indings of fact and conclusions of law are necessary on decisions of any motion or order ex mero moto *only when requested by a party and as provided by Rule 41(b)*." N.C. Gen. Stat. § 1A-1, Rule 52 (2003) (emphasis added).

Pursuant to Rule 52 the trial court did not err in failing to make findings of fact where they were not requested by a party. *See id.* The trial court ordered the costs taxed based on evidence which included an affidavit from defendants' attorney and several invoices and receipts. In plaintiff's response to defendant's motion for costs, no evidence was presented countering defendants' affidavit, invoices or receipts. Plaintiff has not argued either here or before the trial court that defendants' costs were unreasonable or unnecessary, and the record would support a finding that the costs were reasonable and necessary. On this evidence the trial court did not abuse its discretion. *See Briley at* 547, 501 S.E.2d at 656. *Id.*

We therefore conclude that the trial court did not abuse its discretion in the costs taxed to the plaintiff except for the costs for travel to mediation and that the trial court was not required to make findings of fact stating that such costs were "reasonable and necessary" given the absence of a request for findings and the evidence presented. *See id.*; *Briley at* 547, 501 S.E.2d at 656.

V. Conclusion

In conclusion, we reverse the trial court's order mandating plaintiff to pay $26.52 in travel costs to mediation and affirm all other costs taxed.

Affirmed in part, reversed in part.

Chief Judge MARTIN and Judge ARROWOOD concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. ELIJAH BRYANT PATE, DEFENDANT

No. COA07-13

(Filed 4 December 2007)

1. Criminal Law— instructions—deadlocked jury—no prejudicial error

There was no prejudicial error from an erroneous instruction to a deadlocked jury where, examining the entire record, there was no probable impact on the guilty verdict. The error was instructing the jury that its inability to agree might result in another jury having to try the issue after a tremendous investment of time and money by the State and the defense. Although the term "deadlock" was not used by the jury, a note from the jury to the judge, and the dialogue and attendant circumstances, indicated that the jury was deadlocked.

2. Sentencing— exercise of right to jury trial—improper consideration—not supported by record

The record did not indicate that the trial court improperly considered defendant's exercise of his right to a jury trial in imposing an active sentence for indecent liberties, although defendant argued otherwise.

Appeal by defendant Elijah Bryant Pate from judgment entered on 12 July 2006 by Judge Jerry Braswell in Superior Court, Wayne County. Heard in the Court of Appeals 30 August 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Anita LeVeaux, for the State.

Jeffrey Evan Noecker for defendant-appellant.

STROUD, Judge.

After a jury trial defendant was convicted of indecent liberties with a minor on 12 July 2006 in Superior Court, Wayne County. Supplemental instructions were provided to the jury after the jury indicated they were at a "standstill." Judge Jerry Braswell sentenced defendant to an active sentence within the presumptive range of sentences, between 16 and 20 months. Defendant appeals.

I. Background

On 4 April 2005 defendant was indicted by the Wayne County Grand Jury for: (1) first degree statutory sex offense, (2) indecent liberties with a minor, and (3) a lewd and lascivious act with a minor. On 6 February 2006, a superseding indictment was issued charging defendant with: (1) indecent liberties with a minor on or about 1 January 2001 up to and including 30 June 2002, (2) a lewd and lascivious act with a minor on or about 1 January 2001 up to and including 30 June 2002, (3) first degree statutory sex offense, (4) indecent liberties with a minor on or about 1 August 2001 up to and including 30 June 2002, and (5) a lewd and lascivious act with a minor on or about 1 August 2001 up to and including 30 June 2002.

On 10, 11 and 12 July 2006 a jury trial was held before Judge Jerry Braswell in Superior Court, Wayne County. On 12 July 2006 Judge Braswell dismissed both charges of a lewd and lascivious act with a minor and instructed the jury as to the remaining three charges. At 11:26 a.m. the jury retired to deliberate. At approximately 1:03 p.m. the jury came back to the courtroom and informed the court they had not reached a decision. Judge Braswell gave the jury a lunch break until 2:30 p.m. Later in the day, the jury sent a note to the trial judge. The note is not in the record, but the parties agree the note read, "Your Honor, We seem to be at a standstill. [W]e can agree on two counts but are 10-2 on the third. What do you suggest we do." At 4:08 p.m. the jury returned to the courtroom where the following dialogue took place:

> THE COURT: Ms. Myers, I have seen your—the note.
>
> FOREMAN MYERS: Okay.
>
> THE COURT: It appears to the Court that you are making some progress. It would appear to the Court that you've made substantial progress. But that you seem to be at the present time unable to resolve one remaining issue.
>
> FOREMAN MYERS: Yes.
>
> THE COURT: Based on the numerical count that you have, it would appear to the Court that I need to send you back in to do some further discussion. You've been at this for a couple hours or so. Do you believe that if you go back and continue discussing this matter and sifting through the evidence and exchanging idears [sic] that you will be able to come to a unanimous decision?

FOREMAN MYERS: (Foreman looking at her fellow jurors) We could try.

THE COURT: You'll try.

FOREMAN MYERS: I think they're pretty adamant.

THE COURT: Both the State and the Defendant have put a great deal of time and effort into this situation, into this case, and what you're discovering that these—arriving at your decisions sometimes is not easy. But that's the way our jury system works. You're the social conscience of this community and you have to make that decision.

If the remaining issue is not resolved, your question, sort of what can we do or should we do? What's the next step?

Then on that issue it would be what we would characterize or classify as a hung jury.

FOREMAN MYERS: Right.

THE COURT: And then that issue may have to be put—could possibly be retried again and heard by another jury for somebody else to try to resolve it, if you're not able to, which is why we're urging you to go back and continue to work on it, and the Defendant and the State have chosen you to make this decision. I didn't say it was going to be easy, but it's entrusted in you, that responsibility, as so we've been here for a couple days now, and we can stay a little bit longer, but, you know, it would be best if we tried it and go ahead and try to resolve that one remaining issue that we have, because it's not going away. And it's your duty to try, if you can, to reach a unanimous verdict, and then if you can't then let me know that as well, but I'm going to give you another chance to try to see if you can do it.

At no point during the preceding dialogue or thereafter did defendant object to the trial court's statements to the jury.

The jury then left the courtroom and returned at 4:43 p.m. with a unanimous verdict of: (1) guilty of taking indecent liberties with a minor child on or about 1 August 2001 and up to and including 30 June 2002, (2) not guilty of first degree sex offense, and (3) not guilty of taking indecent liberties with a minor child on or about 1 January 2001 and up to and including 30 June 2002. Judge Braswell sentenced defendant within the presumptive range of sentences, 16

to 20 months. Defendant appeals and assigns as error the trial court's supplemental jury instructions and imposition of an active sentence of imprisonment.

II. Jury Instructions

[1] Defendant contends the trial court erred in its "coercive manner [of] informing the deadlocked jury that the parties had put a great deal of time and effort into the case, and if they failed to reach a unanimous verdict another jury could be brought in to decide the issues."

> 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. 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. Further, in 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. Wood, 185 N.C. App. 227, 232, 647 S.E.2d 679, 684 (2007) (internal citations and internal quotations omitted).

The law governing the present case is N.C. Gen. Stat. § 15A-1235. *See* N.C. Gen. Stat. § 15A-1235 (2005). N.C. Gen. Stat. § 15A-1235 provides that

> (a) Before the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.
>
> (b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:
>
> (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(c) *If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.*

(d) If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury.

N.C. Gen. Stat. § 15A-1235 (emphasis added).

In the present case the jury did not actually use the word "deadlock"; however, they did inform the judge that they were at a "standstill" and the jury foreperson indicated that they were adamant about their positions. Though the legal term "deadlock" was not used by the jury, we believe the note, dialogue, and attendant circumstances indicate that the jury was deadlocked.

In *State v. Easterling*, the trial court on its own motion brought the jury in from deliberations and instructed them,

Members of the jury, I realize what a disagreement means, and I presume you understand and realize what a disagreement means. *It means that there will be another week or more of the time of the Court that will have to be consumed in the trial of these actions again.* I do not want to force you or coerce you in any way to reach a verdict, but it is your duty to try to reconcile your differences and to reach a verdict, if it can be done, without any surrender of anyone's conscientious convictions. *You have heard the evidence in this case, and all of it; and a mistrial will mean that another jury will have to be selected to hear the case or these cases, and the evidence again.* I recognize that there are reasons sometimes why jurors cannot agree. The Court wants to emphasize that it is your duty to do whatever you can to reason the matter over together as reasonable men, reasonable women, and to reconcile your differences, if such is possible without the surrender of your conscientious convictions, and to reach a verdict. . . .

State v. Easterling, 300 N.C. 594, 606, 268 S.E.2d 800, 808 (1980) (emphasis added).

The North Carolina Supreme Court held that the instructions above were in error but did not grant a new trial because the instructions were not prejudicial to the defendant, as "[t]he record provide[d] not the slightest indication that the jury was in fact deadlocked in its deliberations, or in any other way open to pressure by the trial judge to 'force' a verdict, at the time the charge was given." *See id.* at 608-09, 268 S.E.2d at 809. The Court went on to carefully distinguish *Easterling* from the facts in *State v. Lamb* where there had been an "initial jury disagreement preced[ing] the offending instruction." *See id.* at 609, 268 S.E.2d at 809.

In *State v. Lipfird*, the jury returned to the courtroom after indicating that they were unable to reach a verdict. 302 N.C. 391, 391, 276 S.E.2d 161, 161 (1981). The judge then gave the following instruction:

> All right, now, Members of the Jury, anything further? *I presume that you members of the jury realize what a disagreement means. It means, of course, that it will be more time of the Court that will have to be consumed in the trial of this action again.* I don't want to force you or coerce you in any way to reach a verdict, but it is your duty to try to reconcile your differences and reach a verdict if it can be done without the surrender of one's conscientious convictions.
>
> You've heard the evidence in the case. *A mistrial, of course, will mean that more time and another jury will have to be selected to hear the cases and this evidence again.*
>
> . . . .

Id. (emphasis in original). The North Carolina Supreme Court granted a new trial based upon the erroneous jury instructions because "it was error, in violation of G.S. § 15A-1235 . . . to instruct a *deadlocked* jury that its inability to agree will result in the inconvenience of having to retry the case." *Id.* at 392, 276 S.E.2d at 162 (discussing the holding in *Easterling*, 300 N.C. 594, 268 S.E.2d 800) (emphasis added).

In *State v. Lamb*, upon being informed that the jury "could not reach a decision" the trial court gave instructions substantially similar to the instructions in the present case. *See State v. Lamb*, 44 N.C. App. 251, 252, 261 S.E.2d 130, 130-31 (1979), *disc. rev. denied*, 299 N.C. 739, 267 S.E.2d 667 (1980). The trial court instructed that

> Both the State and the defendants have a tremendous amount of time and money invested in this case.
>
> If you don't reach a verdict, it means that it will have to be tried again by another jury in this county and that involves a duplication of all the expense and all the time.
>
> . . . .

Id. This Court reversed and remanded the case stating that

> [i]t was error under the . . . existing law for the court to charge the jurors that if they did not agree upon a verdict another jury might be called upon to try the case; that the State and defendants had a tremendous amount of time and money invested, and retrial involved a duplication of all the time and expense.

Id. at 260, 261 S.E.2d at 135.

Here, just as in *Lipfird*, the trial court "instruct[ed] a deadlocked jury that its inability to agree will result in the inconvenience of having to retry the case" and that if they did not reach a unanimous decision another jury may have to hear the case. *See Lipfird* at 391, 276 S.E.2d at 161. Similarly to *Lamb* the trial court here erroneously informed the jury that "if they did not agree upon a verdict another jury might be called upon to try the case" and "that the State and defendants had a tremendous amount of time and money invested." *See Lamb* at 260, 261 S.E.2d 135. "Although the instruction herein did not mention the expense of retrying the case, it clearly mentioned the potential inconvenience and use of the court's time. In our view . . . this instruction constitute[s] prejudicial error." *State v. Johnson*, 80 N.C. App. 311, 314, 341 S.E.2d 770, 772 (1986). Just as in *Easterling* we find error in the trial court's instructions. *See Easterling* at 608, 268 S.E.2d at 809.

However, the present case is distinguishable from *Easterling* in that the jury was deadlocked at the time supplemental instructions were provided. *See Easterling* at 609, 268 S.E.2d at 809. Though both *Lipfird* and *Lamb* had deadlocked juries neither indicate what standard of review the courts were using or simply refer to "prejudicial error." *See Lipfird*, 302 N.C. 391, 276 S.E.2d 161; *Lamb*, 44 N.C. App. 251, 261 S.E.2d 130. Prejudicial error is "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443 (2005). A "reasonable pos-

sibility" of a different result at trial is a much lower standard than that a different result "probably" would have been reached at trial, which is what this Court must find for there to be plain error. *See id*; *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80 (1986); Wood at 232, 647 S.E.2d at 684.

> The plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.
>
> . . . .
>
> [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. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *U.S. v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, *McCaskill v. U.S.*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982) (footnotes omitted) (emphasis in original) (internal quotations omitted)).

In *State v. Williams* this Court stated the trial court erred in its jury instructions, but concluded it did not rise to a level of plain error because an "error does not . . . automatically entitle the defendant to a new trial. We have recognized that every variance from the procedures set forth in the statute does not require the granting of a new trial." *State v. Williams*, 315 N.C. 310, 327-28, 338 S.E.2d 75, 86 (1986) (internal citation and internal quotations omitted).

The trial court did erroneously instruct the jury, but we cannot now conclude that the error was so fundamental that "absent the error, the jury *probably* would have reached a different verdict . . . or . . . the error . . . constitute[d] a miscarriage of justice." *Wood* at 232, 647 S.E.2d at 684 (emphasis added). The State presented evidence which included, *inter alia*, eyewitness testimony and the signed con-

fession of defendant, with changes to the confession initialed by defendant. We have examined the entire record and do not conclude the trial court's error in instructions had "a probable impact on the jury's finding of guilt." *Odom* at 660, 300 S.E.2d at 378. This assignment of error is overruled.

III. Sentencing

[2] Defendant next assigns error to the trial court's imposition of an active sentence based on defendant exercising his right to a jury trial. Defendant attempts to characterize the alleged sentencing error as a constitutional question which this court reviews *de novo*. *Row v. Row*, 185 N.C. App. ——, ——, 650 S.E.2d 1, 4 (2007).

> A sentence within the statutory limit will be presumed regular and valid. However, such a presumption is not conclusive. If the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant's rights.

State v. Boone, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977).

Pursuant to the United State's Constitution a criminal defendant has a right to a jury trial. U.S. Const. amend. VI. Defendant relies on *State v. Peterson*, where this Court remanded a case for a new sentencing hearing after the judge repeatedly commented about defendant's choice to exercise his constitutionally protected right to a jury trial. *State v. Peterson*, 154 N.C. App. 515, 571 S.E.2d 883 (2002).

However, in the present case, the record does not indicate that the trial court improperly considered defendant's exercise of his right to a jury trial in imposing an active sentence. The only words of the trial court that defendant uses to support this proposition is the trial judge saying, "[H]ow is it that you could come into court and try to convince this court . . . ." After a thorough review of the transcript and record we do not consider this language nor any other statement by the trial court as evidence that the court improperly considered defendant's exercise of his right to a jury trial during the sentencing phase. This assignment of error is without merit.

IV. Conclusion

For the foregoing reasons we conclude that the trial court did not commit plain error in instructing the jury and that the trial court did

not improperly consider defendant's exercise of his right to a jury trial when it imposed an active sentence.

NO ERROR.

Judges ELMORE and STEELMAN concur.

STATE OF NORTH CAROLINA v. OZELL BLANGO BRIMMER, DEFENDANT

No. COA06-1701

(Filed 4 December 2007)

Search and Seizure— motion to suppress evidence—vehicle stop—canine sniff of vehicle

The trial court did not err in a possession with intent to sell or deliver marijuana and maintaining a vehicle for selling controlled substances case by denying defendant's motion to suppress evidence obtained as a result of a vehicle stop even though defendant contends the State lacked reasonable suspicion to conduct a dog sniff, because: (1) a dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment; (2) if the detention is prolonged for only a very short period of time, the intrusion is considered de minimis and as a result, even if the traffic stop has been effectively completed, the sniff is not considered to have prolonged the detention beyond the time reasonably necessary for the stop; (3) in this case the canine unit arrived prior to an officer giving defendant the warning ticket, the officer then explained that another officer was going to conduct a dog sniff of the exterior of defendant's car, it took the dog a minute and a half to complete the sniff, and the stop was extended only for the time necessary to explain about the dog sniff and the one-and-a-half minutes of the actual sniff; and (4) defendant chose on his own initiative to exit his car and talk with the police officer after the canine unit had already arrived, and defendant's own actions in leaving the car necessarily prolonged the stop for the modest period of time necessary to be frisked, to talk with the officer, and to return to his car.

Appeal by defendant from judgment entered 26 September 2006 by Judge Kenneth F. Crow in Craven County Superior Court. Heard in the Court of Appeals 29 August 2007.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

McAfee Law, P.A., by Robert J. McAfee, for defendant-appellant.

GEER, Judge.

Defendant pled guilty to one count of possession with intent to sell or deliver marijuana and one count of maintaining a vehicle for selling controlled substances, but reserved the right to appeal the trial court's denial of his motion to suppress evidence obtained as a result of a vehicle stop. Although defendant does not contest the validity of the initial stop, he contends that a subsequent drug dog sniff constituted an unlawful detention without reasonable suspicion. Based on *Illinois v. Caballes*, 543 U.S. 405, 160 L. Ed. 2d 842, 125 S. Ct. 834 (2005), and *State v. Branch*, 177 N.C. App. 104, 627 S.E.2d 506, *disc. review denied*, 360 N.C. 537, 634 S.E.2d 220 (2006), we hold that the trial court properly denied the motion to suppress.

Facts

On 24 January 2006, Officer Todd Conway was traveling behind defendant's vehicle. As he routinely does while on duty, Officer Conway ran defendant's license tag to check for valid registration and insurance. Before Officer Conway received a response from the Division of Motor Vehicles ("DMV"), defendant made a left turn onto another street. Officer Conway kept driving straight, but five to six seconds later, he learned that defendant's tags were registered to a Cadillac rather than the Lexus that defendant was driving. At that point, Officer Conway turned around, located defendant, and stopped him.

Officer Conway told defendant that he was being stopped on suspicion of having fictitious tags. Defendant explained that his mother had just purchased the car and gave Officer Conway the transfer of title tags and his driver's license. The officer told defendant that he was going to issue a written warning.

As Officer Conway walked back to his car with defendant's paperwork, he recognized the name on defendant's driver's license as a name he had heard mentioned over the radio by narcotics officers.

Officer Conway called the on-duty narcotics officer, who confirmed that defendant was suspected of narcotics involvement. Officer Conway then requested that a canine officer come to the scene in order to conduct a drug dog sniff.

Officer Conway was out of warning tickets, but borrowed another officer's warning ticket book. About seven minutes after the stop began, as Officer Conway began to walk back to defendant's vehicle with the warning ticket, Officer Copeland, the canine officer, arrived. When Officer Conway reached defendant's vehicle, defendant began to attempt to get out of his car. Although Officer Conway allowed defendant to exit the car, he asked defendant if he could pat him down to make sure he had no weapons. After defendant consented to the frisk, Officer Conway had defendant step away from the car while the officer finished talking to him.

Officer Conway then returned defendant's driver's license and registration and asked defendant if there was anything illegal in the car. When defendant responded "no," Officer Conway explained to him that he was going to have a dog walk around the car. The dog sniff took a minute and a half to two minutes to conduct. Officer Copeland reported to Officer Conway that the dog, Nick, had alerted to the passenger side of the vehicle. From the time Officer Copeland arrived at the scene until the time Nick alerted, approximately four minutes elapsed. The officers then obtained defendant's keys, searched the car, and found a large quantity of marijuana.

Defendant was indicted on charges of possession with intent to sell or deliver marijuana and maintaining a vehicle for selling controlled substances. On 21 September 2006, defendant filed a motion to suppress the evidence found in his car. At the 26 September 2006 hearing on the motion, the State presented the testimony of Officers Conway and Copeland. Defendant presented no evidence. After the trial court denied the motion to suppress, defendant pled guilty, but reserved his right to appeal the denial of the motion. The trial court sentenced defendant to six to eight months imprisonment, suspended the sentence, and placed defendant on unsupervised probation for 24 months.

Discussion

The sole issue presented on appeal is whether the trial court erred in denying defendant's motion to suppress. Defendant does not dispute the lawfulness of the traffic stop. Instead,

defendant contends that the State lacked reasonable suspicion to conduct the dog sniff.

Defendant first argues that because a dog sniff was not necessary to verify the validity of defendant's license plate, the officer was required to have reasonable suspicion to justify the need for a dog sniff apart from the traffic stop. This argument is foreclosed by *Caballes* and *Branch*, the controlling authorities with respect to canine sniffs.

In *Caballes*, a state trooper stopped the defendant for speeding. When the officer radioed the police dispatcher to report the stop, a canine officer immediately headed to the scene. 543 U.S. at 406, 160 L. Ed. 2d at 845, 125 S. Ct. at 836. Upon arrival, the canine officer walked the dog around the car while the other officer was writing the defendant a warning ticket. *Id.*, 160 L. Ed. 2d at 846, 125 S. Ct. at 836. After the dog alerted to the trunk of the car, the officers searched the trunk and found marijuana. *Id.* The entire incident took less than 10 minutes. *Id.* The Illinois Supreme Court, in holding that the dog sniff constituted an unlawful seizure, reasoned that the use of the dog converted the lawful traffic stop into a drug investigation, and because the shift in purpose was not supported by any reasonable suspicion that respondent possessed narcotics, it became unlawful, *id.* at 408, 160 L. Ed. 2d at 847, 125 S. Ct. at 837—the same reasoning relied upon by defendant in this case.

In reversing the Illinois Supreme Court, however, the United States Supreme Court specifically held: "In our view, conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy. Our cases hold that it did not." *Id.* The Court explained that "any interest in possessing contraband cannot be deemed legitimate, and thus, governmental conduct that *only* reveals the possession of contraband compromises no legitimate privacy interest." *Id.* (internal quotation marks omitted). The Court, therefore, concluded that "[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." *Id.* at 410, 160 L. Ed. 2d at 848, 125 S. Ct. at 838.

This Court first applied *Caballes* in *Branch*, in which this Court had initially held, prior to the filing of *Caballes*, that reason-

able suspicion was required before an officer conducted a canine sniff of a suspect's lawfully stopped vehicle. *See State v. Branch*, 162 N.C. App. 707, 714, 591 S.E.2d 923, 927 (2004), *disc. review improvidently allowed*, 359 N.C. 406, 610 S.E.2d 198, *vacated*, 546 U.S. 931, 163 L. Ed. 2d 314, 126 S. Ct. 411 (2005). The United States Supreme Court, however, vacated that decision for reconsideration in light of *Caballes*. *Branch*, 177 N.C. App. at 105, 627 S.E.2d at 507.

In *Branch*, police officers, who had stopped the defendant at a driver's license checkpoint, conducted a dog sniff of the defendant's car while another officer was obtaining information regarding the defendant over the radio. In response to the defendant's contention that even though the initial stop was lawful, the officers lacked reasonable suspicion to conduct the dog sniff, this Court held on remand:

> [O]nce the lawfulness of a person's detention is established, *Caballes* instructs us that officers need no additional assessment under the Fourth Amendment before walking a drug-sniffing dog around the exterior of that individual's vehicle. . . . Thus, based on *Caballes*, once [the defendant] was detained to verify her driving privileges, Deputies . . . needed no heightened suspicion of criminal activity before walking [the dog] around her car.

Id. at 108, 627 S.E.2d at 509.

Accordingly, in this case, based on *Caballes* and *Branch*, because the initial traffic stop was lawful, the officers needed no further justification in order to conduct the dog sniff. Nonetheless, defendant argues that once he was issued the warning ticket, Officer Conway was required to have reasonable suspicion to prolong the detention in order to complete the dog sniff.

In *Caballes*, the Supreme Court warned that "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." 543 U.S. at 407, 160 L. Ed. 2d at 846, 125 S. Ct. at 837. Courts applying *Caballes* have held, however, that if the detention is prolonged for only a very short period of time, the intrusion is considered *de minimis*. As a result, even if the traffic stop has been effectively completed, the sniff is not considered to have prolonged the detention beyond the time reasonably necessary for the stop.

United States v. Alexander, 448 F.3d 1014 (8th Cir. 2006), *cert. denied*, —— U.S. ——, 166 L. Ed. 2d 715, 127 S. Ct. 929 (2007), involves facts similar to those in this case. In *Alexander*, after a traffic stop based on probable cause, an officer told the defendant that he would give him a written warning and then asked the defendant whether there was anything illegal in his car and whether he would consent to a search of the car. *Id.* at 1015. After the defendant refused to give consent, the officer told the defendant that the officer was going to conduct a drug dog sniff and if the dog did not alert, then the defendant would be free to go. The dog alerted four minutes after the defendant was told of the warning ticket and 16 minutes after the traffic stop commenced. *Id.* at 1016.

In reviewing the trial court's denial of a motion to suppress, the Eighth Circuit first noted the rule that "[o]nce an officer has decided to permit a routine traffic offender to depart with a ticket, a warning, or an all clear, the Fourth Amendment applies to limit any subsequent detention or search." *Id.* The court added: "We recognize, however, that this dividing line is artificial and that dog sniffs that occur within a short time following the completion of a traffic stop are not constitutionally prohibited if they constitute only *de minimis* intrusions on the defendant's Fourth Amendment rights." *Id.* The court then pointed to the holding in *Caballes* that " 'conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise conducted in a reasonable manner.' " *Id.* at 1017 (quoting *Caballes*, 543 U.S. at 408, 160 L. Ed. 2d at 847, 125 S. Ct. at 837). According to the Eighth Circuit, "[i]t is precisely this reasonableness inquiry" that led it to recognize "that the artificial line marking the end of a traffic stop does not foreclose the momentary extension of the detention for the purpose of conducting a canine sniff of the vehicle's exterior." *Id.* Because the defendant's detention in *Alexander* was, at most, extended four minutes beyond the point when the defendant was told of the warning ticket, the Eighth Circuit held that the dog sniff was legal, and the trial court properly denied the motion to suppress. *Id. See also United States v. Williams*, 429 F.3d 767, 772 (8th Cir. 2005) ("[A] brief five to six minute wait for the drug-sniffing dog is well within the time frame for finding that the stop was not unreasonably prolonged.").

The Florida District Court of Appeal applied the *Alexander* reasoning in *State v. Griffin*, 949 So. 2d 309 (Fla. Dist. Ct. App.), *disc. review denied*, 958 So. 2d 920 (2007). A canine officer had stopped the defendant for speeding and failure to maintain a single lane. *Id.* at

311. The officer called for a second officer to assist at the scene because his department's procedure required the presence of a second officer prior to conducting a dog sniff. *Id.* When the second officer arrived five to 10 minutes later, the first officer stopped writing the defendant's citation and walked his dog around the car. *Id.* The dog sniff lasted for only 20 to 90 seconds, and the defendant was arrested 15 minutes after the stop began. *Id.* Relying upon the *Alexander* analysis, the court concluded that the stop was not conducted in an "unreasonable manner or improperly delayed" and any intrusion upon the defendant's liberty interests resulting from the interruption of the writing of the citation was "*de minimis* and, therefore, not unconstitutional." *Id.* at 315. *See also Hugueley v. Dresden Police Dep't*, 469 F. Supp. 2d 507, 513 (W.D. Tenn. 2007) (holding that the plaintiff's "two and one-half minute detention following the traffic stop while [the officer] conducted a dog-sniff on the exterior of his vehicle was *de minimis*, and it did not convert the valid traffic stop into an unreasonable seizure in violation of the Fourth Amendment").

In this case, the canine unit arrived prior to Officer Conway's giving the warning ticket to defendant. Officer Conway then proceeded to explain to defendant that Officer Copeland was going to conduct a dog sniff of the exterior of defendant's car. The court found that it took the dog a minute and a half to complete the sniff. Thus, the stop was extended only for the time necessary to explain about the dog sniff and the one-and-a-half minutes of the actual sniff. We find the reasoning of *Alexander* persuasive and hold that this very brief additional time did not prolong the detention beyond that reasonably necessary for the traffic stop.

Our Supreme Court's decision in *State v. McClendon*, 350 N.C. 630, 517 S.E.2d 128 (1999), predating *Caballes*, and this Court's decision in *State v. Euceda-Valle*, 182 N.C. App. 268, 641 S.E.2d 858, *appeal dismissed, disc. review denied, and cert. denied*, 361 N.C. 698, —— S.E.2d ——, (2007), are not to the contrary. In *McClendon*, the Supreme Court "address[ed] the question of whether the further detention of defendant from the time the warning ticket was issued until the time the canine unit arrived went beyond the scope of the stop and was unreasonable." *Id.* at 636, 517 S.E.2d at 132. The Court held that "[i]n order to further detain a person after lawfully stopping him, an officer must have reasonable suspicion, based on specific and articulable facts, that criminal activity is afoot." *Id.* The officer in that case, however, called for a canine unit only after he had already

issued the defendant a warning ticket, and the canine unit did not arrive until 15 to 20 minutes later. *Id.* at 634, 517 S.E.2d at 131. Because of the lengthy detention after the undisputed conclusion of the traffic stop, the Court had no reason to consider whether—as in this case—a *de minimis* extension of the traffic stop required additional reasonable suspicion.

In *Euceda-Valle*, this Court applied *McLendon* when a dog sniff occurred immediately after a warning ticket had been given to the defendant following a lawful traffic stop. 182 N.C. App. at 270-71, 641 S.E.2d at 862. Because the Court concluded that the trial court properly found the existence of reasonable articulable suspicion, this Court did not need to address the issue presented in this case. *Id.* at 270-71, 641 S.E.2d at 863. Further, the defendant was required to remain in the officer's patrol car while the drug sniff took place. *Id.* at 270-71, 641 S.E.2d at 862. The trial court specifically found that the defendant was, during this period of time, required to remain "in [the police officer's] control." *Id.*

In this case, in contrast to *McLendon* and *Euceda-Valle*, defendant chose, on his own initiative, to exit his car and talk with the police officer after the canine unit had already arrived. Defendant's own actions in leaving the car necessarily prolonged the stop for the modest period of time necessary to be frisked, to talk with the officer, and—in the absence of the dog sniff—to return to his car. The dog sniff added only a minute and a half beyond defendant's conversation with the officer. We hold that the trial court properly concluded that such a very brief addition of time did not extend the legitimate traffic stop so as to require application of the principle set forth in *McLendon*.

Defendant does not dispute that once Nick, the drug dog, alerted to the presence of contraband, the officers then had probable cause to conduct a search of the vehicle. *See Caballes*, 543 U.S. at 409, 160 L. Ed. 2d at 847, 125 S. Ct. at 838. We, therefore, affirm the trial court's denial of defendant's motion to suppress.

Affirm.

Judges CALABRIA and JACKSON concur.

STATE OF NORTH CAROLINA EX REL. PATRICIA A. LIVELY, PLAINTIFF v.
CRAIG A. BERRY, DEFENDANT

No. COA06-1678

(Filed 4 December 2007)

Child Support, Custody, and Visitation— foreign child support orders—defenses—statutory rather than equitable

The trial court erred by not fully confirming registration of Florida child support orders where defendant did not establish any defense to registration of the orders under N.C.G.S. § 52C-6-607. Equitable defenses to defendant's child support obligations can be raised only in Florida.

Appeal by plaintiff from order entered on 25 August 2006 by Judge Michael A. Paul in District Court, Hyde County. Heard in the Court of Appeals 10 September 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Lisa Bradley Dawson for the State.

Sarah Alston Homes for defendant-appellee.

STROUD, Judge.

Plaintiff appeals trial court's order which denied registration of foreign child support orders as to arrears based on the *ex mero motu* argument that registering such orders denied defendant of his substantive and procedural due process rights. The dispositive question before this Court is whether the trial court erred in not confirming the registration of the foreign support orders in their entirety as defendant failed to raise any valid defense under the Uniform Interstate Family Support Act, codified in chapter 52 of the North Carolina General Statutes. For the following reasons, we reverse and remand.

I. Background

On 5 June 1988 Craig A. Berry (hereinafter "defendant") and Patricia A. Lively (hereinafter "mother") were married in Rockledge, Florida. On 12 August 1989 defendant and mother had a son, hereinafter referred to as "the child". On 29 January 1991 defendant and mother were divorced.

Defendant and mother agreed to a Separation, Child Custody and Property Settlement Agreement ("agreement"). The parents agreed

the child's primary residence would be with his mother. The agreement was signed and verified by defendant and incorporated into the Final Judgment of Dissolution of Marriage by the Circuit Court in Brevard County, Florida. The judgment provided:

> Child Support. The Father, CRAIG A. BERRY, shall promptly pay by cash, postal money order, or check payable to the Circuit Court, Brevard County, Florida, P.O. Drawer H, Titusville, Florida, 32780, for disbursement to the Mother, PATRICIA A. BERRY, whose address is 1900 Post Road, #176, Melbourne, Florida, 32935, for support and maintenance of said minor child, the sum of $50.00 per week, commencing February 1, 1991, plus court costs of $1.50 per payment and a like sum on each Friday thereafter, until furthr [sic] notice of this Court. Mailed certified checks and money orders must show the Father's name and the above Court case number.

On or about 6 July 2005 an order was entered in Florida which established defendant's child support arrears as of 28 April 2005 in the amount of $31,915.00 and public assistance arrears in the amount of $850.00. On or about 18 November 2005 the Florida Child Support Enforcement office requested a verification of address for defendant. On 30 December 2005, Tara Tanaka, manager of the Compliance Enforcement Process Child Support Enforcement Program verified the defendant's Fairfield, North Carolina address. On 9 February 2006 the Office of Child Support Enforcement in Brevard County, Florida requested the Child Support Enforcement division of the Department of Human Resources in Raleigh, North Carolina to register two foreign support orders.

The first order under the case number 05-1990-DR-012494 (hereinafter "child support order") required defendant to pay the Florida State Disbursement Unit: (1) $50.00 per week for ongoing child support payments due to mother and (2) $33,865.00 as of 23 January 2006 for child support arrears owed to mother. The second order under the case number 05-2004-DR-70325 (hereinafter "public assistance order") required defendant to pay $850.00, to be paid in the amount of $5.00 per week, to the Florida State Disbursement Unit for arrears while the child was in foster care.

On or about 12 April 2006 both orders were registered in Hyde County, North Carolina. On or about 13 April 2006 a certified copy of the notice of registration was sent to defendant and defendant received the notice. On 28 April 2006 defendant filed a request for

hearing and motion to vacate registration of the foreign support orders based solely on the grounds that he had been denied visitation rights with the child. On 22 May 2006 notice was sent to defendant that a hearing was scheduled on 8 June 2006 at 9:30 a.m. in District Court, Hyde County, North Carolina. Defendant requested continuance of the 8 June 2006 hearing, and it was continued to 6 July 2006 at 9:30 a.m. in District Court, Hyde County, North Carolina.

At the hearing defendant testified, *inter alia*, that: (1) in or around 1992 defendant moved to North Carolina from Florida, (2) he was not aware of the location of mother for a short period of time after the divorce, (3) since approximately 1993 he has been residing at the same address in North Carolina, his current address, (4) on 6 November 2003 by regular mail at the address where he is currently residing, Florida notified defendant that his son was being taken into custody, (5) he had received documents from social services informing him that his son had been placed in juvenile hall, (6) he had not attended his son's juvenile hearings in Florida because he knew that there were outstanding orders for his arrest in Florida for failure to pay child support, and (7) he did not make child support payments because he was not allowed to visit with his child. The only defense to his non-payment of child support defendant raised in his response or at the hearing was that he has not had visitation with the child.

On or about 23 August 2006 the trial court registered only the ongoing $50.00 monthly payment portion of the child support order and declined to register the portion of the child support order requiring defendant to pay arrears. The trial court also declined to register the public assistance order requiring defendant to pay arrears to Florida for the time the child was in foster care on the grounds that defendant's substantive and procedural due process rights were denied because the State of Florida did not notify defendant in advance that it would be enforcing the child support order even though "the Florida and Brevard County officials knew the defendant's address." The defense of due process was not raised by defendant but by the trial court *ex mero motu*.[1] Plaintiff appeals.

1. It is unclear why the trial court viewed this lack of advance notification of registration as a due process issue considering that (1) no such notification is required by UIFSA, and (2) defendant testified that he did not attend his son's juvenile hearings in Florida because he knew that there were outstanding orders for his arrest for failure to pay child support, demonstrating that defendant was very well aware that he had child support arrearages that were accruing and that Florida was seeking to collect arrearages.

II. Registration of Foreign Support Orders

Plaintiff argues that the trial court was required to follow the statutory language of the Uniform Interstate Family Support Act ("UIFSA"), codified in chapter 52C of the North Carolina General Statutes, and to allow the registration of the foreign support orders unless defendant presented evidence sufficient to establish at least one of the seven specifically enumerated defenses under UIFSA. We agree. "Where a party asserts an error of law occurred, we apply a *de novo* standard of review." *Craven Reg'l Med. Auth. v. N.C. Dep't. of Health and Human Servs.*, 176 N.C. App. 46, 51, 625 S.E.2d 837, 840 (2006).

Pursuant to N.C. Gen. Stat. § 52C-6-607

(a) A party contesting the validity or enforcement of a registered order or seeking to vacate the registration has the burden of proving one or more of the following defenses:

(1) The issuing tribunal lacked personal jurisdiction over the contesting party;

(2) The order was obtained by fraud;

(3) The order has been vacated, suspended, or modified by a later order;

(4) The issuing tribunal has stayed the order pending appeal;

(5) There is a defense under the law of this State to the remedy sought;

(6) Full or partial payment has been made; or

(7) The statute of limitations under G.S. 52C-6-604 precludes enforcement of some or all of the arrears.

(b) If a party presents evidence establishing a full or partial defense under subsection (a) of this section, a tribunal may stay enforcement of the registered order, continue the proceeding to permit production of additional relevant evidence, and issue other appropriate orders. An uncontested portion of the registered order may be enforced by all remedies available under the law of this State.

(c) If the contesting party does not establish a defense under subsection (a) of this section to the validity or enforcement of

> *the order, the registering tribunal shall issue an order confirming the order.*

N.C. Gen. Stat. § 52C-6-607 (2005) (emphasis added). "As used in statutes, the word 'shall' is generally imperative or mandatory." *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979); *see also In re Z.T.B.*, 170 N.C. App. 564, 569, 613 S.E.2d 298, 300 (2005) ("The use of the word 'shall' by our Legislature has been held by this Court to be a mandate . . . .").

In *Martin County ex rel. Hampton v. Dallas*, the trial court denied registration of a foreign child support order. 140 N.C. App. 267, 269, 535 S.E.2d 903, 905 (2000). This Court reversed and remanded stating that "[t]he trial court did not have the discretion to vacate that registration unless the defendant met the burden of proving one of the defenses set out in N.C. Gen. Stat. § 52C-6-607(a)." *Id.* at 269-70, 535 S.E.2d 903, 905-06.

> Plaintiff's support order became registered in North Carolina upon filing. Applying the appropriate law, UIFSA, the record is devoid of a defense under section 52C-6-607 of the General Statutes, which would justify vacating a properly registered support order. Under UIFSA, unless the court finds that the defendant has met his burden of proving one of the specified defenses, enforcement is compulsory.

Welsher v. Rager, 127 N.C. App. 521, 526, 491 S.E.2d 661, 664 (1997).

We also note that federal law, the Full Faith and Credit for Child Support Orders Act ("FFCCSOA"), has been interpreted by this Court in conjunction with UIFSA. *See, e.g., New Hanover Cty. ex rel Mannthey v. Kilbourne*, 157 N.C. App. 239, 578 S.E.2d 610 (2003). We have stated that

> G.S. 52C-6-607(a)(5) allows defendant to assert defenses under North Carolina law to the enforcement procedures sought but does not allow defendant to assert equitable defenses under North Carolina law to the amount of arrears. *See* John L. Saxon, *The Federal "Full Faith and Credit for Child Support Orders Act*," 5 INST. OF GOV'T FAM. L. BULL. 1, 4 (1995) ("When *interpreting* an out-of-state child support order, the forum state is required to apply the law of the rendering state," [. . .] but "with the possible exception of the statute of limitation, the procedures and remedies of the forum state will apply to the enforcement of out-of-state child support orders within the forum state.")

> Because G.S. 52C-6-607(a)(5) is limited to "defenses under the law of this State," this subsection does not authorize the assertion of defenses against enforcement raised by defendant in this case . . . .

State ex rel. George v. Bray, 130 N.C. App. 552, 558, 503 S.E.2d 686, 691 (1998).

The trial judge erroneously concluded as a matter of law that "enforcement of foreign support orders under Chapter 52C of the General Statutes of North Carolina is an equitable remedy." Chapter 52C provides a legal remedy, not an equitable remedy. *Id.* at 558, 503 S.E.2d at 691. Any equitable defenses to the child support obligations that defendant may wish to raise can be raised only in Florida. *See id.* If defendant is successful in Florida, he could then contest enforcement of the orders "in North Carolina under G.S. 52C-6-607(a)(3) on the grounds that the order has been modified." *Id.* at 559, 503 S.E.2d at 691.

In addition, under the FFCCSOA, the trial court did not have the authority to modify the Florida child support order by permitting registration of a portion of the order, the ongoing monthly child support, and denying registration of the arrears. "Modification is defined by FFCCSOA as a change in a child support order that affects the amount, scope, or duration of the order and modifies, replaces, supersedes, or otherwise is made subsequent to the child support order." *Id.* at 555, 503 S.E.2d at 689 (citation and internal quotations omitted).

> Modification of a valid order by a responding state is allowable only if the court has jurisdiction to enter the order and (1) all parties have consented to the jurisdiction of the responding state to modify the order or (2) neither the child nor any of the parties remain in the issuing state.

Id. Mother still resides in Florida and she has not consented to have North Carolina exercise jurisdiction to modify the orders. Florida therefore "retains continuing, exclusive jurisdiction over the action . . . and North Carolina does not have jurisdiction to modify the order." *Id.*

In North Carolina defendant's only potential defenses to registration of the orders were those enumerated defenses under N.C. Gen. Stat. § 52C-6-607. *See Dallas* at 269-70, 535 S.E.2d at 905-06; *Bray* at 558, 503 S.E.2d at 691. The only defense raised by defendant was

that he was not allowed to visit his child. Denial of visitation is not one of the seven enumerated defenses under N.C. Gen. Stat. § 52C-6-607. Defendant did not argue or present evidence as to any other potential defense under either North Carolina or Florida law. The refusal of the trial court to register the arrears portion of the orders affected the amount of the orders and thus effectively modified the orders. *See Bray* at 555, 503 S.E.2d at 689. Pursuant to the mandatory language of N.C. Gen. Stat. § 52C-6-607, the trial court erred by failing to confirm the registration of the Florida orders in full and without modification. *See* N.C. Gen. Stat. § 52C-6-607.

III. Conclusion

We reverse and remand this case because of the trial court's failure to follow the statutory language of N.C. Gen. Stat. § 52C-6-607. Defendant failed to establish any defense to registration of the orders under N.C. Gen. Stat. § 52C-6-607 and therefore the registration of the orders should be confirmed. Due to our ruling upon this issue, we need not review plaintiff's other assignments of error.

REVERSED AND REMANDED.

Chief Judge MARTIN and Judge ARROWOOD concur.

STATE OF NORTH CAROLINA v. LARRY DALE TONEY, DEFENDANT

No. COA06-1601

(Filed 4 December 2007)

1. Search and Seizure— motion to suppress evidence—consent—failure to make written findings of fact—undisputed evidence

The trial court did not err in a possession with intent to sell or deliver marijuana, possession of Xanax, possession of methadone, possession of drug paraphernalia, and knowingly maintaining a dwelling for the purpose of keeping controlled substances case by denying defendant's motion to suppress evidence seized as a result of the search of a hotel room, because: (1) although defendant contends the trial court failed to make written findings of fact in violation of N.C.G.S. § 15A-977(f), our

Supreme Court has held that if there is no material conflict in the evidence, it is not reversible error to fail to make such rulings since the propriety of the ruling on the undisputed facts can be determined by the evidence; (2) a review of the evidence revealed that there was no material conflict when an officer was the only witness to testify in connection with defendant's oral motion to suppress, and the undisputed evidence revealed the officers' actual entry into the room was the result of their asking defendant's wife for consent to search the room and her specific consent that they do so; and (3) although defendant contends it was unreasonable for the officer to accept consent when the only evidence available to the police was that the woman said it was her room, the woman found outside the hotel room identified herself and explained that she was staying in the room with her husband but had gotten locked out during the night, there was no dispute that the woman was married to defendant and that they shared the hotel room, and the hotel management confirmed that the woman was a lawful occupant of the room by letting her into the room.

2. Drugs— maintaining dwelling for purpose of keeping controlled substances—motion to dismiss—sufficiency of evidence

The trial court erred by denying defendant's motion to dismiss the charge of maintaining a dwelling for the purpose of keeping controlled substances, and the case is remanded for resentencing based on the trial court consolidating the convictions into a single judgment for purposes of sentencing, because: (1) the State's evidence showed that defendant occupied the room one night and was present during the search, and there was no evidence that he paid for the room or was even a registered guest in the room; and (2) it would be mere speculation that defendant, as opposed to his wife, maintained or kept the room.

Appeal by defendant from judgment entered 21 July 2006 by Judge Alma L. Hinton in Pitt County Superior Court. Heard in the Court of Appeals 22 August 2007.

Attorney General Roy Cooper, by Assistant Attorney General M. Elizabeth Guzman, for the State.

Mary March Exum for defendant-appellant.

GEER, Judge.

Defendant Larry Dale Toney appeals from convictions of possession with intent to sell or deliver marijuana; possession of Xanax; possession of methadone; possession of drug paraphernalia; and knowingly maintaining a dwelling for the purpose of keeping controlled substances. On appeal, defendant argues that the trial court erred in denying his motion to suppress evidence obtained in a search of his hotel room and in denying his motion to dismiss the charge of maintaining a dwelling for the purposes of keeping controlled substances. Because defendant's wife consented to the search of the hotel room, we hold that the trial court properly denied defendant's motion to suppress. With respect to the motion to dismiss, however, we agree with defendant that *State v. Kraus*, 147 N.C. App. 766, 557 S.E.2d 144 (2001), requires that we reverse defendant's conviction for maintaining a dwelling for the purpose of keeping controlled substances and remand for resentencing.

Facts

On 16 July 2003, Officer Michael Dawson of the Greenville Police Department was dispatched to assist Emergency Medical Services with a reportedly unconscious woman lying outside of a hotel room. When Officer Dawson arrived, a white female, who had scratches and dried blood on her, was lying on the ground in front of room 237. Officer Dawson and another Greenville Police officer woke the woman and offered her medical assistance, but she refused. The woman identified herself as Amy Toney and told Officer Dawson that she and her husband—who was later identified as defendant—were using drugs in the room the night before and that there might still be drugs present in the room. Ms. Toney explained that, at some point during the night, she had left the room, and when she could not get back in, she fell asleep outside the door.

After Officer Dawson unsuccessfully attempted to awaken defendant by knocking on the door, hotel management arrived with a key and opened the door for Ms. Toney. When the door was open, Officer Dawson could see digital scales and plastic baggies on a dresser about two or three feet from the door. Officer Dawson testified that these items are commonly used in the packaging of narcotics for distribution. Defendant was lying on the bed.

Ms. Toney gave Officer Dawson consent to search the hotel room. During the search, the officers discovered several pills, including some in a prescription bottle with the name "Kemp Leonard" on it

that was located in a duffle bag containing both men's and women's clothing. They also found a small amount of marijuana in the sheets of the bed. After Ms. Toney gave the officers consent to search her car, a third officer found between three and four pounds of marijuana in a plastic grocery bag. The car was registered to Ms. Toney.

Both defendant and his wife were arrested and transported to the Greenville Police Department. Defendant was subsequently indicted with possession with intent to manufacture, sell, and deliver methadone; knowingly and intentionally maintaining a dwelling for the purposes of keeping and/or selling controlled substances; conspiracy to sell methadone; possession with intent to manufacture, sell, and deliver Klonopin; conspiracy to sell Klonopin; possession of drug paraphernalia; possession with intent to sell and deliver Xanax; conspiracy to deliver Xanax; felonious possession of marijuana; possession with intent to sell and deliver marijuana; conspiracy to sell marijuana; and conspiracy to deliver marijuana.

At the close of all the evidence, defendant made a motion to dismiss that the trial court allowed as to the conspiracy charges and all charges involving Klonopin. During the charge conference, the trial court also dismissed the charge of felonious possession of marijuana. The jury found defendant guilty of possession of marijuana with intent to sell or deliver it, possession of methadone, knowingly maintaining a place for keeping and/or selling controlled substances, possession of Xanax, and possession of drug paraphernalia. The trial court consolidated the charges and sentenced defendant to a single presumptive range term of 7 to 9 months imprisonment. Defendant timely appealed to this Court.

I

[1] Defendant first challenges the trial court's denial of his motion to suppress. During Officer Dawson's testimony, defendant made an oral motion to suppress evidence seized as a result of the search of the hotel room. After allowing voir dire examination of Officer Dawson, the trial judge orally denied the motion. Defendant argues that the trial court erred in failing to make written findings of fact in violation of N.C. Gen. Stat. § 15A-977(f) (2005). Alternatively, defendant contends that the search violated the Fourth Amendment because Officer Dawson lacked valid consent to search the hotel room.

N.C. Gen. Stat. § 15A-977(f) provides that when a trial court is deciding a motion to suppress, "[t]he judge must set forth in the

record his findings of facts and conclusions of law." Although the statute does not, on its face, seem to require written, as opposed to oral, findings of fact, we need not address defendant's argument. N.C. Gen. Stat. § 15A-977(f) notwithstanding, our Supreme Court has held that "[i]f there is not a material conflict in the evidence, it is not reversible error to fail to make such findings because we can determine the propriety of the ruling on the undisputed facts which the evidence shows." *State v. Lovin*, 339 N.C. 695, 706, 454 S.E.2d 229, 235 (1995).

Upon review of the evidence, we have identified no material conflict in the evidence. Officer Dawson was the only witness to testify in connection with defendant's oral motion to suppress. Defendant contends that a conflict arose out of Officer Dawson's testimony and his official report regarding "[h]ow entry into the [hotel] room was obtained . . . ." The evidence, however, was undisputed that the officers' actual entry into the room was the result of their asking Ms. Toney for consent to search the room and her specific consent that they do so. There is no evidence that the officers entered the room prior to receiving that consent. The only possible conflict was as to whether Ms. Toney specifically asked hotel management to unlock the room door. This conflict is immaterial given Ms. Toney's express consent to the officers' entry and the complete lack of any evidence that the officers relied upon what they saw through the opened hotel room door as a basis for entry into the room. Since there was no material dispute in the evidence in this case, findings of fact were not required.

Defendant next contends that it was "unreasonable for Officer Dawson to accept consent from Mrs. Toney to enter the room when the only evidence available to the police was that she said it was her room." The United States Supreme Court has held that "permission to search [may be] obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171, 39 L. Ed. 2d 242, 250, 94 S. Ct. 988, 993 (1974). In the absence of actual authority, a search may still be proper if an officer obtains consent from a third party whom he reasonably believes has authority to consent. *Illinois v. Rodriguez*, 497 U.S. 177, 189, 111 L. Ed. 2d 148, 161, 110 S. Ct. 2793, 2801 (1990). N.C. Gen. Stat. § 15A-222(3) (2005) codifies the principle set forth in *Rodriguez* and allows a third party to give consent when he or she is "reasonably apparently entitled to give or withhold consent to a search of premises."

In this case, Ms. Toney gave consent for the search of the hotel room. Ms. Toney was found outside the hotel room, identified herself, and explained that she was staying in the room with her husband, but had gotten locked out during the night. Our Supreme Court has held that "a wife may consent to a search of the premises she shares with her husband." *State v. Worsley*, 336 N.C. 268, 283, 443 S.E.2d 68, 76 (1994). Since there is no dispute that Ms. Toney was married to defendant and that they were sharing the hotel room, she could validly consent to a search of the room. Moreover, hotel management confirmed that Ms. Toney was a lawful occupant of the room by letting her into the room. At that point, Ms. Toney consented to a search of the room. We see no basis for holding that this consent was insufficient to justify the search. Since defendant makes no other argument regarding the legality of the search, we hold that the trial court properly denied the motion to suppress.

II

[2] Next, defendant argues that the trial court erred in denying his motion to dismiss the charge of maintaining a dwelling for the purpose of keeping controlled substances. In ruling on defendant's motion to dismiss, the trial court must determine whether the State presented substantial evidence (1) of each essential element of the offense and (2) of defendant's being the perpetrator. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404, 123 S. Ct. 488 (2002). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). In reviewing the evidence, the court must draw all reasonable inferences in the State's favor. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818, 115 S. Ct. 2565 (1995).

N.C. Gen. Stat. § 90-108(a)(7) (2005) provides that it shall be unlawful for any person to "knowingly keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article." A "pivotal" question under this statute "is whether there is evidence that defendant owned, leased, maintained, or was otherwise responsible for the premises." *State v. Boyd*, 177 N.C. App. 165, 174, 628 S.E.2d 796, 804 (2006).

Defendant argues that the State failed to present sufficient evidence that he "maintained" the hotel room. "Maintain means to 'bear the expense of; carry on, . . . hold or keep in an existing state or condition.' " *State v. Allen*, 102 N.C. App. 598, 608, 403 S.E.2d 907, 913 (1991) (quoting Black's Law Dictionary 859 (5th ed. 1979)), *rev'd on other grounds*, 332 N.C. 123, 418 S.E.2d 225 (1992).

In *Kraus*, this Court addressed similar evidence to that presented in this case. Law enforcement officers arrived at a hotel after management had complained of a marijuana smell emanating from a hotel room. Law enforcement obtained consent from the registered guest to search the room and found quantities of marijuana and crack cocaine in addition to drug paraphernalia. *Kraus*, 147 N.C. App. at 767, 557 S.E.2d at 146. In considering whether the State presented sufficient evidence that the defendant "maintained" the hotel room to uphold a conviction under N.C. Gen. Stat. § 90-108(a)(7), the Court pointed out that the State's evidence only "tended to show that defendant had access to a key, spent the previous night in the motel room, and was present when law enforcement officials discovered the contraband." *Id.* at 769, 557 S.E.2d at 147. Although this evidence supported a finding of occupancy of the motel room, the State presented no evidence that defendant "rent[ed] the room or otherwise finance[d] its upkeep." *Id.* The Court further noted that the defendant had occupied the room for only 24 hours. The Court held: "Under these facts, the State failed to present sufficient evidence from which a reasonable jury could conclude that defendant maintained the motel room." *Id.*

This case is materially indistinguishable from *Kraus*. The State's evidence shows that defendant occupied the room one night and was present during the search. There is no evidence that he paid for the room or was even a registered guest in the room. It would be mere speculation that defendant, as opposed to his wife, maintained or kept the room. *Kraus* mandates that we reverse defendant's conviction for maintaining a dwelling for the purposes of keeping controlled substances.

The State, however, contends that *State v. Frazier*, 142 N.C. App. 361, 542 S.E.2d 682 (2001), supports defendant's conviction. In *Frazier*, the State presented evidence that the defendant had lived in the hotel room where the drugs were found for six or seven weeks, "sometimes" paid rent for the room, and was present in the room during daytime hours. *Id.* at 365-66, 542 S.E.2d at 686. This evidence was held sufficient to prove that the defendant "kept or maintained" the

hotel room. *Id.* at 366, 542 S.E.2d at 686. Since the State, in this case, presented no evidence that defendant paid any amount for the hotel room and the evidence did not indicate that defendant had inhabited the room for longer than 24 hours, we believe this case is controlled by *Kraus* and not *Frazier*.

We, therefore, reverse defendant's conviction of the misdemeanor charge of knowingly maintaining a place for the purpose of keeping or selling controlled substances. Defendant has failed to demonstrate any error with respect to the remaining convictions. Since, however, the trial court consolidated the convictions into a single judgment for purposes of sentencing, we must remand for resentencing. *See State v. Brown*, 350 N.C. 193, 213, 513 S.E.2d 57, 70 (1999) (after vacating one of defendant's convictions, remanding to trial court for resentencing on remaining conviction because Court could not "assume that the trial court's consideration of two offenses, as opposed to one, had no affect on the sentence imposed").

No error in part; reversed and remanded for resentencing in part.

Judges CALABRIA and JACKSON concur.

STATE OF NORTH CAROLINA v. EARL LEE BRUNSON, III

No. COA07-284

(Filed 4 December 2007)

1. Appeal and Error— preservation of issues—introduction of evidence after denial of motion to dismiss

Although defendant contends the trial court erred by denying his motion to dismiss the charges of first-degree kidnapping, second-degree rape, and assault by strangulation, defendant failed to preserve this issue for review, because: (1) N.C.G.S. § 15-173 provides that if defendant introduces evidence, he waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such motion as ground for appeal, and in this case defendant presented evidence following the trial court's denial of his motion; (2) defendant failed to renew his motion for dismissal

at the close of all evidence; and (3) even if the issue had been properly preserved, there was sufficient evidence to submit these charges to the jury.

2. Assault— by strangulation—misdemeanor assault on female not a lesser-included offense

The trial court did not commit plain error by failing to submit the charge of misdemeanor assault on a female as a lesser-included offense of assault by strangulation, because: (1) N.C.G.S. § 14-33(c)(2) provides that the elements of assault on a female are assault upon a female person by a male person at least 18 years of age, whereas the offense of assault by strangulation only requires that an individual assault another person and inflict physical injury by strangulation; and (2) assault on a female is not a lesser-included offense of assault by strangulation since each offense includes at least one element not present in the other.

3. Criminal Law— trial court's remarks to defense counsel— failure to show prejudice

The trial court did not commit prejudicial error in a first-degree kidnapping, second-degree rape, and assault by strangulation case by its remarks directed toward defense counsel when ruling on evidentiary issues, commenting on procedural matters, or urging the prosecutor and defense counsel to proceed efficiently with the trial of the case, because: (1) N.C.G.S. § 15A-1222 does not apply to comments made outside of the jury's presence; (2) unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error is considered harmless and the burden is on defendant to show the remarks deprived him of a fair trial; (3) a trial court generally is not impermissibly expressing an opinion when it makes ordinary rulings during the course of the trial; and (4) a review of the record revealed that the statements were not prejudicial, nor does the record reveal a cumulative effect of prejudice resulting from any general tone or trend of hostility or ridicule.

Appeal by Defendant from judgments entered 2 August 2006 by Judge J.B. Allen, Jr., in Wake County Superior Court. Heard in the Court of Appeals 17 October 2007.

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

Haral E. Carlin, for Defendant.

ARROWOOD, Judge.

Defendant, Earl Lee Brunson, III, appeals from judgments entered on his convictions of first degree kidnapping, second degree rape, and assault by strangulation. We find no error.

The Defendant was tried before a Wake County jury beginning 31 July 2006. The State's evidence at trial tended to show, in pertinent part, the following: Heather Burns ("Burns") testified that she was twenty years old and that she and the Defendant previously had a romantic relationship. Defendant was the father of Burns' son, born in June 2004, and Burns and Defendant were still dating in February 2006. On the evening of 17 February 2006 they went shopping and then returned to Burns' apartment. After Burns fell asleep at around 9:00 p.m., the Defendant took Burns' car and went out to socialize with friends. Burns woke up at around 2:30 a.m. on 18 February 2004 and saw that her car was missing. She could not reach Defendant by cell phone and called the police to report the car as stolen. When law enforcement officers came to the apartment, she told them that defendant had been drinking and did not have a drivers' license.

When Defendant returned to Burns' apartment at around 3:30 a.m., he was angry at Burns for calling the police about her car. He went to Burns' bedroom and started yelling and cursing at her, hitting the back of her head, and pulling her hair. Their son came to the bedroom and Defendant told him to kiss his mother goodbye because he'd never see her again, then gave Burns a notebook and crayon to write a note for the child to read after she was dead. Defendant choked Burns with his hands, hard enough that her vision blurred, her head hurt, and she had difficulty breathing. Defendant also threatened Burns with a steak knife. Burns ran into the kitchen to get her cell phone, but slipped and fell on the kitchen floor. Defendant followed her into the kitchen, where he choked her again while she lay on the floor, this time with "stronger" force.

After choking Burns a second time, the Defendant demanded she have sex with him, telling her he was "going to get some" and that she "didn't have a choice." He "dragged" her to the living room, where he "used both hands to push [her] on the couch." Burns cried and told Defendant to stop, but he forced her to have intercourse with him, and choked her again. As soon as she was able to slip away from Defendant, Burns picked up her son, left the apartment, and ran to the Cary Fire Station, about a half mile away. Shortly after she got there, law enforcement officers from the Cary Police Department

arrived. After speaking with Burns, law enforcement officers were dispatched to her apartment, where the Defendant was arrested without incident. Burns was taken to WakeMed Medical Center's emergency room for an examination; later that morning she gave a statement to police officers.

Testimony by medical, fire department, and law enforcement personnel generally corroborated Burns' trial testimony. Scott Sidney, a firefighter with the Cary Fire Department, testified that when Burns arrived at the Fire Station in the early morning hours of 18 February 2006, she was "hysterical" and crying. Burns said that her boyfriend had tried to kill her, that he choked and hit her, and that he ordered her to write a note to her son to read after she was dead. A few minutes later, law enforcement officers arrived and assumed control of the situation. Another firefighter, Bonnie McDonald, testified that Burns was sobbing and that she became "almost hysterical" while repeating how the Defendant had told her to kiss her son goodbye. McDonald testified that Burns seemed "genuinely in fear for her life."

Lynn MacDonald, the nurse who treated Burns in the emergency room, testified that Burns reported being raped and choked by the father of her son, and that Burns had a sore neck and was upset and crying. Dr. Gay Benevides, the physician who treated Burns in the emergency room, testified that Burns seemed "horrified" by what had happened and that Burns' account of the events of that night was "bone-chilling." Cary City Police Officers Lillian Royal and Joseph Lengel testified about the statement Burns gave on 18 February 2004, which largely corroborated Burns's trial testimony.

The Defendant testified on his own behalf. He corroborated Burns' testimony, that on the night in question they had taken their son shopping and then returned to Burns' apartment; that after Burns fell asleep he took her car and went out; and that when he returned the couple argued and fought. However, Defendant testified that he had Burns' permission to take her car; that their argument was about his seeing other women, and that his only act of physical aggression was to "push" Burns after she "attacked" him.

Defendant denied having hit or choked Burns, denied brandishing a knife, threatening her, or dragging her to the living room to rape her. Defendant acknowledged that he and Burns had sex in the living room, but testified that it was consensual. Defendant's mother, father, and stepfather also testified on his behalf about the relationship

between Burns and the Defendant. However, none of these witnesses were present during the incident giving rise to these charges.

After the presentation of evidence, the jury found the Defendant guilty of second degree rape, first degree kidnapping, and assault by strangulation. Defendant was sentenced to consecutive prison terms of 100 to 129 months for second degree rape and eight to ten months for assault by strangulation. The court continued prayer for judgment on the conviction of first degree kidnapping. From these convictions and sentences Defendant timely appealed.

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[1] Defendant argues first that the trial court erred by denying his motion to dismiss the charges against him at the end of the State's evidence. At the close of the State's evidence, Defendant moved for dismissal of all charges, on the grounds that the State had presented insufficient evidence to submit the charges to the jury. Following the trial court's denial of his motion, the Defendant presented evidence. Defendant failed to renew his motion for dismissal at the close of all the evidence. We conclude that Defendant failed to preserve this issue for appellate review.

Under N.C. Gen. Stat. § 15-173 (2005), "[i]f the defendant introduces evidence, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal." Moreover, N.C.R. App. P. 10(b)(3) specifically provides that:

> (b) (3) A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action . . . at trial. If a defendant makes such a motion after the State has presented all its evidence and . . . the defendant then introduces evidence, his motion for dismissal . . . made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.
>
> A defendant may make a motion to dismiss the action or judgment as in case of nonsuit at the conclusion of all the evidence[.] . . . However, if a defendant fails to move to dismiss the action or for judgment as in case of nonsuit at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

See also, *e.g.*, *State v. Farmer*, 177 N.C. App. 710, 717-18, 630 S.E.2d 244, 249 (2006) ("Defendant failed to preserve for appellate review his assignment of error regarding the sufficiency of the evidence by failing to renew his motion to dismiss after offering evidence."). We further note that even if the issue had been properly preserved, there appears to be sufficient evidence to submit these charges to the jury. This assignment of error is overruled.

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[2] Defendant argues next that the trial court erred by failing to submit to the jury the offense of misdemeanor assault on a female as a lesser included offense of assault by strangulation. We disagree.

Initially, we note that Defendant also failed to preserve this issue for review. N.C.R. App. P. 10(b)(2) provides in pertinent part that:

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

Where a defendant neither objects to the trial court's instructions nor requests instructions on lesser offenses, "he is barred by Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure from assigning as error the trial court's failure to instruct the jury on lesser-included offenses supported by evidence at trial." *State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993) (citing *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983)). *Collins* noted further that:

> In *Odom*, this Court adopted the "plain error" rule "to allow for review of some assignments of error normally barred by waiver rules such as Rule 10(b)(2)." . . . [T]o reach the level of "plain error" contemplated in Odom, the error in the trial court's jury instructions must be "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached."

Collins, 334 N.C. at 62, 431 S.E.2d 193 (quoting *Odom*, 307 N.C. at 659-60, 300 S.E.2d at 378; and *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987)). Accordingly, we review this assignment of error under the plain error analysis.

"A trial court is required to give instructions on a lesser-included offense . . . when there is evidence to support a verdict finding the defendant guilty of the lesser offense." *State v. Singletary*, 344 N.C. 95, 103, 472 S.E.2d 895, 900 (1996) (citations omitted). Defendant argues that he was entitled to an instruction on the offense of assault on a female, on the grounds that it is a lesser included offense of assault by strangulation. Accordingly, we consider whether assault on a female is a lesser included offense of assault by strangulation.

In *State v. Weaver*, 306 N.C. 629, 635, 295 S.E.2d 375, 378 (1982), *overruled in part on other grounds by Collins*, 334 N.C. at 61, 431 S.E.2d at 193, the North Carolina Supreme Court held that:

> [T]he definitions accorded the crimes determine whether one offense is a lesser included offense of another crime. In other words, all of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense. The determination is made on a definitional, not a factual basis.

Under N.C. Gen. Stat. § 14-33(c)(2) (2005), the essential elements of assault on a female are (1) assault (2) upon a female person (3) by a male person at least 18 years of age. In contrast, the "offense of assault by strangulation requires only that an individual assault another person and inflict physical injury by strangulation. *See* N.C. Gen. Stat. § 14-32.4(b) (2005)." *State v. Braxton*, 183 N.C. App. 36, 41, 643 S.E.2d 637, 641 (2007). Because each offense includes at least one element not present in the other, assault on a female is not a lesser included offense of assault by strangulation. This assignment of error is overruled.

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[3] Finally, Defendant argues that the trial court committed reversible error by engaging in "improper and disrespectful conduct towards Defendant's trial counsel" in violation of Defendant's statutory and Constitutional rights. Defendant cites several occasions when the trial court ruled on an evidentiary issue, commented on a procedural matter, or urged the prosecutor and defense counsel to proceed efficiently with the trial of the case. Defendant characterizes the court's remarks as showing hostility and ridicule towards defense counsel and thereby prejudicing Defendant's right to a fair trial. We disagree.

Under N.C. Gen. Stat. § 15A-1222 (2005), the trial court "may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." Further, "every criminal defendant is entitled to a trial 'before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm.' " *State v. McLean*, 181 N.C. App. 469, 640 S.E.2d 770, 773 (2007) (quoting *State v. Staley*, 292 N.C. 160, 161, 232 S.E.2d 680, 681 (1977) (internal quotation marks omitted). " 'Thus repeated indications of impatience and displeasure of such nature to indicate that the judge thinks little of counsel's intelligence and what he is doing are most damaging to a fair presentation of the defense.' " *Staley*, 292 N.C. at 163, 232 S.E.2d at 683 (quoting *United States v. Ah Kee Eng*, 241 F.2d 157, 161 (2nd Cir. 1957)). " 'Even if it cannot be said that a remark or comment is prejudicial in itself, an examination of the record may indicate a general tone or trend of hostility or ridicule which has a cumulative effect of prejudice.' " *State v. Theer*, 181 N.C. App. 349, 371, 639 S.E.2d 655, 669 (2007) (quoting *Staley*, 292 N.C. at 165, 232 S.E.2d at 684).

However, G.S. § 15A-1222 does not apply to comments made outside of the jury's presence. *See*, *e.g.*, *State v. Bright*, 301 N.C. 243, 253, 271 S.E.2d 368, 375 (1980) (noting "long line of cases holding that G.S. [§] 15A-1222 is not intended to apply when the jury is not present during the questioning"). Further, " 'unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless.' This burden to show prejudice 'rests upon the defendant to show that the remarks of the trial judge deprived him of a fair trial.' " *Theer*, 181 N.C. App. at 372, 639 S.E.2d at 670 (quoting *State v. Perry*, 231 N.C. 467, 471, 57 S.E.2d 774, 777 (1950); and *State v. Waters*, 87 N.C. App. 502, 504, 361 S.E.2d 416, 417 (1987)). In this regard, "a trial court generally is not impermissibly expressing an opinion when it makes ordinary rulings during the course of the trial." *State v. Weeks*, 322 N.C. 152, 158, 367 S.E.2d 895, 899 (1988) (citations omitted).

Here, after careful examination of the record before us, we conclude that the statements made by the trial court were not prejudicial. The record does not reveal a cumulative effect of prejudice resulting from any general tone or trend of hostility or ridicule. This assignment of error is overruled.

For the reasons discussed above, we conclude that the Defendant had a fair trial, free of reversible error.

No error.

Judges CALABRIA and STEPHENS concur.

DAVID N. SNYDER, ADMINISTRATOR OF THE ESTATE OF TIMOTHY C. SNYDER, PLAINTIFF v. LEARNING SERVICES CORPORATION, AND E.J. HARRILL, DEFENDANTS

No. COA07-98

(Filed 4 December 2007)

Appeal and Error— appealability—denial of summary judgment—qualified immunity

An appeal was dismissed as interlocutory where defendants' motion for summary judgment based on statutory immunity was denied. Defendants were not entitled to the qualified immunity offered by the statute, N.C.G.S. § 1222C-210.1, as a matter of law, and the denial of their motion for summary judgment did not deprive them of a substantial right.

Appeal by defendants from order entered 2 October 2006 by Judge J.B. Allen, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 11 September 2007.

Kirby & Holt, L.L.P., by David F. Kirby, Laurie G. Armstrong, and William B. Bystrynski, for plaintiff-appellee.

Cranfill, Sumner, & Hartzog, L.L.P., by H. Lee Evans, Jr., Jaye E. Bingham, and Katherine Hilkey-Boyatt, for defendants-appellants.

WYNN, Judge.

In general, statutory immunity is "available to [a defendant] if he satisfies all of the [statutory] requirements."[1] Here, the defendants claim qualified immunity under North Carolina General Statutes § 122C-210.1, which is available for one "who follows accepted professional judgment, practice, and standards."[2] Because

1. *Wallace v. Jarvis*, 119 N.C. App. 582, 585, 459 S.E.2d 44, 46, *disc. review denied*, 341 N.C. 657, 462 S.E.2d 527 (1995).

2. N.C. Gen. Stat. § 122C-210.1 (2005); *see also Alt v. Parker*, 112 N.C. App. 307, 313-14, 435 S.E.2d 773, 777 (1993), *cert. denied*, 335 N.C. 766, 442 S.E.2d 507 (1994).

we find that a question of fact remains as to whether the defendants followed accepted professional judgment, practices, and standards, we conclude that they are not entitled to qualified immunity as a matter of law.

Sometime after dark on 31 January 2004, Timothy Snyder wandered away from Defendant Learning Services Corporation's rehabilitation center in Durham County. He was found dead of hypothermia a few blocks away on 5 February 2004.

Thereafter, Plaintiff David Snyder, Timothy Snyder's brother, brought a wrongful death action against Learning Services and E. J. Harrill, its former co-Chief Operating Officer at its Durham location, on 31 May 2005. In his complaint, Mr. Snyder alleged negligence, gross negligence, willful and wanton conduct supporting punitive damages, premises liability, and corporate negligence. Ms. Harrill was named only in the negligence claim.

On 1 August 2005, Learning Services and Ms. Harrill filed their answer and a motion to dismiss under Rule 12(b)(6). Learning Services claimed it was entitled to immunity from Mr. Snyder's claim under North Carolina General Statutes § 122C-210.1; however, the trial court denied the motion to dismiss on 4 April 2006. Defendants then filed a motion for summary judgment on 8 September 2006, again arguing that they were entitled to immunity under Section 122C-210.1 because Mr. Snyder had failed to allege conduct rising to the level of grossly negligent, willful, or wanton. Defendants further argued that Mr. Snyder's claim for punitive damages should fail because he had not offered evidence that the Learning Services employees, officers, directors, or managers had participated in or condoned willful or wanton conduct, as required by North Carolina General Statutes § 1D-15(a).

The trial court denied Defendants' motion for summary judgment and partial summary judgment on 2 October 2006. Defendants appeal to this Court, acknowledging that they are appealing an interlocutory order and arguing that the trial court erred as a matter of law in finding that Mr. Snyder has shown facts sufficient to overcome the immunity that would otherwise be afforded to Learning Services under Section 122C-210.1.

At the outset, this Court must address the issue of whether this appeal may be heard, as Defendants are appealing an interlocutory order denying summary judgment and partial summary judgment.

Denial of summary judgment is interlocutory because it is not a judgment that "disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Nevertheless, Defendants contend that the trial court's order affected a substantial right, and thus, under N.C. Gen. Stat. §§ 1-277 and 7A-27(d), this Court has jurisdiction to consider the interlocutory appeal.

A "substantial right" is one "affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [person] is entitled to have preserved and protected by law: a material right." *Oestreicher v. American Nat'l Stores, Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976). Defendants rely upon a prior holding of this Court that "[t]he denial of a motion for summary judgment based on the defense of qualified immunity does affect a substantial right and is immediately appealable." *Gregory v. Kilbride*, 150 N.C. App. 601, 615, 565 S.E.2d 685, 695 (2002), *disc. review denied*, 357 N.C. 164, 580 S.E.2d 365 (2003).

The *Gregory* panel cited to *Rousselo v. Starling*, 128 N.C. App. 439, 495 S.E.2d 725, *appeal dismissed and review denied*, 348 N.C. 74, 505 S.E.2d 876 (1998), for that proposition. However, *Rousselo* involved a substantial right being implicated with respect to qualified immunity in the narrow context of a section 1983 case, not any instance in which qualified immunity has been implicated as an affirmative defense. *See id.* at 443, 495 S.E.2d at 728 ("[W]hen a motion for summary judgment based on immunity defenses to a section 1983 claim is denied, such an interlocutory order is immediately appealable before final judgment.") (quoting *Corum v. Univ. of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 86 L. Ed. 2d 411 (1985)), *reh'g denied*, 331 N.C. 558, 418 S.E.2d 664, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992)).

We note too that the statement in *Gregory* was dicta and therefore not binding on other panels of this Court. When stating that "[t]he denial of a motion for summary judgment based on the defense of qualified immunity does affect a substantial right and is immediately appealable[,]" *Gregory*, 150 N.C. App. at 615, 565 S.E.2d at 695, the Court also observed that "[i]mproper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the merits by the trier of the facts,

either judge or jury." *Id.* (citation omitted). Thus, although the Court's statement as to a substantial right suggested that the defendant in *Gregory* could, and should, have immediately appealed the interlocutory order denying his motion for summary judgment, it was not the basis of the Court's holding and, as such, is not binding precedent.

Nevertheless, we are presented with the question as to what types of qualified immunity should be considered to implicate a "substantial right," such that an interlocutory order is immediately appealable. We find this Court's decision in *Wallace v. Jarvis*, 119 N.C. App. 582, 459 S.E.2d 44, *disc. review denied*, 341 N.C. 657, 462 S.E.2d 527 (1995), to be an analogous situation and instructive in deciding this issue.

In *Wallace*, an attorney filed a grievance with the North Carolina State Bar concerning a former associate with his firm, alleging that he "may be disabled owing to a mental or physical condition." *Id.* at 583, 459 S.E.2d at 45. The former associate later sued for malicious prosecution, slander, and other claims, and the trial court denied the defendant-attorney's motion for summary judgment. *Id.*, 459 S.E.2d at 46. The defendant-attorney appealed the denial of the motion, arguing that he was entitled to immunity from suit because his communication to the State Bar was statutorily privileged. *Id.* at 584, 459 S.E.2d at 46. The statute in question read:

> Persons shall be immune from suit for all statements made without malice, and intended for transmittal to the North Carolina State Bar or any committee, officer, agent or employee thereof, or given in any investigation or proceedings, pertaining to alleged misconduct, incapacity or disability or to reinstatement of an attorney.

N.C. Gen. Stat. § 84-28.2 (1985).

In its opinion, this Court distinguished between sovereign immunity and statutory immunity, the latter of which would be "available to [defendant] if he satisfies all of the [statutory] requirements." *Wallace*, 119 N.C. App. at 585, 459 S.E.2d at 46. Because the trial court determined that the plaintiff had presented evidence sufficient for a jury to decide the question of fact as to whether the defendant had acted with malice, we concluded that the defendant was not entitled to immunity as a matter of law. As such, the denial of his motion for summary judgment did not deprive him of a substantial right, and we dismissed his appeal as interlocutory. *Id.*, 459 S.E.2d at 47.

Here, similar to the qualified immunity outlined for attorneys in *Wallace*, North Carolina General Statute § 122C-210.1 states in pertinent part:

> No facility or any of its officials, staff, or employees, or any physician or other individual who is responsible for the custody, examination, management, supervision, treatment, or release of a client and *who follows accepted professional judgment, practice, and standards* is civilly liable, personally or otherwise, for actions arising from those responsibilities or for actions of the client. This immunity . . . applies to actions performed in connection with, or arising out of, the admission or commitment of any individual pursuant to this Article [Article 5, Procedures for Admission and Discharge of Clients, under Chapter 122C, Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985].

(Emphasis added). Under North Carolina law, "[c]laims based on ordinary negligence do not overcome . . . statutory immunity" pursuant to Section 122C-210.1; a plaintiff must allege gross or intentional negligence. *Cantrell v. United States*, 735 F. Supp. 670, 673 (E.D.N.C. 1988); *see also Pangburn v. Saad*, 73 N.C. App. 336, 347, 326 S.E.2d 365, 372 (1985) ("We therefore conclude that G.S. Sec. 122-24 [the precursor to N.C. Gen. Stat. § 122C-210.1] was intended to create a qualified immunity for those state employees it protects, extending only to their ordinary negligent acts. It does not, however, protect a tortfeasor from personal liability for gross negligence and intentional torts."). Nevertheless, as found by this Court, N.C. Gen. Stat. § 122C-210.1 offers only a qualified privilege, meaning that, "so long as the requisite procedures were followed and the decision [on how to treat the patient] was an exercise of professional judgment, the defendants are not liable to the plaintiff for their actions." *Alt v. Parker*, 112 N.C. App. 307, 314, 435 S.E.2d 773, 777 (1993), *cert. denied*, 335 N.C. 766, 442 S.E.2d 507 (1994).

In his complaint, Mr. Snyder alleged facts that Learning Services and Ms. Harrill had violated "accepted professional judgment, practice and standards." Moreover, during discovery, the investigative report from the North Carolina Division of Facility Services (NCDFS), the licensing and investigative arm for mental health facilities in North Carolina, was submitted with its findings that Learning Services had failed to adequately supervise Timothy Snyder. NCDFS further concluded that Learning Services was guilty of a Type A vio-

lation, one that results in death or serious physical harm, fined Learning Services, and ordered the center to make immediate corrections. Finally, Mr. Snyder's complaint was certified by an expert under N.C. Rule of Civil Procedure 9(j) that the medical care outlined in the complaint did not comply with the applicable standard of care.

As in *Wallace*, Mr. Snyder has offered evidence sufficient to create a question of fact for a jury to decide whether Defendants Learning Services and Ms. Harrill followed "accepted professional judgment, practice and standards," within the meaning of N.C. Gen. Stat. § 122C-210.1, in their treatment of Timothy Snyder. Thus, Defendants were not entitled to qualified immunity as a matter of law, and the denial of their motion for summary judgment did not deprive them of a substantial right. Accordingly, we dismiss their appeal as interlocutory.

Dismissed.

Judges HUNTER and JACKSON concur.

VONNIE MONROE HICKS, III, PLAINTIFF v. WAKE COUNTY BOARD OF EDUCATION, DEFENDANT

No. COA07-243

(Filed 4 December 2007)

Statutes of Limitation and Repose— declaratory judgment— liability created by statute instead of contract

Although the trial court erred by applying the wrong statute of limitations in a declaratory judgment action to determine plaintiff teacher's rights under N.C.G.S. § 115C-325, even using the correct statute of limitations plaintiff is still barred from bringing his complaint, because: (1) plaintiff's claim for declaratory judgment was not based upon any contract with defendant, but rather was based on a liability created by statute requiring a three-year statute of limitations under N.C.G.S. § 1-52(2); (2) plaintiff's right to bring this claim arose on 16 June 2001 based on defendant's failure to vote on plaintiff's career status by 15 June 2001, and plaintiff did not file his complaint until 15 June 2005; and (3) although plaintiff contends defendant's failure to vote on

his career status constituted a continuing wrong or continuing violation tolling the statute of limitations, there was no statutory requirement that a school board must consider a teacher's career status once each month following the original 15 June deadline since N.C.G.S. § 115C-325(c)(2)(c) provides a mechanism for calculating the amount of a school board's liability for failing to timely vote on a teacher's career status.

Appeal by plaintiff from an order entered 11 October 2006 by Judge Donald Stephens in Wake County Superior Court. Heard in the Court of Appeals 11 October 2007.

Thomas Hicks & Associates, PLLC, by Thomas S. Hicks, for plaintiff-appellant.

Tharrington Smith, L.L.P., by Jonathan A. Blumberg and Deborah A. Stagner, for defendant-appellee.

BRYANT, Judge.

Vonnie Monroe Hicks, III (plaintiff) appeals from an order entered 11 October 2006 granting summary judgment in favor of the Wake County Board of Education (defendant). For the reasons stated herein, we affirm the order of the trial court.

Facts

In August of 1999, plaintiff was hired to teach at Enloe High School in the Wake County Public School System (WCPSS). Plaintiff previously taught at a variety of public and private schools in both North Carolina and California. As part of the hiring process, plaintiff submitted a written application to WCPSS Human Resources, to which he attached a multi-page resume. While plaintiff's resume states he taught in Winston-Salem/Forsyth County schools from 1984 through 1996, his application form indicates he was a teacher there from 1994 through 1996. The WCPSS application form also contains the questions "Have you ever received tenure in another school system?" and "If so, when and where?" Plaintiff left both questions blank. Plaintiff knew that he had previously obtained career status in a North Carolina school system, but he did not reveal this information during the application and hiring process with WCPSS.

Plaintiff was aware by the summer of 2001 that he should have received career status in WCPSS. In December 2002, plaintiff

received an e-mail from a secretary at his school asking if 2003 was his tenure year. Plaintiff replied that he thought this had already happened, but that "I am easy—just want to get it right."

In the Spring of 2003, near the end of plaintiff's fourth year at Enloe High School, plaintiff was informed by an assistant principal that he would be observed frequently because he was in his "tenure year." Again, plaintiff responded that he thought he already had tenure. On 2 April 2003, plaintiff sent a memorandum to Enloe High School's administration stating, in pertinent part, that he was concerned to hear "once again" that he was considered a probationary teacher and that he preferred "teaching at Enloe to receiving two years of monthly salary cheques for not doing so."

The Wake County Board of Education subsequently voted to grant plaintiff career status as a teacher in WCPSS, and plaintiff was notified of this decision by letter dated 27 May 2003. Plaintiff admits that he has received his full salary from WCPSS and was not financially prejudiced.

Procedural History

On 15 June 2005, plaintiff filed a complaint in Wake County Superior Court alleging claims for a declaratory judgment as to his rights under N.C. Gen. Stat. § 115C-325 and for breach of contract. Defendant filed an answer on 19 August 2005, raising, *inter alia*, the affirmative defenses of estoppel and a two-year statute of limitations applicable to contract claims against school boards. Defendant filed a motion for summary judgment on 22 June 2006, once again raising, *inter alia*, the affirmative defenses of estoppel and a two-year statute of limitations applicable to contract claims against school boards pursuant to N.C. Gen. Stat. § 1-53(1). Plaintiff filed a response to the motion for summary judgment on 28 September 2006. On 11 October 2006, the trial court entered an order granting summary judgment based upon the two-year statute of limitations and the doctrine of estoppel. Plaintiff appeals.

Plaintiff raises the issues of whether the trial court erred by granting summary judgment in favor of defendant based upon: (I) plaintiff's claim being barred by a two-year statute of limitations as his right to bring this action accrued on 16 June 2001; and (II) the doctrine of estoppel.

Standard of Review

Under Rule 56(c) of the North Carolina Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). " 'The burden is upon the moving party to show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.' " *Esposito v. Talbert & Bright, Inc.*, 181 N.C. App. 742, 744, 641 S.E.2d 695, 696 (2007) (quoting *McGuire v. Draughon*, 170 N.C. App. 422, 424, 612 S.E.2d 428, 430 (2005)). One means by which the moving party may meet its burden is by showing the opposing party " 'cannot surmount an affirmative defense which would bar the claim.' " *Id.* (quoting *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)). "On appeal, this Court reviews an order granting summary judgment *de novo*." *Id.* at 744, 641 S.E.2d at 697 (citing *McCutchen v. McCutchen*, 360 N.C. 280, 285, 624 S.E.2d 620, 625 (2006)).

I

Plaintiff first argues the trial court erred in applying the wrong statute of limitations to his claim for declaratory judgment and in holding this claim was barred by this statute of limitations. Plaintiff concedes that the trial court did not err in granting summary judgment as to his claim for relief for breach of contract. We agree that the trial court applied the wrong statute of limitations to his claim for declaratory judgment; however, even using the correct statute of limitations, plaintiff is still barred from bringing his claim.

Plaintiff's claim for declaratory judgment is founded upon the requirements set forth in N.C. Gen. Stat. § 115C-325, the applicable version of which provided:

> Employment of a Career Teacher.—A teacher who has obtained career status in any North Carolina public school system need not serve another probationary period of more than two years. The board may grant career status immediately upon employing the teacher, or after the first or second year of employment. If a majority of the board votes against granting career status, the teacher shall not teach beyond the current term. If after two years of employment, the board fails to vote on the issue of granting career status:

> a. It shall not reemploy [sic] the teacher for a second consecutive year;
>
> b. As of June 16, the teacher shall be entitled to one month's pay as compensation for the board's failure to vote upon the issue of granting career status; and
>
> c. The teacher shall be entitled to one additional month's pay for every 30 days beyond June 16 that the board fails to vote upon the issue of granting career status.

N.C. Gen. Stat. § 115C-325(c)(2) (2001).

The trial court held plaintiff's claim was barred by a two-year statute of limitations pursuant to N.C. Gen. Stat. § 1-53(1) (2005) (stating a plaintiff must file an action within two years when the claim is "against a local unit of government upon a contract, obligation or liability arising out of a contract, express or implied"). Plaintiff's claim for declaratory judgment is not based upon any contract with defendant, but rather is based on a liability created by statute and thus a three-year statute of limitations applies. N.C. Gen. Stat. § 1-52(2) (2005) (stating a plaintiff must file an action within three years when the claim is "[u]pon a liability created by statute"); *see also Rose v. Currituck County Bd. of Educ.*, 83 N.C. App. 408, 411-12, 350 S.E.2d 376, 378-79 (1986) (holding the applicable statute of limitations for a claim brought under N.C.G.S. 115C-325 is the three-year statute in N.C.G.S. 1-52(2)). However, plaintiff's claim for declaratory judgment is still barred by the three-year statute of limitations as the trial court did not err in finding plaintiff's right to bring this claim arose on 16 June 2001.

Defendant hired plaintiff as a teacher in August of 1999 and because plaintiff had obtained career status in the Winston-Salem/Forsyth public school system, defendant was required to vote on plaintiff's career status by 15 June 2001. N.C.G.S. § 115C-325(c)(2) (2001). Defendant did not vote on plaintiff's career status by 15 June 2001 and the consequences for its failure to do so, including plaintiff's right to sue, began on 16 June 2001. *Id.*; *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 178-79, 581 S.E.2d 415, 423 (2003) ("a cause of action accrues as soon as the right to institute and maintain a suit arises"). Plaintiff argues, however, that defendant's failure to vote on his career status constitutes a continuing wrong or continuing violation tolling the statute of limitations.

Our Supreme Court has "recognized the 'continuing wrong' or 'continuing violation' doctrine as an exception to the general rule." *Williams*, 357 N.C. at 179, 581 S.E.2d at 423 (citing *Faulkenbury v. Teachers' & State Employees' Ret. Sys.*, 345 N.C. 683, 694-95, 483 S.E.2d 422, 429-30 (1997)). "When this doctrine applies, a statute of limitations does not begin to run until the violative act ceases." *Id.* (citations and quotations omitted). To determine whether plaintiff is subject to a continuing violation,

> we examine [the] case under a test that considers the particular policies of the statute of limitations in question, as well as the nature of the wrongful conduct and harm alleged . . . . In particular, we must examine the wrong alleged by [plaintiff] to determine if the purported violation is the result of continual unlawful acts, each of which restarts the running of the statute of limitations, or if the alleged wrong is instead merely the continual ill effects from an original violation.

Id. (internal citations and quotations omitted).

Defendant contends that because N.C.G.S. § 115C-325(c)(2)(c) provides that a teacher is entitled to an additional month's pay every thirty days that a school board fails to vote upon the issue of granting the teacher's career status, each month a school board fails to vote constitutes a new and continuing wrong against plaintiff. We disagree.

N.C. Gen. Stat. § 115C-325(c)(2)(c) provides a mechanism for calculating the amount of a school board's liability for failing to timely vote on a teacher's career status. There is no statutory requirement that a school board must consider a teacher's career status once each month following the original 15 June deadline. Rather, a teacher's entitlement to an additional month's pay for every thirty days that a school board fails to vote upon the issue of granting the teacher's career status is a continual ill effect from the original violation. Therefore, plaintiff's right to bring his claim under N.C.G.S. § 115C-325(c)(2) arose on 16 June 2001. Plaintiff did not file his complaint until 15 June 2005 and his claim is barred by the three-year statute of limitations. This assignment of error is overruled.

In light of our ruling on this assignment of error, we need not address plaintiff's remaining argument.

Affirmed.

Judges STEELMAN and GEER concur.

THOMAS ROBERT MARRIOTT, ALICE BANKS YEAMAN, JOHN A. WAGNER, ANITA J. SARBO, TIMOTHY MORGAN, JERRY L. MARKATOS, JOSEPH W. JACOB, NANCY BANKS, RACHEL WILFERT, ROBERT GRAHAM, PATRICIA KENLAN, ELAINE C. CHIOSSO, JOHN W. BROOKS, DEBORAH WECHSLER, DAVID PETERSON, JUDITH PETERSON, ANNE R. FLASH, WILLIAM FLASH, KAREN STRAZZA MOORE AND WILLIAM MOORE, PLAINTIFFS v. CHATHAM COUNTY, A NORTH CAROLINA COUNTY AND A BODY CORPORATE AND POLITIC; MEMBERS OF THE CHATHAM COUNTY BOARD OF COMMISSIONERS, IN THEIR OFFICIAL CAPACITIES: BUNKEY MORGAN, CHAIR; TOMMY EMERSON, VICE-CHAIR; PATRICK BARNES; ALLEN MICHAEL CROSS; CARL H. OUTZ; MEMBERS OF THE CHATHAM COUNTY PLANNING BOARD, IN THEIR OFFICIAL CAPACITIES: CHARLES ELIASON, CHAIR; MARK MCBEE, VICE-CHAIR; PAUL MCCOY; MARTIN MASON; MARY NETTLES; EVELYN CROSS; SALLY KOST; CHRIS WALKER; CLYDE HARRIS; AND CECIL WILSON, DEFENDANTS, AND POLK-SULLIVAN, LLC, CHATHAM PARTNERS, LLC, AND ROBERT D. SWAIN, DEFENDANT-INTERVENORS

No. COA07-326

(Filed 4 December 2007)

Zoning— subject matter—standing—separation of powers—procedural injury standing

The trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(1) plaintiffs' complaint to enjoin development of the pertinent property until the county amends two of its ordinances, including adopting minimum criteria to be used in determining whether developers must prepare and submit an environmental impact assessment (EIA), based on lack of subject matter jurisdiction, because: (1) granting the relief requested would violate the doctrine of separation of powers since the adoption of minimum criteria by the county constituted a legislative function, and the judicial branch has no authority to direct a legislative body to enact legislation; and (2) although plaintiffs contend they have procedural injury standing, the remedies plaintiffs seek are unavailable and inappropriate, and their claims do not satisfy the third element of standing which is the redressability of their injury by a favorable decision.

Appeal by plaintiffs from judgment entered 4 December 2006 by Judge Orlando F. Hudson, Jr. in Chatham County Superior Court. Heard in the Court of Appeals 11 October 2007.

Lewis, Anderson, Phillips & Hinkle, PLLC by J. Dickson Phillips, III for plaintiffs-appellants.

Gunn & Messick, LLP by Paul S. Messick, Jr. for defendants-appellees.

Kilpatrick Stockton, LLP by Hayden J. Silver, III and Betsy Cooke for defendant intervenor-appellees.

STEELMAN, Judge.

When plaintiffs seek a remedy which the court is without the authority to grant, plaintiffs do not have standing to pursue the claim.

I. Factual Background

Plaintiffs-appellants (plaintiffs) are landowners in Chatham County whose properties are adjacent to several large tracts of land proposed for residential development along the banks of the Haw River. Defendants-appellees (defendants) are Chatham County, members of the Chatham County Board of Commissioners (Commissioners), and members of the Chatham County Planning Board (Planning Board). Defendant-Intervenors (developers) own real property in Chatham County commonly referred to as The Bluffs, the Banner Tract and Shively Tract (collectively, the "property") which adjoins plaintiffs' properties.

Chatham County has adopted a Subdivision Ordinance, which requires the submission of a sketch plan, a preliminary plat and a final plat. Each stage of development is reviewed and approved by the Planning Board and the Commissioners. On 15 May 2006, the Commissioners approved subdivision sketch plans for The Bluffs. On 21 August 2006, the Commissioners approved subdivision sketch plans for certain lots on the Shively Tract. On 16 October 2006, developers submitted sketch plans for additional lots on Phase II and Phase III of the Shively Tract to the Planning Board. On 6 November 2006, the Planning Board recommended approval of the preliminary plat for Phase I of The Bluffs and sketch plans for Phase II and Phase III of the Shively Tract.

At the 1 May 2006 Planning Board meeting, plaintiffs requested that the Planning Board require that developers prepare an environ-

mental impact assessment (EIA) in connection with the developments. At the 21 August 2006 Commissioners meeting, plaintiffs Tom Marriott and Alice Yeaman expressed concern regarding the absence of an EIA. The Planning Board determined, and the Commissioners agreed, that an EIA was unnecessary.

Plaintiffs brought suit on 20 September 2006 to enjoin the development of the property until the county amends two of its ordinances. Plaintiffs sought a writ of mandamus to compel defendants to adopt minimum criteria to be used in determining whether developers must prepare and submit an EIA.

The first ordinance at issue is Chatham County Subdivision Ordinance § 5.2, which provides in part:

> Pursuant to Chapter 113A of the North Carolina General Statutes, the Planning Board may require the subdivider to submit an environmental impact statement with the preliminary plat if the development exceeds two acres in area, and if the Board deems it necessary for responsible review due to the nature of the land to be subdivided, or peculiarities in the proposed layout.

The Subdivision Ordinance § 5.2 was enacted pursuant to authority set forth in the North Carolina Environmental Policy Act, N.C. Gen. Stat. § 113A-1 *et. seq.* ("SEPA"). N.C. Gen. Stat. § 113A-8 addresses major development projects, and gives counties, cities, and towns the authority to require developers to submit EIAs. Subsection (c) of N.C. Gen. Stat. § 113A-8 provides:

> Any ordinance adopted pursuant to this section *shall establish minimum criteria* to be used in determining whether a statement of environmental impact is required (emphasis added).

There is no dispute that Chatham County has never enacted minimum criteria under its ordinance as required by N.C. Gen. Stat. § 113A-8(c).

Defendants filed a motion to dismiss on 16 October 2006, asserting lack of standing and failure to state a claim upon which relief may be granted. On 18 October 2006 developers filed a motion to intervene and a motion to dismiss. On 26 October 2006 plaintiffs filed a First Amended Complaint pursuant to Rule 15(a) of the North Carolina Rules of Civil Procedure. Judge Hudson heard all pending motions on 16 November 2006 and granted defendants' motions to dismiss on the basis of lack of subject matter jurisdiction (N.C.R. Civ. P. 12(b)(1)) and failure to state a claim upon which relief can be

granted (N.C.R. Civ. P. 12(b)(6)). Orders dismissing plaintiffs' claims with prejudice were filed on 6 December 2006 and 11 December 2006. Plaintiffs appeal.

II. Subject Matter Jurisdiction: Standing

In their first argument, plaintiffs contend that the trial court erred in dismissing their complaint on the grounds of lack of subject matter jurisdiction pursuant to N.C. R. Civ. Pro. 12(b)(1). We disagree.

"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 (2002) (citation omitted). As the party invoking jurisdiction, plaintiffs have the burden of establishing standing. *Neuse River Found. v. Smithfield Foods*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002) (citation omitted). The elements of standing are:

(1) "injury in fact"—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;

(2) the injury is fairly traceable to the challenged action of the defendant;

(3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Neuse River, 155 N.C. App. at 114, 574 S.E.2d at 52 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 364 (1992)). Our standard of review on appeal of a trial court's dismissal on the grounds of lack of standing is *de novo*. *Smith v. Privette*, 128 N.C. App. 490, 493, 495 S.E.2d 395, 397 (1998).

"[A] zoning ordinance or an amendment thereto which is not adopted in accordance with the enabling statute is invalid and ineffective." *Keiger v. Winston-Salem Bd. of Adjustment*, 281 N.C. 715, 720, 190 S.E.2d 175, 179 (1972) (citations and quotations omitted).

Although defendants contend that counties have the discretionary right to decide whether private developers must submit EIAs, this argument mis-characterizes the statutory scheme. Counties have discretion in choosing whether to adopt an ordinance pursuant to Section 113A-8. Counties also have discretion in determining what minimum criteria to adopt. However, the adoption of minimum criteria is not optional. Chatham County has adopted no minimum criteria

under its Subdivision Ordinance § 5.2, and the ordinance does not comply with its enabling statute N.C. Gen. Stat. § 113A-8(c).

In their first amended complaint, plaintiffs sought an injunction against further approval of developments, and against all development activities in connection with proposed projects, pending adoption by Chatham County of minimum criteria and the preparation of proper EIAs.

"The courts have absolutely no authority to control or supervise the power vested by the Constitution in the General Assembly as a coordinate branch of the government." *Person v. Board of State Tax Com'rs*, 184 N.C. 499, 503, 115 S.E. 336, 339 (1922). The adoption of minimum criteria by Chatham County constitutes a legislative function. Although courts are authorized to interpret and declare the law, the judicial branch has no authority to direct a legislative body to enact legislation. *In re Markham*, 259 N.C. 566, 570, 131 S.E.2d 329, 333 (1963) ("While it is within the province of the courts to pass upon the validity of statutes and ordinances, courts may not legislate nor undertake to compel legislative bodies to do so one way or another. (Citations) The court erred in seeking to compel the defendant mayor and city commission members to amend the ordinance.") To grant the relief requested by plaintiffs would be to violate the doctrine of separation of powers, *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 58, 344 S.E.2d 272, 276 (1986), and the trial court was without authority to do so.

Plaintiffs argue that they have "procedural injury standing" and that the harm they have suffered is the failure to require the environmental impact study. This argument must fail. First, the authority cited by plaintiffs for the "procedural injury standing" doctrine is in the context of the North Carolina Administrative Procedure Act, which is inapposite here. Second, the injury in the instant case is not the failure to require the study, as plaintiffs suggest, but instead it is the failure to adopt minimum criteria.

The only remedy available to plaintiffs is to have the courts invalidate the provisions of the Subdivision Ordinance that do not comply with the provisions of N.C. Gen. Stat. § 113A-8. If this portion of the ordinance is invalidated, then there is no requirement of an EIS, and this remedy would not redress plaintiffs' alleged injuries. The remedies plaintiffs seek are unavailable and inappropriate, and their claims do not satisfy the third element of standing, which is the redressability of their injury by a favorable decision.

"If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Estate of Apple v. Commercial Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16, *disc. review denied*, 359 N.C. 632, 613 S.E.2d 688 (2005) (citation omitted). We hold that plaintiffs lacked standing to bring their claims and that the trial court properly granted defendants' and defendants-intervenors' motions to dismiss.

Because we affirm the superior court's decision that it lacked subject matter jurisdiction, we do not address plaintiffs' other assignments of error.

AFFIRMED.

Judges BRYANT and GEER concur.

STATE OF NORTH CAROLINA v. MAURICE TREMAINE McBRIDE

No. COA07-22

(Filed 4 December 2007)

1. Constitutional Law— speedy trial—factors to be considered

The trial court did not err in a prosecution for obtaining property by false pretenses by denying defendant's motion to dismiss for violation of his right to a speedy trial. Although a delay of three years and seven months is exceptionally long, the other three factors to be considered weighed heavily against defendant.

2. Appeal and Error— preservation of issues—failure to continue objection

The defendant in a false pretenses prosecution did not preserve for appellate review his objection to testimony that two checks were counterfeit where his objection was overruled, he objected only sporadically, and he referred to the checks as counterfeit during his cross-examination.

3. Evidence— testimony that checks were counterfeit—no plain error

There was no plain error in a false pretenses prosecution from the admission of testimony that checks were counterfeit. It

is entirely unlikely that the evidence at issue had any serious effect on the trial's outcome, nor did the admission of the evidence preclude defendant from receiving a full and fair trial.

4. False Pretenses— counterfeit check scheme—evidence sufficient

The evidence of obtaining property by false pretenses pursuant to a counterfeit check scheme was sufficient where defendant's statements indicated an intentionally false representation which was effective.

5. False Pretenses— counterfeit checks—sufficiency of indictment

There was no confusion of offenses in an indictment for obtaining property by false pretenses which alleged that defendant "solicited" the deposit of counterfeit checks. There was no defect in the failure to specify a victim; the offense of obtaining property by false pretenses does not require that the State prove an intent to defraud any particular person.

Appeal by defendant from judgment entered 3 May 2006 by Judge A. Leon Stanback in Wake County Superior Court. Heard in the Court of Appeals 30 August 2007.

Attorney General Roy Cooper, by Assistant Attorney General Patrick S. Wooten, for the State.

Kathleen Arundell Widelski, for defendant.

ELMORE, Judge.

Maurice McBride (defendant) approached a friend of his, Antoinette Hines, in the summer of 2002. He offered Hines, who was experiencing financial difficulties, the opportunity to deposit a check for him. He explained that a friend of his owed him money, and that his friend had written him too many checks. He told Hines that if she would deposit a check for $9,475.25, she could give him the cash and keep $2,000.00 for her troubles. Hines agreed, and two weeks later she received a check in the mail. She deposited the check and consummated their agreement.

Hines discussed the transaction with her childhood friend, Jestina McArthur. McArthur was also experiencing money problems, and Hines told her that defendant might be able to help her. Indeed,

defendant was happy to extend the same offer to McArthur that he had to Hines. The two struck a bargain, and McArthur deposited a check for $9,200.00, of which she kept $2,000.00.

The following Friday, McArthur received a number of messages on her answering machine from both defendant and the credit union at which she deposited the check. Defendant exhorted McArthur, "[D]on't [tell] them where you got the check from," and "[y]ou tell them that it came in the mail, you went to your ATM, you deposited it in there." The credit union, along with Hines, called to inform McArthur that the check she deposited was counterfeit, as was the one that Hines deposited. Defendant did not return subsequent phone calls.

On 4 November 2002, defendant was indicted on two counts of Obtaining Property by False Pretenses. A jury found him guilty of both counts on 3 May 2006, and the court entered judgment against him that day. Defendant now appeals.

[1] Defendant first argues that the trial court erred in denying his motion to dismiss based on his constitutional right to a speedy trial. We disagree.

> In determining whether a defendant has been deprived of his right to a speedy trial, N.C. Const. art I, § 18; U.S Const. amend VI, our courts consider four interrelated factors together with such other circumstances as may be relevant. The factors are (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant resulting from the delay. No single factor is regarded as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial. Instead the factors and other circumstances are to be balanced by the court with an awareness that it is dealing with a fundamental right of the accused which is specifically affirmed in the Constitution. The burden is, nonetheless, on the defendant to show that his constitutional rights have been violated and a defendant who has caused or acquiesced in the delay will not be allowed to use it as a vehicle in which to escape justice.

State v. Chaplin, 122 N.C. App. 659, 662-63, 471 S.E.2d 653, 655 (1996) (quotations and citations omitted). Considering the four factors outlined by the *Chaplin* court, we hold that the trial court properly denied defendant's motion. Although a delay of three years and seven

months from arrest to trial is exceptionally long, the other factors weigh heavily against defendant's cause. There appears to be no reason for the delay in the record.[1] Defendant did not assert his right to a speedy trial until 2 May 2006, and defendant has demonstrated no prejudice whatsoever from the delay. Defendant was not incarcerated during the delay; indeed, he moved to Virginia during that time. Under these circumstances, we hold that defendant's right to a speedy trial was not impaired, and the trial court did not err in denying defendant's motion.

[2] Defendant also argues that the trial court's admission of evidence as to the status of a bank check and bank account was either error or plain error.[2] We are not persuaded.

The trial court allowed Wayne Williams, the Senior Fraud Investigator with Coastal Federal Credit Union, to testify that the two checks involved in this case were counterfeit. Defendant's objection to the admission of this evidence was overruled. Throughout the trial, defendant objected only sporadically to the admission of this evidence, and defendant's trial counsel even referred to the checks as counterfeit during his cross-examinations.

> Generally, a defendant must make a timely objection to proffered testimony in order to preserve the issue for appellate review, and when a defendant has failed to object this Court may only review the matter for plain error. Also, where 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. Thus, as defendant has failed to preserve his appeal on the above testimony by either failing to object initially, or by failing to object when the same testimony was elicited later, this assignment of error may be reviewed only for plain error.

State v. McDougald, 181 N.C. App. 41, 47, 638 S.E.2d 546, 551 (2007) (internal quotations, citations, and alterations omitted).

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1. Defendant's counsel acknowledges that she has no authority for her assertion that it is "inherently unfair to hold [the lack of a reason in the record] against the Defendant." In the absence of a reason in the record, we cannot state that defendant has met his burden on this issue.

2. Defendant groups his arguments together in his brief. Although the State urges this Court to consider defendant's contention regarding error on this point abandoned because defendant failed to argue under the section of his brief alleging error, we decline to do so. It is clear that in defendant's brief he combines his two assignments of error into one argument, arguing alternatively that this Court find error or plain error.

[3] Under our plain error standard of review, "a defendant has the burden of showing: (i) that a different result probably would have been reached but for the error; or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Watkins*, 181 N.C. App. 502, 507, 640 S.E.2d 409, 413 (2007) (quotations and citation omitted). Defendant has not carried his burden. It is entirely unlikely that the evidence at issue had any serious effect on the trial's outcome. Nor did the admission of the evidence preclude defendant from receiving a full and fair trial. Accordingly, defendant's contention must fail.

[4] Defendant next claims that the trial court erred in denying his motion to dismiss based on insufficiency of the evidence. Because we hold that the evidence was sufficient to justify sending the case to the jury, we find defendant's argument to be without merit.

"In ruling on a defendant's motion to dismiss, the trial court should consider if the state has presented substantial evidence on each element of the crime and substantial evidence that the defendant is the perpetrator." *State v. Replogle*, 181 N.C. App. 579, 580-81, 640 S.E.2d 757, 759 (2007) (quotations and citation omitted). Our Supreme Court has enumerated the elements of obtaining property by false pretenses: "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *State v. Parker*, 354 N.C. 268, 284, 553 S.E.2d 885, 897 (2001) (citation omitted). "The evidence should be viewed in the light most favorable to the state, with all conflicts resolved in the state's favor. . . . If substantial evidence exists supporting defendant's guilt, the jury should be allowed to decide if the defendant is guilty beyond a reasonable doubt." *Replogle* at 580-81, 640 S.E.2d at 759 (quotations and citations omitted) (alteration in original).

In this case, the trial court received evidence that defendant told McArthur, "I do this all the time. They're going to clear. The checks are good." Likewise, defendant told Hines that he had "done it several times." This evidence clearly indicates both that defendant made a false representation, and that it was his intent to do so. Moreover, his deception was effective; the bank released the money to McArthur and Hines, who in turn gave it to defendant. There was abundant evidence to justify sending this case to the jury. Defendant's arguments to the contrary are therefore without merit.

[5] Finally, defendant claims that the indictment against him was fatally defective. Defendant avers that the indictment, which charges that defendant committed two counts of obtaining property by false pretenses, actually alleges that he also committed the crime of solicitation to commit a felony. Defendant bases this assertion on the following language of the indictment: "[T]he defendant solicited [McArthur and Hines] into depositing a counterfeit Cores State Bank check . . . ." However, a plain reading of the term "solicit" does not necessarily imply the allegation of a separate criminal act. *Black's Law Dictionary* defines "solicitation" as "**1.** The act or an instance of requesting or seeking to obtain something; a request or petition . . . ." *Black's Law Dictionary*, 1427 (8th ed. 2004).[3] In this situation, there was no confusion as to what offenses the State accused the defendant. Defendant's assertion is therefore without merit.

Likewise, defendant's additional contention regarding his indictment, that the indictment failed to specify the alleged victim, is similarly without merit. The statute proscribing the offense of obtaining property by false pretenses does not require that the State prove "an intent to defraud any particular person." N.C. Gen. Stat. § 14-100(a) (2005). The indictment was not defective.

Having conducted a thorough review of the record and briefs, we conclude that defendant received a fair trial free from error.

No error.

Judges STEELMAN and STROUD concur.

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3. We note that *Black's* goes on to define the term in four additional ways, one of which is the criminal offense that defendant would have this Court find renders his indictment defective. However, we hold that, given that the indictment clearly accused defendant only of two counts of obtaining property by false pretenses, the first entry is the appropriate definition in this case.

IN RE: K.A.D., A MINOR CHILD

No. COA07-662

(Filed 4 December 2007)

Termination of Parental Rights— summons—issuance to juvenile required

An order terminating parental rights was vacated for lack of subject matter jurisdiction where a summons was not issued to the juvenile as required by N.C.G.S. § 7B-1106(a)(5).

Appeal by respondent from order entered 8 February 2007 by Judge David B. Brantley in District Court, Wayne County. Heard in the Court of Appeals 5 November 2007.

Arnold O. Jones, II, for petitioners-appellees.

Betsy J. Wolfenden, for respondent-appellant.

WYNN, Judge.

"Failure to issue a summons deprives the trial court of subject matter jurisdiction."[1] In this case, Respondent-father argues that the trial court lacked subject matter jurisdiction over the termination of parental rights proceeding where no summons was issued to the juvenile. Because no summons was issued to the juvenile as required by N.C. Gen. Stat. § 7B-1106(a) (2005), we must vacate the order terminating Respondent-father's parental rights.

K.A.D., the juvenile, was born on 12 June 2003. Shortly after birth, the Wayne County Department of Social Services ("DSS") took K.A.D. into protective custody. On 24 June 2003, DSS filed a petition alleging that K.A.D. was a neglected and dependent juvenile. K.A.D. was subsequently placed with Petitioners, K.A.D.'s paternal grandfather and paternal step-grandmother. On 30 September 2003, the trial court dismissed the petition and returned K.A.D. to the parents.

On 30 June 2004, Petitioners and Respondent-father filed a complaint seeking custody against K.A.D.'s mother. On 1 July 2004, the court entered an order granting exclusive emergency custody of K.A.D. to Petitioners and Respondent-father, with Petitioners having primary physical custody. On 12 July 2004, the trial court held a temporary custody hearing. Respondent-father indicated that he had reconciled with the child's mother, but was scheduled to leave for mili-

1. *In re C.T. & R.S.*, 182 N.C. App. 472, 475, 643 S.E.2d 23, 25 (2007).

tary duty. The trial court granted exclusive temporary custody of the child to Petitioners.

On 18 November 2004, Respondent-father voluntarily dismissed his complaint against the child's mother. On 2 December 2004, Petitioners filed a motion in the cause alleging that their claims previously raised against the child's mother should also apply against Respondent-father. On 18 February 2005, Petitioners were granted sole custody of K.A.D.

On 25 July 2006, Petitioners filed a petition to terminate the parental rights of Respondent-father and K.A.D.'s mother. On the same day, Petitioners issued a summons to Respondent-father and K.A.D.'s mother. On 8 September 2006, the court appointed Delaina Boyd as guardian ad litem for K.A.D. On 8 February 2007, the trial court terminated the parental rights of Respondent-father and the mother. Respondent-father appeals.

The sole argument raised by Respondent-father on appeal is that the trial court lacked subject matter jurisdiction over the termination of parental rights proceeding. Respondent-father cites Petitioners' failure to issue a summons to the juvenile, pursuant to N.C. Gen. Stat. §7B-1106(a)(5), as the basis for his argument. We must agree.

In reviewing a question of subject matter jurisdiction, our standard of review is *de novo*. *Raleigh Rescue Mission, Inc. v. Bd. of Adjust. of Raleigh*, 153 N.C. App. 737, 740, 571 S.E.2d 588, 590 (2002) (defining *de novo* as "consider[ing] the question anew, as if not previously considered or decided."). Issues of subject matter jurisdiction may be raised for the first time on appeal. *See* N.C. R. App. P. 10(a) (2005) (stating that "any party to the appeal may present for review . . . whether the court had jurisdiction of the subject matter").

Respondent-father argues that Petitioners failed to issue a summons to K.A.D. as required by N.C. Gen. Stat. §7B-1106(a)(5). Section 7B-1106(a) provides in pertinent part:

> (a) Except as provided in G.S. 7B-1105, upon the filing of the petition, the court shall cause a summons to be issued. The summons shall be directed to the following persons or agency, not otherwise a party petitioner, who shall be named as respondents:
>
> (1) The parents of the juvenile;
>
> (2) Any person who has been judicially appointed as guardian of the person of the juvenile;

(3) The custodian of the juvenile appointed by a court of competent jurisdiction;

(4) Any county department of social services or licensed child-placing agency to whom a juvenile has been released by one parent pursuant to Part 7 of Article 3 of Chapter 48 of the General Statutes or any county department of social services to whom placement responsibility for the child has been given by a court of competent jurisdiction; and

(5) *The juvenile.*

N.C. Gen. Stat. § 7B-1106(a) (emphasis added).

It is well settled that the "summons, not the complaint, constitutes the exercise of the power of the State to bring the defendant before the court." *Childress v. Forsyth Cty. Hosp. Auth., Inc.*, 70 N.C. App. 281, 285, 319 S.E.2d 329, 332 (1984) (citation omitted), *disc. review denied*, 312 N.C. 796, 325 S.E.2d 484 (1985). "The purpose of a summons is to give notice to a person to appear at a certain place and time to answer a complaint against him." *Latham v. Cherry*, 111 N.C. App. 871, 874, 433 S.E.2d 478, 481 (1993), *cert. denied*, 335 N.C. 556, 441 S.E.2d 116 (1994). "In order for a summons to serve as proper notification, it must be issued and served in the manner prescribed by statute." *Id.*

Here, Petitioners issued a summons designating Respondent-father and K.A.D.'s mother as respondents on 26 July 2006. Accordingly, a summons was issued to Respondent-father and the juvenile's mother. However, K.A.D. was not listed as a respondent in the summons, as required by N.C. Gen. Stat. § 7B-1106(a), and no summons was issued to K.A.D.

This Court has recently held that the failure to issue a summons to the juvenile deprives the trial court of subject matter jurisdiction. *In re C.T. & R.S.*, 182 N.C. App. 472, 475, 643 S.E.2d 23, 25 (2007). When a summons is not properly issued, an order terminating parental rights must be vacated for lack of subject matter jurisdiction. *Id.* Accordingly, because the trial court lacked subject matter jurisdiction, we must vacate the order terminating Respondent-father's parental rights.

Vacated.

Judges ELMORE and STROUD concur.

IN RE S.W.

[187 N.C. App. 505 (2007)]

IN THE MATTER OF: S.W.

No. COA07-707

(Filed 4 December 2007)

Child Abuse and Neglect— broken ribs in infant—failure to seek medical attention

The trial court did not err by finding that an infant was abused and neglected where he was taken to the hospital with a fever and chest congestion, found to have broken ribs between three and eight weeks old, and the parents contended that they did not know how the injury had happened. The parents were the primary caretakers, and there was an undisputed finding that the injury would have caused the child to cry. Even if they did not inflict the wounds, the parents either did not notice or ignored the injury, and the failure to obtain medical care constitutes neglect. Although no treatment was given even after the wounds were discovered midway through the healing process, broken bones in a baby four months old are certainly a serious injury requiring medical attention. N.C.G.S. 7B-101(15).

Appeal by respondents from an order entered 27 March 2007 by Judge Amber Davis in Dare County District Court. Heard in the Court of Appeals 14 November 2007.

Sharp, Michael, Outten & Graham L.L.P., by Steven D. Michael, for petitioner-appellee Dare County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by John J. Butler, for appellee Guardian ad Litem.

Betsy J. Wolfenden for respondent-appellant mother.

Richard Croutharmel for respondent-appellant father.

HUNTER, Judge.

Both parents of S.W. appeal from an order adjudicating him abused and neglected. After careful review, we affirm as to both parents.

S.W. was born in July 2006. On 11 November 2006, S.W. was brought to the Outer Banks Hospital by his parents ("respondents").

There he presented with a high fever and symptoms of chest congestion. Chest x-rays showed that four of S.W.'s ribs, three on one side and one on the other, had been fractured and were in the process of healing; all four injuries were at least three weeks and possibly as much as eight weeks old. The ribs on each side were at different stages in the healing process, suggesting that the injuries were sustained during two different incidents. The parents told the treating physician that they did not know how S.W. had received these injuries.

On 13 November 2006, Child Protective Services removed S.W. from his parents' care. Since that time, he has been in the care of three different foster families, during which time he has been treated several times by doctors for a virus common in infants and an ear infection, but has presented no bruises or injuries.

After conducting a two-day adjudication and disposition hearing, the court adjudicated S.W. abused and neglected on 28 February 2007. On 27 March 2007, the court reduced to writing its order that the Dare County Department of Social Services ("DSS") have legal custody over S.W. Both parents appeal from this order.

The adjudication of S.W. as abused and neglected is the first step in the termination of parental rights. In this stage, the burden is on the petitioner to provide "clear, cogent, and convincing evidence" that the named grounds in N.C. Gen. Stat. § 7B-1111(a) (2005) exist. *See In re C.C., J.C.*, 173 N.C. App. 375, 380, 618 S.E.2d 813, 817 (2005). Here, S.W. was adjudicated abused and neglected pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) through the two following conclusions of law:

> 3. S.W. is an abused child as defined in [N.C. Gen. Stat. §] 7B-101 in that the juvenile's parents have inflicted or allowed to be inflicted on the juvenile a serious physical injury by other than accidental means and they created or allowed to be created a serious risk of serious physical injury to the juvenile by other than accidental means.
>
> 4. S.W. is a neglected child as defined in [N.C. Gen. Stat. §] 7B-101 in that the child does not receive proper care from his parents and lives in an environment injurious to the child's welfare.

Both parents argue that (1) they did not inflict any of the injuries on the child, and so no abuse exists, and (2) they did not know the child needed medical care, so their failure to obtain it is not neglect. Both arguments are without merit.

Per N.C. Gen. Stat. § 7B-101(15) (2005), a juvenile "who is not provided necessary medical care" is a neglected juvenile. Here, S.W. was brought to the hospital at least three weeks after four of his ribs were broken. Respondent-father argues that if the parents were not aware that S.W. needed medical care, their failure to provide it did not constitute neglect. However, as the trial court found in yet another undisputed finding of fact, the rib fractures would have caused S.W. to cry when he was lifted or moved about. Given that his parents were his primary caretakers, even accepting their argument that they did not inflict the wounds at issue, they either failed to notice their baby's extensive injuries and pain, or noticed but ignored them. Either way, their failure to obtain medical attention for the child constitutes neglect per the statute.

Both parents argue that if S.W.'s discomfort was that obvious, other persons who interacted with him in the preceding six to eight weeks should also have noticed. During that time, S.W. attended two daycares: Candy's Daycare from 2 to 4 October 2006 and Cameron's Daycare from 9 October to 13 November 2006. As the medical expert testified, however, the fact that neither daycare did not report any such irritability is unsurprising, given that the fractures could have been as old as eight weeks, meaning they could easily predate S.W.'s attendance at daycare.

Both parents also specifically attempt to place blame on either or both of the daycares S.W. attended, arguing that S.W. might have been injured there. As the trial court found in an undisputed finding of fact, however, three formal, independent investigations conducted on both daycares by DSS, Nags Head Police Department, and Division of Child Development found them non-negligent and not responsible for any injury to S.W. Other than these daycares, S.W. was in the exclusive care and custody of his parents.

The parents further argue that since S.W. was not treated for his broken ribs even upon their discovery, it cannot be said that he required medical attention. Regardless of whether midway through the child's healing process no elaborate medical treatment was given, broken bones in a baby four months old are certainly a serious injury that need medical attention.

Even if S.W.'s injuries were sustained as the result of an accident while he was in someone else's care, respondent-parents' failure to obtain medical care for him when he had four broken ribs constitutes

neglect. The fact that S.W.'s ribs had been broken for at least three weeks (and possibly as long as eight weeks) when he was first presented for medical care certainly shows that he lives in an environment injurious to his welfare. As such, the trial court's holding is affirmed.

Affirmed.

Judges McGEE and BRYANT concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 4 DECEMBER 2007

COTTER v. COTTER No. 07-246	Durham (05CVD4863)	Affirmed in part, reversed and remanded in part
DUNHAM v. K & S SANITATION, INC. No. 07-410	Mecklenburg (06CVS12413)	Affirmed
EDWARDS v. STATE ex rel. DEP'T OF MOTOR VEHICLES No. 07-298	Buncombe (05CVS2484)	Affirmed
84 LUMBER CO. v. HABITECH ENTERS., INC. No. 07-177	Wake (03CVD691)	Affirmed
HILL v. HILL No. 07-266	Henderson (99CVS67)	Affirmed
HORNE v. NASH-ROCKY MOUNT BD. OF EDUC. No. 06-1647	Ind. Comm. (TA-17240)	Affirmed
IN RE B.T.F. & D.W.H. No. 07-1009	Gaston (06JT346-47)	Affirmed
IN RE D.M.L., R.E.L. No. 07-574	Wayne (04JT75-76)	Affirmed
IN RE DUNN No. 07-191	Durham (95E751)	Affirmed in part, reversed in part, and remanded
IN RE J.M. No. 07-900	Cumberland (01JA65)	Dismissed
IN RE M.L.C. No. 07-859	Guilford (04J586)	Affirmed
IN RE R.G.J. No. 07-817	Harnett (05J208)	Affirmed
IN RE S.J.DM., IV No. 07-787	Rutherford (06JT109)	Affirmed
KEYES v. N.C. DEP'T OF TRANSP. No. 06-1649	Beaufort (06CVS540) (050SP0553)	Remanded
MINTZ v. MINTZ No. 07-8	Bladen (04CVD143)	Dismissed
RUSSO v. FOOD LION No. 06-520	Ind. Comm. (I.C. #950433)	Affirmed

SMITH v. STARNES No. 07-443	Union (92SP92)	Affirmed
STATE v. ANDRADE No. 07-588	Forsyth (05CRS60185) (06CRS1348)	No error
STATE v. AUTERY No. 07-714	Forsyth (06CRS56307)	Affirmed
STATE v. AYSCUE No. 07-345	Alexander (05CRS51338)	No error
STATE v. BARBEE No. 07-12	Stanly (05CRS2566-83) (05CRS51055-64)	No error
STATE v. BURTON No. 07-499	Davidson (05CRS4855) (05CRS51939)	Affirmed in part; vacated in part and remanded for resentencing
STATE v. GREEN No. 07-430	Pitt (05CRS53680) (05CRS5893)	No error
STATE v. GROCE No. 07-507	Wake (05CRS1701)	No error in part and remanded in part
STATE v. HALL No. 07-595	Iredell (05CRS59502) (05CRS59504)	No error
STATE v. HUTCHINSON No. 07-370	Henderson (05CRS3981) (06CRS239)	Dismissed
STATE v. JORDAN No. 07-399	Guilford (02CRS103161)	Vacated
STATE v. MOORE No. 06-1618	Beaufort (04CRS53077) (04CRS53059) (05CRS4661)	No error
STATE v. REED No. 07-250	Forsyth (06CRS53839) (06CRS8759)	No error in part; vacated in part and remanded for resentencing
STATE v. REESE No. 06-1098	Guilford (03CRS96775-88) (03CRS98645-46)	New trial
STATE v. RESA No. 07-606	Randolph (04CRS56796-97)	No error

STATE v. ROSARIO No. 07-401	Buncombe (05CRS9564) (05CRS58306)	Remanded for resentencing
STATE v. STOVALL No. 07-160	Iredell (06CRS2452) (06CRS50678)	No error
STATE v. STRYKER No. 07-590	Guilford (05CRS24739) (05CRS94498)	No error
STATE v. YATES No. 07-573	Cumberland (05CRS69681) (05CRS63813) (06CRS52796) (06CRS59498-500)	Affirmed
WATERS v. WILSON No. 06-1702	Alamance (05CVS1091)	Reversed
WESLEY LONG NURSING CTR., INC. v. HARPER No. 06-1706	Guilford (06CVD3889)	Affirmed

STATE OF NORTH CAROLINA v. DEVOZEO PERSON, DEFENDANT

No. COA06-1507

(Filed 18 December 2007)

1. Rape; Sexual Offenses— first-degree rape—first-degree sexual offense—personal use of dangerous weapon—insufficient evidence

The trial court erred by denying defendant's motion to dismiss the charges of first-degree rape as a principal and first-degree sexual offense by anal intercourse based upon insufficient evidence that defendant personally employed or displayed a dangerous weapon during commission of those offenses, although his accomplice displayed a gun, and the case is remanded to the trial court with instructions to enter judgment for second-degree rape and second-degree sexual offense.

2. Appeal and Error— preservation of issues—motions to dismiss—assignment of error

Defendant was not procedurally barred on appeal from arguing that he could not properly be convicted of first-degree rape as a principal or first-degree sexual offense by anal intercourse because there was no evidence that defendant personally employed or displayed a dangerous weapon during commission of those offenses where it was apparent that defendant's motions to dismiss all charges at the close of the State's evidence and at the close of all evidence were based upon the insufficiency of the evidence, and defendant's assignment of error to "the trial court's denial of defendant's motions to dismiss the charges on the grounds that the evidence was insufficient to prove each and every element of the crimes beyond a reasonable doubt" was adequate under N.C. R. App. P. 10(c)(1).

3. Rape— first-degree rape based on acting in concert—instructions—plain error analysis—fundamental error—double jeopardy

The trial court committed plain error by its instructions to the jury regarding the second charge of first-degree rape based on acting in concert with someone else, and defendant is entitled to a new trial on this charge, because: (1) the instruction allowed the jury to convict defendant based on the theory of acting in concert regardless of whether the jury believed that defendant had

acted together with the accomplice as the accomplice committed the offense, or believed that defendant committed the offense acting alone; (2) fundamental error occurred since the trial court instructed the jury in a manner such that the jury was allowed to convict defendant twice for the same offense in violation of his right against double jeopardy; and (3) the holding in *State v. Graham*, 145 N.C. App. 483 (2001), that such an error was fundamental is controlling and renders immaterial any consideration whether the jury's verdict was affected.

4. Sexual Offenses— first-degree sexual offense by anal intercourse—instructions—penetration—attempt

The trial court did not commit plain error by failing to instruct the jury regarding "attempt" in connection with the charge of first-degree sexual offense by anal intercourse, because: (1) the fact that defendant struggled to penetrate is far from equivocal and in no way negates a completed act; (2) the State presented DNA evidence that defendant's sperm was found on the anal swab collected from the victim following the attack, which provided unequivocal evidence of penetration equivalent to the victim's testimony; and (3) in addition to the DNA evidence, there was also the victim's testimony indicating that defendant struggled in engaging in anal intercourse, but never specifically excluded penetration.

5. Constitutional Law— effective assistance of counsel—failure to request instruction

Defendant did not receive ineffective assistance of counsel based on defense counsel's failure to request that the jury be instructed on the offense of attempted first-degree sexual offense, because the Court of Appeals' conclusion that the trial court was not required to provide an instruction on the attempted crime, even if it had been requested to do so, necessarily established that defendant was not denied effective assistance of counsel.

6. Constitutional Law— right to trial by jury—consideration of defendant's refusal of plea offer and election to go to trial—credibility

The trial court did not err or commit plain error during sentencing in a robbery with a dangerous weapon, second-degree kidnapping, first-degree rape as the principal, first-degree rape by acting in concert with someone else, first-degree sexual offense

by fellatio, first-degree sexual offense by anal intercourse, and first-degree sexual offense by digital penetration case when it allegedly considered the fact that defendant refused a plea offer and chose instead to exercise his right to a jury trial, because: (1) although there was a dispute over whether defendant properly preserved this argument for appellate review, an error at sentencing is not considered an error at trial for the purpose of N.C. R. App. P. 10(b)(1), and thus the rule does not have any application when a defendant seeks to challenge the finding of an aggravating factor at sentencing; (2) given the context of the pertinent comments, it cannot be inferred that the judge improperly considered defendant's election to go to trial in sentencing defendant; (3) the remarks indicated that the judge was commenting instead on defendant's lack of credibility when claiming he wanted another opportunity to prove himself as an honorable law abiding, caring, loving man and citizen and that he had been misled by the wrong crowd; and (4) the judge's remarks pointed out that defendant was given precisely the opportunity he supposedly desired when the State offered to agree to certain concessions in exchange for his testimony against his coparticipant, and defendant refused.

7. Sentencing— restitution—ability to pay

The trial court did not err in a robbery with a dangerous weapon, second-degree kidnapping, first-degree rape as the principal, first-degree rape by acting in concert with someone else, first-degree sexual offense by fellatio, first-degree sexual offense by anal intercourse, and first-degree sexual offense by digital penetration case by ordering restitution to the victim in the amount of $2,300.52 to pay for the victim's medical expenses related to the attack, because: (1) although the court was required by N.C.G.S. § 15A-1340.36(a) to consider various factors regarding defendant's ability to pay in determining the precise amount of the restitution, the statute also specifically provided that the court is not required to make findings of fact or conclusions of law on these matters; (2) the liability for the restitution was joint and several with defendant's coparticipant, and the relatively modest amount of restitution and the terms of its payment are not such as to lead to a common sense conclusion that the trial court did not consider defendant's ability to pay; (3) defendant did not suggest at trial that he lacked the ability to pay this amount; and (4) defendant failed to cite any decision in which a North

Carolina appellate court reversed such a modest award of restitution for failure to consider defendant's ability to pay.

Judge JACKSON concurring in part, concurring in result only in part, and dissenting.

Appeal by defendant from judgments entered 2 March 2006 by Judge Jesse B. Caldwell III in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 June 2007.

Attorney General Roy Cooper, by Assistant Attorney General K. D. Sturgis, for the State.

Office of the Public Defender, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

GEER, Judge.

Defendant Devozeo Person appeals from convictions for the following offenses: robbery with a dangerous weapon; second degree kidnapping; first degree rape as the principal; first degree rape by acting in concert with someone else; first degree sexual offense by fellatio; first degree sexual offense by anal intercourse; and first degree sexual offense by digital penetration. On appeal, defendant argues, and we agree, that the evidence at trial was insufficient to sustain the convictions for first degree rape and first degree sexual offense by anal intercourse. In addition, with respect to the conviction for first degree rape by acting in concert with someone else, defendant is entitled to a new trial since the jury instructions on that count were fatally flawed. Regarding the remaining convictions, however, we hold that defendant's trial was free of prejudicial error.

Facts

At trial, the State's evidence tended to show the following facts. At about 2:00 a.m. on 7 December 2002, "Carla," a married mother of four children, finished work at a Kentucky Fried Chicken restaurant.[1] When she arrived home, she realized she had left a shirt at the restaurant that she needed to wear the next day. She drove back to work, retrieved the shirt, and returned to her apartment.

Upon arriving home the second time, Carla parked her car and was about to get out when she noticed a man standing next to her car

1. We use the pseudonym "Carla" in order to protect the privacy of the prosecuting witness and for ease of reading.

door. Immediately, she locked the door and put the keys back into the ignition. The man, Nicholas Johnson, pointed a gun at her and threatened to shoot if she did not open the door. After Carla complied, defendant approached and took her keys and cell phone. The men then went through her purse and stole the money inside, about $300.00, as well as a necklace and bracelet Carla was wearing.

The men opened the trunk of the car and ordered her to get inside. When she refused and pleaded with them to take everything, including the car, she was grabbed by her hair and forced into the trunk. The men drove around for approximately two hours, making a few brief stops, while Carla remained locked in the trunk. At one point, she succeeded in opening the trunk and tried to signal to another car, but the men stopped the car, threatened to shoot her if she tried to escape, and shut her back inside the trunk.

Eventually, defendant and Johnson stopped the car at an abandoned house. The men opened the trunk and took Carla behind the house. Johnson ordered her to sit on the steps and pull down her pants, but she refused. Johnson pointed the gun at her and threatened that she would never see her children again if she did not obey. When she still refused, Johnson himself pulled down her pants and underwear, inserted his fingers into her vagina, and remarked to defendant that he thought Carla was having her period. While still pointing the gun at Carla, Johnson first engaged in sexual intercourse followed by anal intercourse and then forced Carla to perform fellatio on him.

After Johnson finished, defendant inserted his penis in Carla's vagina and, after a while, told her to turn around. According to Carla's in-court testimony, which was related through an interpreter, defendant "tried" to put his penis in her rectum, but he "didn't last very long."

Before leaving on foot, the two men threatened Carla that if she went to the police, they would kill her and her children. When the men were gone, Carla went back to her car, found her keys, and drove away. She spotted police officers at a gas station and told them about the attack. The officers recognized Carla as a woman who had been reported as missing by her husband when she did not return home from work at the expected time.

Carla was taken to a hospital where a nurse and a doctor administered a sexual assault examination. Vaginal, anal, and oral swabs were taken from Carla. Sperm was found on the vaginal and anal swabs. Through subsequent testing, authorities learned that sperm on

the vaginal and anal swabs matched defendant's DNA profile. The probability that the source of the sperm was a member of the African-American population, other than defendant, was approximately 1 in 3.05 quadrillion.

After defendant was arrested in June 2005, he gave a statement to the police. Defendant told detectives that, with Nicholas Johnson holding the gun, the two men robbed the victim, put her in the trunk of the car, and drove her to an abandoned house. He admitted to watching as Johnson forced the victim to engage in fellatio and intercourse. Defendant admitted that he too had intercourse with the victim against her will, stating that he joined in because he was intoxicated.

In July 2005, defendant was indicted on the following charges: one count of robbery with a dangerous weapon; one count of first degree kidnapping; two counts of first degree rape; and three counts of first degree sexual offense based on acts of fellatio, anal intercourse, and digital penetration. Following a jury trial in February and March 2006 in Mecklenburg County Superior Court, defendant was convicted of one count of robbery with a dangerous weapon, one count of second degree kidnapping, first degree rape by acting in concert with another person, first degree rape as the principal, first degree sexual offense by fellatio, first degree sexual offense by anal intercourse, and first degree sexual offense by digital penetration.

The trial court sentenced defendant to a presumptive range term of 288 to 355 months for first degree rape as a principal, followed by consecutive presumptive range terms of 77 to 102 months for robbery with a dangerous weapon, 29 to 44 months for second degree kidnapping, and 230 to 285 months for first degree rape by acting in concert. In addition, the court imposed a presumptive range sentence of 288 to 355 months for first degree sexual offense by anal intercourse to run consecutive to the sentence for first degree rape by acting in concert. Finally, the court imposed two presumptive range sentences of 230 to 285 months for first degree sexual offense by fellatio and for first degree sexual offense by digital penetration, with the sentences running concurrently with each other, but consecutive to the sentence for first degree sexual offense by anal intercourse. The trial court also ordered defendant to pay $2,300.52 in restitution to the victim, noting that defendant and Nicholas Johnson were to be held jointly and severally liable for rendering payment. Defendant gave timely notice of appeal to this Court.

I

[1] Defendant first argues that the trial court erred in denying his motion to dismiss the charges of first degree rape and first degree sexual offense by anal intercourse because there was insufficient evidence showing that defendant employed or displayed a dangerous weapon during commission of these offenses. Both rape and sexual offense crimes are elevated to the first degree when the actor "[e]mploys or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon." N.C. Gen. Stat. §§ 14-27.2(a)(2)(a), -27.4(a)(2)(a) (2005).

Defendant asserts that our prior decision in *State v. Roberts*, 176 N.C. App. 159, 163-64, 625 S.E.2d 846, 850 (2006), is controlling. In *Roberts*, we held that when a defendant is charged with first degree sexual offense as a principal and not on the theory of acting in concert or aiding and abetting, "the evidence must support a finding that defendant personally employed or displayed a dangerous or deadly weapon in the commission of the sexual offense." *Id.* at 164, 625 S.E.2d at 850. *See also State v. Wilson*, 345 N.C. 119, 123, 478 S.E.2d 507, 510 (1996) (noting that "in the absence of an acting in concert instruction, the State must prove that the defendant committed each element of the offense").

In this case, the indictments charging defendant with first degree rape as a principal and first degree sexual offense by anal intercourse alleged that defendant committed the acts while "displaying a handgun, a dangerous and deadly weapon . . . ." When the trial judge instructed the jury on each of those charges, he instructed that the jury needed to find, as a requisite element of the offense, that defendant employed or displayed a dangerous or deadly weapon. The judge did not, with respect to those two charges, provide any instruction that would have allowed the jury to convict defendant for "acting in concert" with Nicholas Johnson.

[2] We agree with defendant that *Roberts* is controlling under these facts. Indeed, the State, in its brief, concedes that it is unable to distinguish *Roberts*. The State nevertheless argues that defendant's argument is procedurally barred because his motion to dismiss and assignment of error were "broadside" and, therefore, insufficient under our appellate rules. We disagree.

At trial, defendant moved to dismiss all the charges at the close of the State's evidence and at the close of all the evidence, and thus

he sufficiently preserved the denial of his motion for appellate review under N.C.R. App. P. 10(b)(3). Although defendant provided no specific reasoning to support the motion to dismiss, he was not required to do so, since it was apparent from the context that he was moving to dismiss all the charges based on the insufficiency of the evidence. *See* N.C.R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make *if the specific grounds were not apparent from the context*." (emphasis added)). *See also State v. Mueller*, 184 N.C. App. 553, 559, 647 S.E.2d 440, 446 (2007) (rejecting State's argument that defendant only preserved right to appeal denial of motion to dismiss with respect to charges for which defendant provided specific argument to trial court and holding that defendant "did preserve his right to appeal all of the convictions before us based upon an insufficiency of the evidence to support each conviction").

Defendant then assigned error to "[t]he trial court's denial of defendant's motions to dismiss the charges on the grounds that the evidence was insufficient to prove each and every element of the crimes charged beyond a reasonable doubt." This assignment of error is adequate under N.C.R. App. P. 10(c)(1), which specifies that "[e]ach 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." Defendant's assignment of error is confined to a single issue of law—the appropriateness of the denial of defendants' motions to dismiss at the close of the State's evidence and the close of all the evidence—and specifies the legal basis for the assignment of error. We see no reasonable basis for requiring criminal defendants to include anything more in an assignment of error addressing the sufficiency of the evidence. Indeed, the requirement sought by the State would amount to a significant departure from prior appellate practice—such a change should be imposed only prospectively and only by our Supreme Court.

Since the issue is properly before this Court and the record contains no evidence showing defendant's personal use or display of a dangerous weapon, "[t]he evidence is insufficient to permit a reasonable jury to convict defendant of [the] first degree" offenses for which no acting in concert instruction was given. *Roberts*, 176 N.C. App. at 164, 625 S.E.2d at 850. We, therefore, vacate the judgments for first degree rape as a principal and first degree sexual offense based on

anal intercourse. Since, however, the jury necessarily determined that defendant's conduct satisfied the elements of second degree rape and second degree sexual offense by anal intercourse, we remand to the trial court with instructions to enter judgment for second degree rape and second degree sexual offense. *See id.*

II

[3] In his next argument, defendant challenges the trial court's instructions to the jury regarding the second charge of first degree rape based on "acting in concert with someone else." In the final mandate with respect to this "acting in concert" charge, the trial court stated:

> Now members of the jury, I charge you therefore, that if you find, beyond a reasonable doubt, that on or about the alleged date, the Defendant *acting either by himself or acting with* [sic] *together with someone else*, members of the jury, engaged in vaginal intercourse with the victim, and that he did so by force or threat of force, and that this was sufficient to overcome any resistance which the victim might make, and that the victim did not consent, and it was against her will, and that the Defendant employed or displayed a weapon, members of the jury, of a dangerous or deadly weapon, then it would be your duty to return a verdict of guilty of first degree rape, members of the jury, by acting in concert with someone else.

(Emphasis added.) Defendant contends that the trial court erred in this instruction by referring to guilt both as a principal and by acting in concert. Defendant's trial counsel did not object to this instruction and, therefore, defendant asks that we review for plain error. *See* N.C.R. App. P. 10(c)(4) ("In criminal cases, a question which was not preserved by objection noted at trial . . . may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.").

In support of his argument that the challenged jury instruction constitutes plain error, defendant relies upon *State v. Graham*, 145 N.C. App. 483, 487, 549 S.E.2d 908, 911 (2001). In *Graham*, as in this case, the defendant sexually assaulted his victims with the participation of an accomplice. The *Graham* defendant was tried on multiple charges based both on his own individual conduct and on the theory of "acting in concert" with the accomplice. When instructing the jurors on the offenses based only on "acting in concert," the trial

court directed the jury: "So I charge that if you find from the evidence beyond a reasonable doubt that on or about June 13th, 1997, the defendant acting *either by himself* or acting together with [the accomplice] committed these offenses, then you would find him guilty." *Id.* at 486, 549 S.E.2d at 911. We held that the trial court erred in giving this instruction:

> The State contends the foregoing instruction was proper because it was taken from the pattern jury instruction for acting in concert. However, defendant correctly asserts that the cited instruction allowed the jury to convict him twice for the same crime. To be precise, the jury instruction allowed the jury to convict defendant based on the theory of acting in concert regardless of whether the jury believed that defendant had acted together with [the accomplice] as [the accomplice] committed the offense, or believed that defendant committed the offense acting alone. Since defendant was separately convicted for all of the same offenses based on his own actions, the cited jury instructions allowed defendant to be convicted twice for the same offense, and thus violated his rights under the Fifth and Fourteenth Amendments to the United States Constitution and under Article I, § 19, of the North Carolina Constitution to be free from double jeopardy. Thus, use of the pattern instructions without appropriate amendment under the circumstances of this particular case rendered the charge confusing.

Id. at 487, 549 S.E.2d at 911 (internal citations omitted).

Since, like here, the defendant in *Graham* did not object to the instruction at trial, the Court was required to determine whether the error constituted plain error. The Court held: "[W]here the trial court instructed the jury in a manner such that the jury was allowed to convict defendant twice for the same offense, *fundamental error occurred*. Defendant is therefore entitled to a new trial with corrected jury instructions for the crimes with which he was charged on the basis of acting in concert with [the accomplice]." *Id.* (emphasis added).

The holding in *Graham* is directly applicable to this case. Defendant was tried on two counts of first degree rape, one for his own conduct and one for acting in concert with Nicholas Johnson. The jury instruction in this case is virtually indistinguishable from the instruction in *Graham* and effectively "allowed the jury to convict [defendant] twice for the same crime." *Id.* Although the State and the

dissent seek to distinguish *Graham* on the grounds that the jury instruction—even if erroneous—was not sufficiently prejudicial to have a probable impact on the jury's verdict, *Graham's* holding that such an error was "fundamental" is controlling and renders immaterial any consideration whether the jury's verdict was affected.

We are barred by controlling Supreme Court authority from adopting the dissent's suggestion that, for purposes of plain error analysis, "[m]erely labeling an error as 'fundamental' does not relieve this Court of the obligation to review the error for harmlessness." In *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997), with now Chief Justice Parker writing for the Court, the Supreme Court specifically held: To successfully establish plain error, defendant must demonstrate "(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial."

This holding arose out of prior decisions by the Supreme Court also indicating that plain error may be established by *either* of two methods, including showing that a different result would probably have been reached *or* that the error was sufficiently fundamental. *See, e.g.*, *State v. Black*, 308 N.C. 736, 740-41, 303 S.E.2d 804, 806-07 (1983) (accord). Indeed, the Supreme Court has since repeated this bifurcated standard in *State v. Jones*, 358 N.C. 330, 346, 595 S.E.2d 124, 135 ("Under the plain error standard of review, defendant has the burden of showing: '(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.' " (quoting *Bishop*, 346 N.C. at 385, 488 S.E.2d at 779)), *cert. denied*, 534 U.S. 1023, 160 L. Ed. 2d 500, 125 S. Ct. 659 (2004). *See also State v. Anderson*, 355 N.C. 136, 142, 558 S.E.2d 87, 92 (2002) (accord); *State v. Braxton*, 352 N.C. 158, 197, 531 S.E.2d 428, 451 (2000) (accord), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797, 121 S. Ct. 890 (2001).

The dissent never addresses the standard set out in *Bishop*, *Black*, *Jones*, *Anderson*, *Braxton*, and other cases. We are bound by that articulation until the Supreme Court holds otherwise. Under those opinions, an error that is so fundamental as to result in a miscarriage of justice constitutes plain error. *Graham* has specifically held that the type of jury instruction used in this case constitutes just such a fundamental error. We are bound by *Graham*. Accordingly, consistent with *Graham*, we hold that defendant is entitled to a new trial on the charge of first degree rape by acting in concert with someone else.

III

[4] Defendant further contends that the trial court erred in its instructions by failing to instruct the jury regarding "attempt" in connection with the charge of first degree sexual offense by anal intercourse. Specifically, defendant argues that an instruction on attempted first degree sexual offense was required because there was conflicting evidence on the crucial element of anal penetration, and, as a result, the jury could have found him guilty of the attempted offense although acquitting him of the completed offense. Defendant acknowledges that his trial counsel failed to request such an instruction, but argues on appeal that the trial court committed plain error. Our review of this question is, therefore, limited to a plain error analysis. *See* N.C.R. App. P. 10(c)(4).

"A trial court must submit a lesser included offense instruction if the evidence would permit a jury rationally to find defendant guilty of the lesser offense and acquit him of the greater." *State v. Johnson*, 317 N.C. 417, 436, 347 S.E.2d 7, 18 (1986), *superseded by statute on other grounds as stated by State v. Moore*, 335 N.C. 567, 440 S.E.2d 797, *cert. denied*, 513 U.S. 898, 130 L. Ed. 2d 174, 115 S. Ct. 253 (1994). If the State, as in this case, seeks to convict a defendant of only the greater offense of first degree sexual offense, "the trial court needs to present an instruction on the lesser included offense [of attempted first degree sexual offense] only when the 'defendant presents evidence thereof or when the State's evidence is conflicting.' " *State v. Woody*, 124 N.C. App. 296, 307, 477 S.E.2d 462, 467 (1996) (quoting *State v. Ward*, 118 N.C. App. 389, 398, 455 S.E.2d 666, 671 (1995)); *see also Johnson*, 317 N.C. at 436, 347 S.E.2d at 18 ("Instructions pertaining to attempted first degree rape as a lesser included offense of first degree rape are warranted when the evidence pertaining to the crucial element of penetration conflicts or when, from the evidence presented, the jury may draw conflicting inferences.").

Defendant relies principally on the victim's direct-examination testimony to argue that an attempt instruction was warranted. As reflected in the transcript, her testimony regarding the anal intercourse offense was brief and somewhat ambiguous:

> Q And you say he stuck his penis in your private. Do you mean vagina when you say private?
>
> A Yes.
>
> Q And then what happened?

A He lasted a short time, and then he told me to turn around. *He tried to put his penis into my rectum, but he didn't try. He didn't last very long.*

Q And then what happened?

A They left me there . . . .

(Emphasis added.) Based on this testimony, defendant argues the jury would likely have acquitted him of the greater offense requiring completion of the act of anal intercourse and convicted him of only attempted anal intercourse had the jury been given an "attempt" instruction. The victim's testimony does not, however, necessarily mean that the State's evidence of penetration was conflicting.

In *State v. Williams*, 314 N.C. 337, 351, 333 S.E.2d 708, 718 (1985) (emphasis omitted), the defendant argued that his statement to police that he merely "struggled to penetrate without an erection" cast doubt on whether the act ever occurred. The Supreme Court observed, however, that "[t]he simple fact that a person struggles to accomplish some feat, taken by itself, implies neither success nor failure. The fact that defendant 'struggled to penetrate' is far from equivocal and in no way negates a completed act." *Id.* at 352, 333 S.E.2d at 718. The Court concluded that the victim's unequivocal testimony that the defendant completed the act, in conjunction with the fact that the defendant's testimony did not actually deny penetration, "compelled the instruction given by the trial court," which did not include an attempt instruction. *Id.*

Defendant argues, however, that the evidence here was similar to that in *Johnson*, in which the Supreme Court held the "evidence create[d] a conflict as to whether penetration occurred," and, thus, the trial court "committed reversible error by failing to instruct the jury on the lesser included offense of attempted first degree rape." 317 N.C. at 436, 347 S.E.2d at 18. In *Johnson*, although the victim testified on direct examination that the defendant had penetrated her vagina, she admitted on cross-examination to giving a statement to the police that "the man 'tried to push it in but couldn't.' " *Id.* A doctor further testified that when he examined the victim, he found her to have an unusually narrow vagina and that the victim had told him that she had " 'felt pressure but not penetration.' " *Id.*

We believe this case is controlled by *Williams* rather than *Johnson*. Carla's testimony paralleled that of the defendant in *Williams*, with her testimony indicating only that defendant struggled

in engaging in anal intercourse; she never specifically excluded penetration. In addition to this testimony, the State presented DNA evidence that defendant's sperm was found on the anal swab collected from Carla following the attack—unequivocal evidence of penetration equivalent to the victim's testimony in *Williams*.[2] Given the DNA evidence in combination with Carla's testimony, we hold that *Williams* establishes that the trial court did not err in failing to instruct the jury regarding "attempt." *See also State v. Rhinehart*, 322 N.C. 53, 58-60, 366 S.E.2d 429, 432-33 (1988) (trial court did not err in refusing to give attempt instruction because victim's statements that defendant "tried to suck" victim's penis provided no basis "from which the jury could reasonably have found that defendant committed merely the lesser included offense of attempted first-degree sexual offense," especially when victim's "emotional statements in the minutes following the incident that defendant had 'tried to suck' his penis pale in significance" to other strong evidence of completed act).

[5] In a separate assignment of error, defendant also argues that he was denied effective assistance of counsel insofar as his trial counsel failed to request that the jury be instructed on the offense of attempted first degree sexual offense. To establish a claim of ineffective assistance of counsel, a defendant must show (1) his counsel's performance was deficient, and (2) his defense was prejudiced by counsel's deficient performance. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). Our conclusion that the trial court was not required to provide an instruction on the attempted crime—even if it had been requested to do so—necessarily establishes that defendant was not denied effective assistance of counsel.

IV

[6] Defendant next argues that the trial court "erred or committed plain error" when, during sentencing, it improperly considered the fact that he refused a plea offer and chose instead to exercise his right to a jury trial. The parties dispute whether defendant preserved this argument for appellate review. Although our appellate rules generally require a party to "present[] to the trial court a timely request, objection or motion," N.C.R. App. P. 10(b)(1), in order to preserve an issue for appeal, the Supreme Court has held that this rule "does not

2. In defendant's own testimony at trial, he did not deny having anal intercourse with the victim. Defendant merely testified that he did not remember if he did or not. When asked "how [his] semen got on her vagina or her anus," defendant stated: "Probably cause I had sex with her. I can't remember if it was, so I was probably intoxicated, and can't remember."

have any application" when a defendant seeks to challenge the finding of an aggravating factor at his sentencing, even though he did not overtly object when the finding was made. *State v. Canady*, 330 N.C. 398, 401, 410 S.E.2d 875, 878 (1991). This Court has subsequently relied on *Canady* for the proposition that "an error at sentencing is not considered an error at trial for the purpose of . . . Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure." *State v. Hargett*, 157 N.C. App. 90, 92, 577 S.E.2d 703, 705 (2003). *Accord 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, 646 S.E.2d 535 (2007); *State v. Curmon*, 171 N.C. App. 697, 703, 615 S.E.2d 417, 422 (2005). Accordingly, defendant's contentions regarding sentencing are properly before the Court.

Even though "[a] sentence within the statutory limit will be presumed regular and valid[,] . . . such a presumption is not conclusive." *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). "If the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant's rights." *Id.* Our Supreme Court has further stated: "Where it can reasonably be inferred from the language of the trial judge that the sentence was imposed at least in part because defendant did not agree to a plea offer by the state and insisted on a trial by jury, defendant's constitutional right to trial by jury has been abridged, and a new sentencing hearing must result." *State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990).

Here, defendant relies on references of the trial judge to the fact that defendant rejected an offer by the State to grant concessions on charges or sentencing if defendant would testify against Johnson. Defendant's argument, however, fails to take into account the context in which the trial judge made his remarks, including the fact that the trial judge was responding to statements made by defendant.

Before imposition of sentence, defendant accepted the judge's invitation to address the court personally and stated:

> Concerning the prior convictions of my life, I was young and misguided, without a father in the home. Played a big influence in my mother.
>
> Me and my mother and three kids, and I was just led by the wrong crowd.

I was young when I had responsibility in crime, and I deeply regret it. That's in the past. I can't dwell on the past. I just want to go forward.

But prior to this situation, on the situation with the victim, sorry that it happened to her, and wish I wouldn't have been involved in the way I was involved in it.

I just hurt my [sic] so bad, that I feel like I was robbed out of a decent life. Forgive me, Your Honor.

. . . .

. . . I apologize for taking up your time, the time of the jurors and everybody's time. What's done, I can't go back to the past.

. . . .

I just wish that, you know, I had another opportunity to prove myself that I was a honorable law abiding, caring, loving man [and] citizen, but you know, there's hope. Look hopful [sic] to the bright future; that's all. . . .

. . . .

I wish that I would have been perceived as a man of who I am in my heart rather than a piece of paper.

I hate being judged by paper, cause I know who I am. I'm not a criminal, definitely not a rapist.

Immediately following defendant's statement, the trial judge responded:

THE COURT: Thank you, sir. My recollection is from [sic].

My pretrial conference [sic] that the Defendant was afforded an opportunity, even as late as last week if I'm not mistaken, to testify against Nicholas Johnson, and receive in [sic] concession on the charges and/or sentences, is that correct?

[PROSECUTOR]: That's correct, Your Honor, he was.

THE COURT: He chose to reject that offer, which was made even as late as last week.

The crimes for which this Defendant had been convicted are violent, and are serious.

I think I'll reserve further comment. The evidence is all of record in this case.

Stand up please, Mr. Person.

Following these remarks, the trial court went on to pronounce the individual sentences.

Given this context, we do not believe that it can be reasonably inferred that the judge improperly considered defendant's election to go to trial in sentencing defendant. Our review of the above remarks indicates that the judge was commenting instead on defendant's lack of credibility when claiming he wanted "another opportunity to prove" himself as an "honorable law abiding, caring, loving man [and] citizen" and that he had been misled by "the wrong crowd." The judge's remarks point out that defendant was given precisely the opportunity he supposedly desired when the State offered to agree to certain concessions in exchange for his testimony against Nicholas Johnson. The trial judge could reasonably determine—as his comments indicate he did—that the sincerity of defendant's statements was in serious doubt given his refusal to testify against someone who was part of "the wrong crowd."

In short, based on the record, we hold that defendant was not more seriously punished as a result of his exercise of his constitutional right to trial by jury. *See State v. Gantt*, 161 N.C. App. 265, 272, 588 S.E.2d 893, 898 (2003) ("Although we disapprove of the trial court's reference to defendant's failure to enter a plea agreement, 'we cannot, under the facts of this case, say that defendant was prejudiced or that defendant was more severely punished because he exercised his constitutional right to trial by jury.' " (quoting *State v. Bright*, 301 N.C. 243, 262, 271 S.E.2d 368, 380 (1980)), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 83 (2004). This assignment of error is overruled.

V

[7] Finally, we turn to defendant's argument that the trial court committed error in ordering restitution to the victim in the amount of $2,300.52. Even though defendant did not voice an objection to restitution at sentencing, this assignment of error is fully reviewable on appeal. *See State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) ("While defendant did not specifically object to the trial court's entry of an award of restitution, this issue is deemed preserved for appellate review under N.C. Gen. Stat. § 15A-1446(d)(18).").

N.C. Gen. Stat. § 15A-1340.36 (2005) provides in relevant part:

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

Defendant contends that the trial court violated this statute by failing to consider any of the factors relating to defendant's ability to pay the restitution amount.

During the hearing on sentencing, the prosecutor requested restitution in the amount of $2,300.52 in order to compensate the victim for her medical expenses related to the attack and presented the court with a copy of the victim's medical bills. After setting out the terms of imprisonment, the trial court then stated that it was "imposing a civil judgment or lien against the Defendant in the amount of $2,300.52 in favor of [the victim] by reason of restitution." The court later indicated that liability for the restitution was joint and several with Nicholas Johnson. On the judgment for first degree rape, 05 CRS 227174, and only that judgment, the court indicated that restitution was awarded in the amount of $2,300.52 and a civil lien imposed with joint and several liability with the co-defendant. The court also recommended payment of restitution as a condition of post-release supervision, if applicable, or from work release earnings, if applicable.

Because defendant was convicted of a B1 felony, the victim had "the right to receive restitution as ordered by the court . . . ." N.C. Gen. Stat. § 15A-834(b) (2005). Under N.C. Gen. Stat. § 15A-1340.34 (2005), the court was, therefore, required to order "that the defendant make restitution to the victim . . . for any injuries or damages arising directly and proximately out of the offense committed by the defendant." The court's order of restitution to reimburse the victim for her medical expenses resulting from the rape complied with this statute.

While the court was also required by N.C. Gen. Stat. § 15A-1340.36(a) to consider various factors regarding defendant's ability to pay in determining the precise amount of the restitution, the statute also specifically provides that "the court is not required to make findings of fact or conclusions of law on these matters." Defendant, however, cites to *State v. Mucci*, 163 N.C. App. 615, 626, 594 S.E.2d 411, 419 (2004), in which this Court held: "Although the statute expressly does not require the trial court to make findings of fact or conclusions of law on the factors, the record in this case reveals that the trial court did not consider any of the factors related to defendant's ability to pay the full amount of restitution and thus this case must be remanded for a new sentencing hearing."

A key factor in *Mucci*, however, as with the cases upon which it relied, was the large amount of restitution and the fact that common sense dictated that the defendant could not pay the amount ordered. In *Mucci*, the court conditioned probation on the defendant's paying "full restitution of over $26,000.00 in addition to performing twenty-five hours per week of community service for the entire probationary period [of 36 months], for a total of 3,600 hours, while remaining gainfully employed and paying $4,000.00 in fines plus $500.00 in costs . . . ." *Id.* at 627, 594 S.E.2d at 419. *Mucci* relied upon *State v. Smith*, 90 N.C. App. 161, 368 S.E.2d 33 (1988), *aff'd per curiam*, 323 N.C. 703, 374 S.E.2d 866, *cert. denied*, 490 U.S. 1100, 104 L. Ed. 2d 1007, 109 S. Ct. 2453 (1989), and *State v. Hayes*, 113 N.C. App. 172, 437 S.E.2d 717 (1993). In *Smith*, the trial court conditioned the defendant's probation on payment of $500,000.00, with the result that the defendant would have to pay a minimum of $62,500.00 per year (if her probation were extended). 90 N.C. App. at 168, 368 S.E.2d at 38. This Court observed: "Common sense dictates that only a person of substantial means could comply with such a requirement." *Id.* Likewise, in *Hayes*, when the trial court ordered restitution in the amount of $208,899.00, payable over a five-year probationary period, this Court concluded: "As in *Smith*, common sense dictates that this defendant will be unable to pay this amount." 113 N.C. App. at 175, 437 S.E.2d at 719.

In *Smith*, this Court distinguished our Supreme Court's decision in *State v. Hunter*, 315 N.C. 371, 338 S.E.2d 99 (1986), "in which the Court upheld a restitution order under similar circumstances" to those of *Smith*. *Smith*, 90 N.C. App. at 168, 368 S.E.2d at 38. The Court pointed out that "[i]n *Hunter*, however, the amount of restitution was only $919.25." *Id.*

We believe this case falls within the scope of *Hunter*. *See Hunter*, 315 N.C. at 376, 338 S.E.2d at 103 (upholding restitution award of $919.25 when trial judge "knew defendant's age, her relationship to the victim, that she resided with her mother, that she was indigent for legal purposes, and that the victim's family had insurance of an uncertain amount," even though court did not expressly refer to defendant's ability to pay). The restitution is only $2,300.52, and the record contains no expressed mandatory time limitation for its payment. In contrast to *Mucci*, *Hayes*, and *Smith*, this relatively modest amount of restitution and the terms of its payment are not such as to lead to a "common sense" conclusion that the trial court did not consider defendant's ability to pay. Indeed, defendant did not suggest below that he lacked the ability to pay this amount. *See State v. Riley*, 167 N.C. App. 346, 349, 605 S.E.2d 212, 215 (2004) ("Because [the defendant] failed to present evidence showing that she would not be able to make the required restitution payments, we find no error."). Defendant has cited no decision in which a North Carolina appellate court has reversed such a moderate award of restitution for failure to consider the defendant's ability to pay. Under the circumstances presented to us, we decline to do so in this case.

Conclusion

In summary, we remand to the trial court for entry of judgment on second degree rape (as a principal) and second degree sexual offense based on anal intercourse. The trial court must conduct a new sentencing hearing with respect to those two offenses. As for the charge of first degree rape by acting in concert with someone else, we hold that defendant is entitled to a new trial. We find no error regarding defendant's remaining convictions and sentences.

Remanded in part; new trial in part; no error in part.

Judge CALABRIA concurs.

Judge JACKSON concurs in part, concurs in the result only in part and dissents in part in a separate agreement.

JACKSON, Judge, concurring in part, concurring in result only in part and dissenting in part.

I concur with sections I, III, and IV of the majority's opinion, and concur only in the result of section V. However, for the reasons stated

below, I must respectfully dissent from Part II of the majority's opinion which concludes that defendant is entitled to a new trial on the charge of first degree rape by acting in concert with someone else. I would hold no plain error.

Although I agree that the majority's reliance on *State v. Graham*, 145 N.C. App. 483, 487, 549 S.E.2d 908, 911 (2001), is appropriate inasmuch as it holds that the pattern jury instruction on acting in concert leaves open the possibility that defendant is being convicted twice for the same conduct, I disagree with the majority's contention that because *Graham* labeled this error "fundamental," whether or not the error is harmless is immaterial.

The North Carolina Supreme Court adopted the plain error rule in *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983), stating that

> the plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

Id. (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982) (footnotes omitted) (emphasis in original)). *Odom* continued, "In 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." *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79 (citing *United States v. Jackson*, 569 F.2d 1003 (7th Cir.), *cert. denied*, 437 U.S. 907, 57 L. Ed. 2d 1137 (1978)). That is, "[b]efore deciding that an error by the trial court amounts to 'plain error,' the appellate court must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (citing *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79).

Merely labeling an error as "fundamental" does not relieve this Court of the obligation to review the error for harmlessness. The United States Supreme Court has applied harmless error analysis to a myraid of constitutional errors affecting "fundamental" rights. *See Arizona v. Fulminante*, 499 U.S. 279, 306, 113 L. Ed. 2d 302, 329 (1991). In *Fulminante*, the Supreme Court listed the following exemplary cases:

> *Clemons v. Mississippi*, 494 U.S. 738, 752-754 (1990) (unconstitutionally overbroad jury instructions at the sentencing stage of a capital case); *Satterwhite v. Texas*, 486 U.S. 249 (1988) (admission of evidence at the sentencing stage of a capital case in violation of the Sixth Amendment Counsel Clause); *Carella v. California*, 491 U.S. 263, 266 (1989) (jury instruction containing an erroneous conclusive presumption); *Pope v. Illinois*, 481 U.S. 497, 501-504 (1987) (jury instruction misstating an element of the offense); *Rose v. Clark*, 478 U.S. 570 (1986) (jury instruction containing an erroneous rebuttable presumption); *Crane v. Kentucky*, 476 U.S. 683, 691 (1986) (erroneous exclusion of defendant's testimony regarding the circumstances of his confession); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) (restriction on a defendant's right to cross-examine a witness for bias in violation of the Sixth Amendment Confrontation Clause); *Rushen v. Spain*, 464 U.S. 114, 117-118, and n. 2 (1983) (denial of a defendant's right to be present at trial); *United States v. Hasting*, 461 U.S. 499 (1983) (improper comment on defendant's silence at trial, in violation of the Fifth Amendment Self-Incrimination Clause); *Hopper v. Evans*, 456 U.S. 605 (1982) (statute improperly forbidding trial court's giving a jury instruction on a lesser included offense in a capital case in violation of the Due Process Clause); *Kentucky v. Whorton*, 441 U.S. 786 (1979) (failure to instruct the jury on the presumption of innocence); *Moore v. Illinois*, 434 U.S. 220, 232 (1977) (admission of identification evidence in violation of the Sixth Amendment Confrontation Clause); *Brown v. United States*, 411 U.S. 223, 231-232 (1973) (admission of the out-of-court statement of a nontestifying codefendant in violation of the Sixth Amendment Confrontation Clause); *Milton v. Wainwright*, 407 U.S. 371 (1972) (confession obtained in violation of *Massiah v. United States*, 377 U.S. 201 (1964)); *Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970) (admission of evidence obtained in violation of the Fourth Amendment); *Coleman v. Alabama*, 399 U.S. 1, 10-11 (1970) (denial of counsel

> at a preliminary hearing in violation of the Sixth Amendment Counsel Clause).

Id. at 306-07, 113 L. Ed. 2d at 329-30 (parallel citations omitted). We need only look to this State's recent examination of sentencing errors in violation of *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), to realize that harmless error may be applied in this case. *See State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, 550 U.S. 948, 167 L. Ed. 2d 1114 (2007) (holding the trial court's, rather than the jury's, finding of an aggravating factor was harmless beyond a reasonable doubt).

North Carolina appellate courts have denied harmless error review when the errors were deemed "structural," *i.e.*, resulting from a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Fulminante*, 499 U.S. at 310, 113 L. Ed. 2d at 331.

The majority contends correctly that we are bound by North Carolina Supreme Court precedent establishing a bifurcated standard for plain error analysis. However, this bifurcated standard does not foreclose a determination of whether the error impacted the jury's verdict in this case. As recently as 15 December 2006, our Supreme Court stated the following:

> We find plain error "only in exceptional cases where, 'after reviewing the entire record, it can be said the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." ' *Thus, the appellate court must study the whole record to determine if the error had such an impact on the guilt determination, therefore constituting plain error." Accordingly, we must determine whether the jury would probably have reached a different verdict if [the error] had not [occurred].*

State v. Hammett, 361 N.C. 92, 98, 637 S.E.2d 518, 522 (2006) (citations omitted) (emphasis added). Clearly, our precedents mandate review of the entire record in our determination as to whether there is a fundamental error that requires reversal for plain error.

Had *Graham* labeled the use of the unaltered pattern jury instruction for acting in concert which exposed the defendant to the possibility of being twice convicted for the same conduct a structural error, I would agree that a harmless error analysis is irrelevant; how-

ever, this "fundamental" error is not "structural." Therefore, I would apply harmless error analysis in this case.

Further, *Graham* held, "*In this case*, . . . fundamental error occurred." *Graham*, 145 N.C. App. at 487, 549 S.E.2d at 911 (emphasis added). I believe this holding was limited to the facts of *Graham*. In *Graham*, the State argued only that using pattern jury instructions to instruct the jury does not constitute plain error. The State did not argue that any error was harmless; therefore, this Court did not apply a harmless error analysis.

In the case *sub judice*, the court went to great lengths to make clear that one charge was for defendant's own conduct, while the other was for acting in concert with Johnson. Although the evidence supported an acting in concert instruction with respect to defendant's individual activity towards the victim, the trial judge elected not to give the instruction for the charge alleging defendant's own conduct. The court proposed that the verdict sheet for first degree rape by acting in concert read "guilty of first degree rape by acting in concert with someone else." After giving general jury instructions, the court went through each jury sheet, pointing out that there were two counts of first degree rape. "The second charge is file number 05-CRS-227172, it reads differently from the one I just read to you." The court explained that the first verdict sheet "simply says guilty of first degree rape or not guilty," while the second says, "guilty of first degree rape by acting in concert with someone else." The court pointed out that "each legal instruction I give you relates only to that particular charge." The court prefaced its instructions on the second rape charge—alleging acting in concert—"I'm going to give you the law, and it's a little different." The court then instructed the jury on first degree rape and acting in concert.

Notwithstanding the court's erroneous instruction, as the State correctly argues, there was overwhelming evidence of defendant's guilt as to both charges. The victim testified that defendant watched while Johnson raped her and that defendant also raped her. Defendant gave a taped confession in which he admitted that he watched Johnson rape and sexually assault the victim, then took Johnson up on his invitation to rape her himself. Defendant admitted that they both had intercourse with her against her will, and that she was in the same position when Johnson raped her as when he raped her. At trial, defendant testified that he remembered seeing Johnson have sex with her from behind. He testified that after Johnson had

sex with her, he "took [his] turn." There was DNA evidence that defendant's semen was found on swabs taken from both the victim's vagina and anus, which defendant testified was there "probably cause I had sex with her."

Given the evidence in this case, I would hold the erroneous jury instruction was harmless beyond a reasonable doubt and that the trial court's use of the unmodified pattern jury instruction did not constitute plain error.

IN THE MATTER OF: M.G., M.B., K.R., J.R.

No. COA07-643

(Filed 18 December 2007)

1. Child Abuse and Neglect— home state—insufficient residence in North Carolina

The trial court incorrectly found that North Carolina was the home state of children who were the subject of an abuse and neglect petition where neither child had lived in North Carolina for at least 6 consecutive months immediately before commencement of proceedings. The record contains insufficient evidence to determine whether jurisdiction exists on another basis.

2. Child Abuse and Neglect— addresses of children—affidavit not accurate—subject matter jurisdiction—not divested

The trial court was not deprived of subject matter jurisdiction in a child neglect and abuse proceeding by an affidavit which inaccurately reported that the children had lived with respondents continuously since 2002.

3. Child Abuse and Neglect— petition—service on children—not required

There is no authority requiring the service of a neglect and abuse petition on the children who were the subject of the petition, and the failure to serve them cannot be held to be a basis for concluding that the trial court lacked subject matter jurisdiction.

4. Child Abuse and Neglect— subject matter jurisdiction—service on parents

In an abuse and neglect proceeding involving a blended family, allocation of the names of the children among summonses

based on the biological parentage of the particular child was sufficient to vest subject matter jurisdiction. This was not a termination of parental rights proceeding; the controlling statute is N.C.G.S. § 7B-406(a), with which DSS complied.

5. Child Abuse and Neglect— amended petition—added allegations—improper

The trial court erred by allowing DSS to amend a neglect and abuse petition to add allegations regarding the sexual abuse of one of several children. The added allegations changed the nature of the conditions relied on in the original petition.

6. Appeal and Error— assignments of error—not supported by argument—abandoned

Respondent mother's assignment of error to findings is deemed abandoned where she provided no argument as to why these findings were not supported by the evidence.

7. Child Abuse and Neglect— focus on children rather than parent—evidence sufficient

In an abuse, neglect, and dependency proceeding, the question is whether the children were abused and not whether respondent mother committed the offense. The mother here witnessed alcohol incidents and allowed the father to drive the children after drinking, which was sufficient to support a determination that respondent mother allowed to be created a substantial risk of physical injury to the juveniles by other than accidental means.

8. Child Abuse and Neglect— serious risk of injury to children—evidence sufficient—statements about illegal conduct—not moral turpitude

Findings of domestic violence, alcohol abuse, and driving children while intoxicated, supported by the evidence, were sufficient support for a determination that respondent father created a substantial risk of serious physical injury to the children. Statements about underage drinking, smoking, and marijuana involves conduct which is illegal, but does not fall within the traditional definition of moral turpitude.

9. Child Abuse and Neglect— indecent liberties—conduct sufficient without intent

The trial court correctly concluded that a child had been sexually abused by groping. The father argues that there was no evi-

dence of sexual gratification, but conduct is sufficient to establish the violation.

Appeal by respondents from order entered 8 March 2007 by Judge Edward A. Pone in Cumberland County District Court. Heard in the Court of Appeals 13 November 2007.

Elizabeth Kennedy-Gurnee for petitioner-appellee.

Lisa Skinner Lefler for respondent-appellant mother.

Annick Lenoir-Peek for respondent-appellant father.

Beth A. Hall for guardian ad litem.

GEER, Judge.

Respondent mother is the biological mother of M.G. ("Martin") and M.B. ("Michelle"). Respondent father is the biological father of K.R. ("Kristen") and J.R. ("Jack").[1] Both respondents appeal from the trial court's order adjudicating all four children abused and neglected.[2] We hold that the trial court properly concluded that the four children were abused as defined by N.C. Gen. Stat. § 7B-101(1)(b) (2005) and neglected as defined by N.C. Gen. Stat. § 7B-101(15). We further affirm the trial court's determination that Kristen was sexually abused under N.C. Gen. Stat. § 7B-101(1)(d). Because, however, the trial court improperly allowed petitioner to amend its petition to add allegations of sexual misconduct as to Michelle, we must reverse the portion of the order concluding that Michelle was sexually abused. Moreover, we remand for further findings of fact regarding the trial court's jurisdiction with respect to Kristen and Jack.

Facts

On 18 May 2006, the Cumberland County Department of Social Services ("DSS") filed a juvenile petition alleging that Martin, Michelle, Kristen, and Jack were dependent, neglected, and abused children. At the time of the petition, Martin was five years old, Michelle was nine, Kristen was 13, and Jack was 14. That same day, an order for non-secure custody was entered, and the children were placed in the custody of DSS.

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1. The pseudonyms Martin, Michelle, Kristen, and Jack are used throughout the opinion to protect the children's privacy and for ease of reading.

2. The biological father of Martin and Michelle and the biological mother of Kristen and Jack were also respondents to the trial proceedings, but are not parties to this appeal.

On 5 December 2006, DSS filed a motion for leave to amend the petition to add allegations, based on recent disclosures by Michelle, that she had been sexually abused by respondent father. A hearing was held on the motion on 4 January 2007, and the court granted the motion on 21 February 2007.

On 19 and 20 February 2007, a hearing was held on the juvenile petition. The evidence presented at the hearing indicated the following. Initially, Kristen and Jack had lived with respondent father, but moved to California to live with their biological mother and her husband. When their mother divorced their stepfather, Jack went to live with the stepfather, but Kristen continued to live with their mother. Jack subsequently moved back to North Carolina to live with his father in December 2005 or January 2006. After Jack and Kristen's mother attempted suicide twice, Kristen also returned to live with her father in February 2006. During Kristen's first night in North Carolina, respondent father allowed Kristen and Jack to drink beer.

Respondent father was living with respondent mother and her two children, Martin and Michelle. While all four children were living with respondents, respondent father often drank alcohol, especially beer, to excess. Although sometimes he was playful, other times, he would yell at respondent mother and the children and chase them. Frequently, Jack would stand up to respondent father on behalf of respondent mother and Kristen. The children became afraid of respondent father when he was drunk—which the trial court found occurred on a regular and consistent basis.

Respondent father committed acts of domestic violence on respondent mother in the presence of the children. On one occasion, respondent father demanded that respondent mother accompany him to the bedroom. Kristen heard respondent mother yelling for respondent father to get off of her, and when respondent mother came out of the bedroom, her lip was "busted" and her arms, legs, and neck were bruised. Respondent mother told Kristen that respondent father had punched and hit her. On another occasion, respondent father hit Jack in the chest with his fist, leaving a bruise.

In addition, respondent father inappropriately slapped Kristen on the buttocks and called her "bitch" and "Big Titty McGee." On one occasion, while drunk, respondent father grabbed Kristen from behind and fondled her breasts, while another time, he inappropriately touched her in the vaginal area. Not only did respondent

mother not intervene, she also called Kristen a "bitch" and frequently yelled at her.

Respondent father walked in on Kristen in the bathroom at least three times when she was taking a shower. Once, while Kristen was taking a shower, Jack and respondent father decided to play a trick on her. Respondent father lit a firecracker and threw it into the bathroom and closed the door.

On at least one occasion, respondent father drove with all four children after he had consumed a large quantity of alcoholic beverages. Respondent mother allowed respondent father to take the children, although she stayed behind. Respondent father drove to a relative's house where he drank more beer. Respondent father said that he had heard that Jack was smoking, pulled out a cigarette, and demanded that Jack smoke the cigarette. Jack refused. Respondent father also began yelling at Kristen and threatened to hit her in the face. He insisted that the children get in the truck to leave. Although they did not want to ride with respondent father, they obeyed. After stopping at a friend's house, respondent father argued with and yelled at the children as he drove them home.

On other occasions, respondent father gave beer to Kristen and Jack and offered them marijuana. Jack drank beer at respondent father's insistence. Both children watched respondent father roll marijuana cigarettes.

Respondent father also engaged in sexual activities with Michelle starting when she was eight or nine years old. On one occasion, he placed his penis in her mouth. When "stuff came out" into her mouth, she almost threw up. Another time, respondent father placed his penis in Michelle's vaginal area, but when Michelle began to cry because it hurt, respondent father said, "let's quit." Although Michelle was afraid to tell anyone, she eventually confided in a family friend and to social workers.

The trial court found that respondent mother observed many of the incidents in which respondent father consumed alcohol to excess and "act[ed] out upon her and the children." According to the trial court, despite respondent mother's knowledge of respondent father's violent and abusive nature and of his alcohol abuse, she failed to protect the minor children. When DSS called respondent father as a witness regarding the petition's allegations, he invoked the Fifth Amendment and declined to testify.

On 8 March 2007, the trial court concluded that Michelle and Kristen had been sexually abused as defined by N.C. Gen. Stat. § 7B-101(1)(d). It further concluded that all four children were abused and neglected as defined in N.C. Gen. Stat. § 7B-101(1)(b) and -101(15), but dismissed the allegations of dependency. Finally, the court concluded that Kristen and Jack were abused as defined in N.C. Gen. Stat. § 7B-101(1)(f). After making 36 dispositional findings of fact, the trial court determined that return of the children to respondents would be contrary to their best interests and that custody should remain with DSS. The court further ordered that respondent father have "absolutely no contact with any of the minor children in this matter." Both respondents appealed from the trial court's order.

I

[1] Respondent father contends that the court lacked subject matter jurisdiction with respect to Kristen and Jack because North Carolina did not qualify as Kristen's and Jack's home state under the Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA"). Under the UCCJEA, a child custody proceeding includes a proceeding for neglect, abuse, dependency, and termination of parental rights. *See* N.C. Gen. Stat. § 50A-102(4) (2005). Initial jurisdiction in a child custody proceeding lies in a North Carolina court only if:

> (1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
>
> (2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S. 50A-208, and:
>
> a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
>
> b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;

(3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208; or

(4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).

N.C. Gen. Stat. § 50A-201(a) (2005). The "home state" is defined as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." N.C. Gen. Stat. § 50A-102(7).

North Carolina courts may also exercise temporary emergency jurisdiction if it is "necessary in an emergency to protect the child because the child . . . is subjected to or threatened with mistreatment or abuse." N.C. Gen. Stat. § 50A-204(a) (2005). Further, "[i]f a child-custody proceeding has not been or is not commenced in a court of a state having jurisdiction under G.S. 50A-201 through G.S. 50A-203, a child-custody determination made under this section becomes a final determination if it so provides, and this State becomes the home state of the child." N.C. Gen. Stat. § 50A-204(b).

In this case, the trial court found as to jurisdiction:

> The juveniles are less than 18 years of age, are physically present in this State and District and were so at the time the petition was filed, and this State is the home state of the juveniles and was so at the time of the commencement of these proceedings.

Neither respondent challenges the court's jurisdiction under the UCCJEA with respect to Martin and Michelle. Respondent father, however, contends that the trial court erred in finding that North Carolina is the "home state" of Kristen and Jack. We agree.

DSS filed the juvenile petition on 18 May 2006. Kristen came to live with her father in February 2006, and Jack moved to North Carolina only one or two months before Kristen. Thus, at the time the petition was filed, Kristen had been living in North Carolina for three months and Jack for four or five months. Since neither child had lived in North Carolina "for at least six consecutive months immediately before the commencement of" the proceedings, the trial

court incorrectly found North Carolina to be their home state. N.C. Gen. Stat. § 50A-102(7).

When "the trial court's sole basis for exercising subject matter jurisdiction is erroneous, we may review the record to determine if subject matter jurisdiction exists in [the] case." *Foley v. Foley*, 156 N.C. App. 409, 412, 576 S.E.2d 383, 385 (2003). While N.C. Gen. Stat. § 50A-201(a) provides three other bases under which a North Carolina court could have jurisdiction, the record does not contain sufficient evidence from which we can determine whether jurisdiction in fact exists. Although the information could have been obtained from respondent father and perhaps from the two children, who were teenagers, no attempt was made to inquire whether there were any prior child custody proceedings.

DSS and the guardian ad litem seem to argue that the lack of evidence in the record is sufficient to support jurisdiction. They cite no authority in support of this contention. Indeed, under these circumstances, controlling precedent dictates that we vacate the decision below as to Kristen and Jack and remand for a determination of subject matter jurisdiction. *See In re J.B.*, 164 N.C. App. 394, 397-98, 595 S.E.2d 794, 796-97 (2004) (vacating and remanding permanency planning order when trial court's findings of fact did not support conclusion of jurisdiction and record lacked evidence to make the determination); *Foley*, 156 N.C. App. at 413, 576 S.E.2d at 386 (vacating custody order and remanding for determination of subject matter jurisdiction when basis for assertion of jurisdiction was in error and record lacked sufficient evidence for this Court to determine subject matter jurisdiction existed). *See also Brewington v. Serrato*, 77 N.C. App. 726, 729, 336 S.E.2d 444, 447 (1985) ("North Carolina has adhered to the view that a trial court in assuming jurisdiction of custody matters must make specific findings of fact supporting its action.").

II

[2] Respondent mother raises additional arguments regarding the trial court's subject matter jurisdiction as to Kristen and Jack. According to respondent mother, the court lacked subject matter jurisdiction because (1) the affidavit of the status of the minor child required by N.C. Gen. Stat. § 50A-209 (2005) inaccurately reported that Kristen and Jack had lived with respondents continuously since 2002, and (2) the petition was not served on either of the two older children. We find neither contention persuasive.

The juvenile petition or an affidavit attached to the petition must contain "the child's present address or whereabouts, the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period." N.C. Gen. Stat. § 50A-209(a). Our Supreme Court has recently held that the failure to comply with § 50A-209(a) does not prevent the court from exercising subject matter jurisdiction over the juvenile proceeding. *In re A.R.G.*, 361 N.C. 392, 398, 646 S.E.2d 349, 353 (2007).

In *A.R.G.*, DSS failed to provide the juvenile's addresses in the initial petition and failed to attach an affidavit providing such information. *Id.* at 394, 646 S.E.2d at 350. The Court pointed out that "[n]othing in [N.C. Gen. Stat. § 50A-209] suggests that the information required is jurisdictional" and, in fact, the language of the statute indicated to the contrary. *Id.* at 399, 646 S.E.2d at 353. The Court further noted that the statute "requires *both* parties to submit the information" and concluded that "[i]t would defy reason to suggest that a parent could defeat the jurisdiction of a trial court by his or her own noncompliance with the statute." *Id.*

If a total omission of the address information required by N.C. Gen. Stat. § 50A-209 does not divest the trial court of subject matter jurisdiction, then inaccurate information cannot divest the court of jurisdiction. Although respondent mother argues that the information was critical in determining who could have abused the children, the required address information for Kristen and Jack was known to respondents and was provided during the course of the hearing. As the Supreme Court reasoned, to hold that the deficiencies in the DSS petition "could have prevented the trial court from acquiring subject matter jurisdiction over the juvenile action would be to elevate form over substance. Such a holding would additionally impose jurisdictional limitations which the General Assembly clearly never intended when it sought to balance the interests of children with the rights of parents in juvenile actions." *A.R.G.*, 361 N.C. at 399, 646 S.E.2d at 353.

[3] With respect to service of the petition on Kristen and Jack, respondent mother cites no authority requiring such service in an initial adjudication. N.C. Gen. Stat. § 7B-406(a) (2005) provides that in neglect, abuse, and dependency proceedings, only the "parent, guardian, custodian, or caretaker" must be served with a summons attaching a copy of the petition. Accordingly, the failure to serve Kristen and Jack with the petition cannot be a basis for concluding that the trial court lacked subject matter jurisdiction.

III

[4] Respondents both contend that the court lacked subject matter jurisdiction as to all four children because the summons served on each respondent failed to name all four of the juveniles. Although the petition listed all four children, the summons served on respondent mother listed only Martin and Michelle, while the summons served on respondent father listed only Kristen and Jack.

In support of their argument, respondents cite *In re C.T. & R.S.*, 182 N.C. App. 472, 475, 643 S.E.2d 23, 25 (2007), in which this Court vacated the portion of an order terminating a mother's parental rights relating to R.S. when the summons issued "referenced" C.T., but did not "mention or reference" R.S. This Court noted that the controlling statute was N.C. Gen. Stat. § 7B-1106(a) (2005), which states in pertinent part: "Except as provided in G.S. 7B-1105, upon the filing of the petition [to terminate parental rights], the court shall cause a summons to be issued. The summons shall be directed to the following persons . . . who shall be named as respondents: (1) The parents of the juvenile . . . ." After noting that the "failure to issue a summons deprives the trial court of subject matter jurisdiction," the Court noted that the appellees had not cited "any case holding that subject matter jurisdiction existed where a statutorily required summons was *not issued* regarding a proceeding concerning a juvenile, a situation different from that presented by technical defects in *service* of a summons." *In re C.T. & R.S.*, 182 N.C. App. at 475, 643 S.E.2d at 25. Accordingly, the Court "vacate[d] the order on termination to the extent it terminates the parental rights of respondent in R.S." *Id.*

This case does not involve the termination of parental rights. The controlling statute is instead N.C. Gen. Stat. § 7B-406(a), which provides: "Immediately after a petition has been filed alleging that a juvenile is abused, neglected, or dependent, the clerk shall issue a summons to the parent, guardian, custodian, or caretaker requiring them to appear for a hearing at the time and place stated in the summons. . . . A copy of the petition shall be attached to each summons." Here, there can be no question that DSS has complied with § 7B-406(a). DSS filed a petition alleging that all four children were abused, neglected, and dependent; the clerk issued a summons to each of the respondent parents; and the summons attached the petition listing each of the four children.

Respondents have pointed to no authority—and we have found none—suggesting that the trial court lacks subject matter jurisdiction

in an abuse, neglect, or dependency proceeding because of a failure to list all of the children on all of the summonses when each child has been listed on the summons for his or her biological parents. It is established that even when a summons is issued to only one parent of a child, the court still has jurisdiction to determine the status of the child in an abuse, neglect, and dependency proceeding. *In re Poole*, 151 N.C. App. 472, 476-77, 568 S.E.2d 200, 203 (2002) (Timmons-Goodson, J., dissenting) (holding that the failure to issue and serve summons on respondent father did not divest court of subject matter jurisdiction to find child dependent when summons was issued and served on mother), *adopted per curiam*, 357 N.C. 151, 579 S.E.2d 248 (2003). Thus, even assuming without deciding, that *C.T.* is relevant to § 7B-406(a) and requires a summons referencing each child, allocation of the names of the children among summonses based on who is the biological parent of the particular child is sufficient to vest the trial court with subject matter jurisdiction over that child.

Further, as this Court recently held, in these types of proceedings—in contrast to termination of parental rights proceedings—the trial court is not required to determine the culpability of each parent as to each child. *In re J.S.*, 182 N.C. App. 79, 86, 641 S.E.2d 395, 399 (2007). The Court explained:

> The purpose of abuse, neglect and dependency proceedings is for the court to determine whether the juvenile should be adjudicated as having the status of abused, neglected or dependent. . . . The purpose of the adjudication and disposition proceedings should not be morphed on appeal into a question of culpability regarding the conduct of an individual parent.

Id. As a result, there is no need to tie each child to each respondent, especially when the issue is only the caption of a summons that attaches the petition identifying all the children. Accordingly, the nature of the captions of the summonses in this case did not result in a lack of subject matter jurisdiction over the children.[3]

IV

[5] Respondents next contend that the trial court erred in allowing DSS to amend its petition to add allegations regarding the sexual abuse of Michelle. N.C. Gen. Stat. § 7B-800 (2005) specifies that "[t]he court may permit a petition to be amended when the amendment does

3. Respondents have not contended or cited any authority suggesting that this approach denied them notice and an opportunity to be heard or otherwise prejudiced them.

not change the nature of the conditions upon which the petition is based." Respondents contend that the original petition did not allege that Michelle was sexually abused and, therefore, the amendment necessarily changed "the conditions" upon which the petition was based as to Michelle. We agree.

In *In re D.C. & C.C.*, 183 N.C. App. 344, 346-47, 644 S.E.2d 640, 641 (2007), the initial petition alleged that D.C. was a neglected and dependent juvenile based on a lack of supervision and domestic violence. The respondent mother subsequently gave birth to C.C. and, two weeks later, the petitioner filed a petition alleging that C.C. was dependent. *Id.* at 346, 644 S.E.2d at 642. At trial, however, the petitioner proceeded on a theory of neglect as to C.C., and the trial court concluded that C.C. was indeed a neglected child. *Id.* at 349-50, 644 S.E.2d at 643. In reversing the order to the extent that it found C.C. to be neglected, this Court first held that the trial court "essentially amended the juvenile petition by allowing DSS to proceed on a condition not alleged in the petition." *Id.* (internal quotation marks omitted). The Court then concluded that adding the ground of neglect when the petition alleged only dependency violated N.C. Gen. Stat. § 7B-800. *Id.*

In this case, the original petition contained no allegations of sexual abuse as to Michelle, although it contained allegations that Kristen had been sexually abused. The abuse allegations relating to Michelle involved placement of Michelle and Martin with a person who left them in the care of someone whose home "was deplorable," respondent father's use of alcohol and marijuana, and respondents' domestic violence. Based on the same factual allegations, the petition also alleged that Michelle was a neglected and dependent child. The motion for leave to amend this petition sought to add allegations regarding recent disclosures that respondent father had inappropriate sexual conduct with Michelle that resulted in criminal charges.

We hold that adding the allegations of Michelle's sexual abuse changed the nature of the conditions relied upon in the original petition as to Michelle. Although DSS argued to the trial court and urges on appeal that the petition contained allegations of sexual misconduct with respect to Kristen, this argument ignores the fact that an abuse, neglect, and dependency proceeding focuses on the status of the child and not on the culpability of the parent. *See In re J.S.*, 182 N.C. App. at 86, 641 S.E.2d at 399. Because the new allegations gave

rise to a different status for Michelle than alleged in the original petition, they violated N.C. Gen. Stat. § 7B-800, even though the original petition alleged inappropriate sexual conduct by respondent father towards another child. Pursuant to *D.C.*, we must, therefore, vacate that portion of the order concluding that Michelle is a sexually abused juvenile as defined by N.C. Gen. Stat. § 7B-101(1)(d). *In re D.C. & C.C.*, 183 N.C. App. at 349-50, 644 S.E.2d at 643.[4]

V

Respondents next challenge the merits of the trial court's determination that the children were neglected and abused.[5] "The role of this Court in reviewing an initial 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 D.S.A.*, 181 N.C. App. 715, 717-18, 641 S.E.2d 18, 20 (2007) (internal quotation marks omitted). " 'In a non-jury neglect [and abuse] adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings.' " *Id.* at 717-18, 641 S.E.2d at 21 (quoting *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997)).

[6] Although respondent mother has assigned error to certain of the trial court's findings of fact and listed those assignments of error under the headings of the argument section of her brief, she has provided no argument as to why these findings were not supported by competent evidence. "Assignments of error not set out in the appellant's brief, or *in support of which no reason or argument is stated or authority cited*, will be taken as abandoned." N.C.R. App. P. 28(b)(6) (emphasis added). Consequently, respondent mother's assignments of error as to the findings of fact are deemed abandoned. *See In re A.H.*, 183 N.C. App. 609, 613, 644 S.E.2d 635, 638 (2007) ("Although respondent assigned error to many of the trial court's findings of fact, claiming that they were unsupported by competent evidence, those assignments of error were not brought forward in her brief. They are, therefore, deemed abandoned.").

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4. Because of this holding, we need not address respondent mother's contention that she was not properly served with the motion to amend.

5. We address the arguments regarding Kristen and Jack in the interests of expediting review. In the event that the trial court concludes on remand that it lacks subject matter jurisdiction over Kristen and Jack, then it will be required to dismiss the petition as to those two children.

[7] With respect to the court's conclusion that the minor children were abused, respondent mother argues only that "[i]n this case, [respondent father] is accused of hitting [Jack] and sexually abusing [Michelle] and [Kristen]. The only direct allegation against [respondent mother] is that she hit [Kristen] after [Kristen] was disrespectful. [Jack], [Kristen's] brother, testified that [Kristen] was a troublemaker." As we have discussed, however, *J.S.* confirms that in an abuse, neglect, and dependency proceeding, the question is whether the children were abused and not whether respondent mother committed the abuse.

Nevertheless, the definition of an abused child includes one whose parent, guardian, custodian, or caretaker "[c]reates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means." N.C. Gen. Stat. § 7B-101(1)(b). The trial court found that respondent mother "knew of [respondent father's] violent and abusive nature, his alcohol abuse, and she failed to take the necessary steps to protect the minor children. [Respondent mother] also witnessed many of the incidents where [respondent father] would consume alcohol to excess and act out upon her and the children." Further, respondent mother allowed respondent father to drive the children after he had consumed a large quantity of alcoholic beverages. These findings of fact are sufficient to support a determination that respondent mother "allow[ed] to be created a substantial risk of serious physical injury to the juvenile by other than accidental means." *Id.*

With respect to the conclusion that the children were neglected juveniles, respondent mother makes no specific argument as to how the findings of fact fail to meet the following definition of a neglected child:

> A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(15). Accordingly, respondent mother has failed to demonstrate that the trial court erred in concluding that Martin, Michelle, Kristen, and Jack were abused and neglected juveniles.

[8] Respondent father also contends that the trial court's findings of fact are insufficient to support its conclusion that the children were abused as defined by N.C. Gen. Stat. § 7B-101(1)(b). He focuses, however, only on the finding of fact that respondent father hit Jack in the chest leaving a bruise. He overlooks the findings of fact regarding his domestic violence, alcohol abuse, and driving the children while intoxicated. Those findings, fully supported by the evidence, in turn provide ample support for the determination that respondent father "created a substantial risk of serious physical injury" to the children. N.C. Gen. Stat. § 7B-101(1)(b).

Respondent father also contends that the trial court erred in concluding that Kristen and Jack were abused pursuant to N.C. Gen. Stat. § 7B-101(1)(f), which permits an adjudication of abuse for a child whose parent "[e]ncourages, directs, or approves of delinquent acts involving moral turpitude committed by the juvenile." The court made the following findings of fact pertinent to this issue:

> 20. That [respondent father] gave beer to his children [Kristen] and [Jack] and offered them marijuana. Both of the minor children [Kristen] and [Jack] have observed [respondent father] roll marijuana cigarettes in their presence. [Jack] drank beer at [respondent father's] request and his insistence.
>
> 21. . . . . He told the minor child [Jack] that he heard he had been smoking. He proceeded to pull out a cigarette, put it in front of the minor child and demanded that he smoke it. The minor child [Jack] refused to smoke the cigarette. . . .

Respondent father does not dispute that the record contains evidence to support these findings.

Respondent father, however, points to testimony by Kristen that her father said "I would rather you come home and before you do your homework you ask me to get high and we'll go get high and then you can go do your homework, and I don't want you going out and getting high with your friends and going on the highway and going 90 miles an hour and dying, or getting in a car wreck." He then argues that he was making "an ill-attempted effort to show his children that they would not enjoy these activities"—conduct he contends may

amount to neglect, but does not amount to abuse under N.C. Gen. Stat. § 7B-101(1)(f).

The dispositive question is whether underage drinking, underage smoking, and marijuana use constitute "acts involving moral turpitude." We have been unable to find any authority and appellees have cited none suggesting that the conduct at issue in this case falls within the traditional definition of acts involving moral turpitude. Crimes involving moral turpitude include " 'act[s] of baseness, vileness, or depravity in the private and social duties that a man owes to his fellowman or to society in general.' " *Dew v. State ex rel. N.C. Dep't of Motor Vehicles*, 127 N.C. App. 309, 311, 488 S.E.2d 836, 837 (1997) (quoting *Jones v. Brinkley*, 174 N.C. 23, 27, 93 S.E. 372, 373 (1917)). *See also State v. Mann*, 317 N.C. 164, 170, 345 S.E.2d 365, 369 (1986) (reaffirming this definition of moral turpitude). Alternatively, moral turpitude is considered "[c]onduct that is contrary to justice, honesty, or morality." *Black's Law Dictionary*, 1030 (8th ed. 2004).

The conduct approved by respondent father is certainly illegal, but our courts have not equated illegality with moral turpitude. While drug dealing would amount to an act involving moral turpitude, *see Dew*, 127 N.C. App. at 312, 488 S.E.2d at 838 ("We hold as a matter of law that the felony of 'conspiracy to possess with intent to distribute marijuana' is a crime involving moral turpitude."), we have found no cases suggesting that illegal substance use standing alone rises to the same level. We agree that the trial court's findings of fact regarding respondent father's encouragement of smoking, drinking, and marijuana use by Kristen and Jack support a determination that they are neglected children, but hold that the conduct does not constitute abuse as defined in N.C. Gen. Stat. § 7B-101(1)(f). We, therefore, reverse that portion of the order concluding that Kristen and Jack were abused under N.C. Gen. Stat. § 7B-101(1)(f).

[9] Finally, respondent father contends that the trial court erred in concluding that Kristen is sexually abused as defined by N.C. Gen. Stat. § 7B-101(1)(d). Under that subsection, a child is abused if her parent, guardian, custodian, or caretaker

> [c]ommits, permits, or encourages the commission of a violation of the following laws by, with, or upon the juvenile: first-degree rape, as provided in G.S. 14-27.2; second degree rape as provided in G.S. 14-27.3; first-degree sexual offense, as provided in G.S. 14-27.4; second degree sexual offense, as provided in G.S. 14-27.5; sexual act by a custodian, as provided in G.S. 14-27.7;

> crime against nature, as provided in G.S. 14-177; incest, as provided in G.S. 14-178; preparation of obscene photographs, slides, or motion pictures of the juvenile, as provided in G.S. 14-190.5; employing or permitting the juvenile to assist in a violation of the obscenity laws as provided in G.S. 14-190.6; dissemination of obscene material to the juvenile as provided in G.S. 14-190.7 and G.S. 14-190.8; displaying or disseminating material harmful to the juvenile as provided in G.S. 14-190.14 and G.S. 14-190.15; first and second degree sexual exploitation of the juvenile as provided in G.S. 14-190.16 and G.S. 14-190.17; promoting the prostitution of the juvenile as provided in G.S. 14-190.18; and taking indecent liberties with the juvenile, as provided in G.S. 14-202.1.

N.C. Gen. Stat. § 7B-101(1)(d).

In this case, the trial court concluded that there had been a violation of N.C. Gen. Stat. § 14-202.1 (2005), the taking of indecent liberties. In reaching this conclusion, the trial court found that respondent father "became drunk, walked up to the minor child [Kristen], grabbed her from behind and fondled her breasts;" that despite Kristen's objection, "he continued to grope the minor;" and that "[o]n another occasion, [respondent father] inappropriately touched the minor [Kristen] in the vaginal area."

Respondent father admits that these findings are supported by Kristen's testimony, but argues that "[n]othing in the evidence or findings supports that they were made for any sexual gratification." Our courts have, however, held that such conduct is sufficient to establish a violation of N.C. Gen. Stat. § 14-202.1. *See, e.g.*, *State v. Bruce*, 90 N.C. App. 547, 551, 369 S.E.2d 95, 98 (concluding that when evidence indicated that on one occasion, defendant started rubbing victim under her shirt, "jury could properly infer that defendant's action in rubbing the victim's breasts was for the purpose of arousing or gratifying his sexual desire" and violated N.C. Gen. Stat. § 14-202.1), *disc. review denied*, 323 N.C. 367, 373 S.E.2d 549 (1988); *State v. Slone*, 76 N.C. App. 628, 631, 334 S.E.2d 78, 80 (1985) (holding that evidence that defendant placed his hand between victim's legs and "rubbed her vagina with his finger" was sufficient "to warrant the inference that the defendant willfully took indecent liberties with the child for the purpose of arousing or gratifying his sexual desire" within the meaning of N.C. Gen. Stat. § 14-202.1). Accordingly, the trial court in this case could properly conclude that Kristen was a sexually abused juvenile.

Conclusion

We affirm the order to the extent that it concludes that Martin, Michelle, Kristen, and Jack were neglected juveniles; that Martin, Michelle, Kristen, and Jack were abused as defined by N.C. Gen. Stat. § 7B-101(1)(b); and that Kristen was sexually abused as defined by N.C. Gen. Stat. § 7B-101(1)(d). We reverse the order to the extent that it concludes that Michelle was sexually abused and that Kristen and Jack were abused as defined by N.C. Gen. Stat. § 7B-101(1)(f). Neither respondent has made any argument regarding the dispositional portion of the order, and, therefore, it is affirmed. Finally, we remand for findings of fact regarding the trial court's subject matter jurisdiction under the UCCJEA with respect to Kristen and Jack.

Affirmed in part; reversed in part; remanded in part.

Judges WYNN and STEELMAN concur.

IN RE: WILLIAMSON VILLAGE CONDOMINIUMS

No. COA07-217

(Filed 18 December 2007)

Housing— commercial condominium buildings—North Carolina Condominium Act—substantial compliance—development time limit

A commercial condominium developer substantially complied with the Condominium Act even though the declaration did not include a development time limit for the exercise of reserved development rights and thus could build an additional condominium building on the property because: (1) the Condominium Act under N.C.G.S. § 47C-2-101(a) excuses nonmaterial noncompliance with its requirements where the declarant has substantially complied in good faith with the material requirements of the statute; (2) the omission of the development time limit was a nonmaterial omission, and the evidence demonstrated that both parties contemplated and expected that plaintiff would construct Building Two at an unspecified future time; (3) defendants approved the declaration with the time limit omitted, and never expressed any concern over construction timing until more than

five years after they approved the plat and declaration; (4) other than the omission of a time limit for the exercise of reserved developments rights, the declaration contained every other relevant component either mandated by the Act or considered to be material by the parties; (5) even where the General Assembly uses mandatory language such as "shall" or "must," it may still excuse noncompliance with the use of a substantial compliance clause; (6) if the General Assembly did not intend for the substantial compliance clause in N.C.G.S. § 47C-1-104(c) to apply to the declaration content requirements of N.C.G.S. § 47C-2-105, it would have excluded that section from its reach; and (7) although the omission of a development time limit may preclude a finding of substantial compliance in cases where the timing of future construction is a material factor in a condominium project, this case does not present such a situation.

Judge TYSON dissenting.

Appeal by Plaintiff from order entered 20 November 2006 by Judge Preston Cornelius in Superior Court, Iredell County. Heard in the Court of Appeals 19 September 2006.

McIntosh Law Firm, by James C. Fuller and Prosser D. Carnegie, for Plaintiff-Appellant.

Eisele, Ashburn, Greene & Chapman, PA, by Douglas G. Eisele, for Defendants-Appellees.

McGEE, Judge.

Williamson Village Partners, LLC (Plaintiff) is a commercial real estate firm. Plaintiff purchased a tract of land in Iredell County on 30 August 1999, with the intent of constructing two commercial condominium buildings (Buildings One and Two) on the property. Each building was to contain three condominium units. Before Plaintiff began construction on Building One, Ben S. Thomas, T. Michael Godley, and Mark L. Childers (Defendants)[1] entered into a contract to purchase one of the condominium units in Building One. The contract for sale referenced the "commercial condominium project to be constructed by [Plaintiff] . . . including Two (2) separate buildings." Under the terms of the contract, Defendants retained the right to approve the final plat and condominium declaration (the

1. Defendants are the named partners of the law firm Thomas, Godley & Childers.

Declaration), which Plaintiff was required to record pursuant to N.C. Gen. Stat. § 47C-1-101 et seq., the North Carolina Condominium Act.

Plaintiff and Defendants worked together to prepare the Declaration and plat. Defendants submitted suggestions to Plaintiff in January 2000 regarding a draft declaration and communicated additional comments and concerns regarding construction of Building One in May and July 2000. None of these concerns directly referenced Building Two. Plaintiff provided Defendants with updated copies of the Declaration and plat for final approval in or around late July 2000. The plat showed the location of Building One and included the future boundary of Building Two, with the following notation: "EXTENTS OF FUTURE BUILDING . . . 'NEED NOT BE BUILT.' " The Declaration included the following provision:

> Section 16.1 Development Rights. Declarant hereby reserves the right to exercise those Development Rights granted herein and under the Condominium Act on existing and additional properties that will be brought under this Declaration of Condominium and as shown in Condominium Book 1 at Pages 105, 106 & 107 recorded in the Iredell County Register of Deeds.

Defendants approved the Declaration and plat, and Plaintiff recorded the documents on 26 July 2000. Plaintiff conveyed a condominium unit in Building One to Defendants on 4 August 2000.[2] The deed referenced Plaintiff's right, reserved pursuant to the Declaration, to construct additional condominium units on the property.

Plaintiff conveyed the second condominium unit in Building One to Linda L. Cherry in May 2002 and the third unit in Building One to FLC Investments in January 2006. Plaintiff made both these grantees aware of its plans to construct Building Two adjacent to Building One. There is no evidence in the record that either of these grantees objected to the future construction of Building Two.

Plaintiff apparently had intended to begin construction on Building Two shortly after it sold the last unit in Building One to FLC Investments. However, in late 2005, Defendants raised objections to the new construction. Specifically, Defendants claimed that the terms of the Declaration did not permit Plaintiff to proceed with the

2. The deed conveyed a one-third undivided interest in the condominium unit to Ben S. Thomas and his wife, Angela L. McConnell; a one-third undivided interest to Mark L. Childers and his wife, Pamela J. Hendricks; and a one-third undivided interest to T. Michael Godley and William R. Carson as joint tenants. All six owners of the condominium unit are defendants in this action.

construction. There is no evidence in the record that Defendants brought this concern to Plaintiff's attention at any time between 1999 and late 2005.

Plaintiff filed a complaint for declaratory judgment in Iredell County Superior Court on 16 February 2006. The complaint attempted to join the owners of all three condominium units in Building One as real parties in interest. Neither Linda L. Cherry nor FLC Investments responded to the complaint. Defendants filed an answer and moved for summary judgment, claiming that Plaintiff did not retain the right to construct Building Two because the terms of the Declaration did not comply with the North Carolina Condominium Act. The trial court granted Defendants' motion, "render[ing] void ab intio [sic] any alleged right of Plaintiff, its successors or assigns, to construct any further buildings." The trial court also noted that its order bound the nonresponding owners of the additional condominium units in Building One.

Plaintiff appeals the trial court's order and argues, *inter alia*, that it retained its development rights because the Declaration substantially complied in good faith with the material requirements of the Condominium Act. We agree.

A.

A trial court should grant a motion for summary judgment if, when taken in the light most favorable to the non-moving party, "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). We review a trial court's grant of a motion for summary judgment *de novo*. *Robins v. Town of Hillsborough*, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007).

Under the North Carolina Condominium Act (the Act), "[a] declaration creating a condominium . . . shall be recorded in every county in which any portion of the condominium is located." N.C. Gen. Stat. § 47C-2-101(a) (2005). The Act lists more than a dozen specific items that must be included in the declaration, including, *inter alia*, a name for the condominium complex, a description of the property, and any use or occupancy restrictions. N.C. Gen. Stat. § 47C-2-105(a)(1), (3), (12) (2005). In addition, the declaration must contain "[a] description of any development rights and other special declarant rights reserved by the declarant, together with a legally suf-

ficient description of the real estate to which each of those rights applies, *and a time limit within which each of those rights must be exercised*[.]" N.C.G.S. § 47C-2-105(a)(8) (emphasis added). However, the Act excuses nonmaterial noncompliance with these requirements where the declarant has substantially complied with the statute. *See* N.C. Gen. Stat. § 47C-1-104(c) (2005) ("If a declarant, in good faith, has attempted to comply with the requirements of [the Act] and has substantially complied with [the Act], nonmaterial errors or omissions shall not be actionable.").

B.

Plaintiff admits that the Declaration does not contain a development time limit, but argues that this omission is excusable under the "substantial compliance" clause in N.C.G.S. § 47C-1-104(c). For the Declaration's noncompliance to be excused, Plaintiff, in good faith: (1) must have attempted to comply with the Act, and (2) must have substantially complied with the Act. In addition, the omission of the development time limit must be a nonmaterial omission. *See id.*

Defendants do not allege that Plaintiff acted in bad faith, nor do Defendants allege that Plaintiff did not attempt to comply with the Act. The question, then, is whether Plaintiff substantially complied with the material provisions of the Act. Our Supreme Court has defined "substantial compliance" as "a compliance which substantially, essentially, in the main, or for the most part, satisfies the [statute's requirements]." *Bank v. Burnette*, 297 N.C. 524, 532, 256 S.E.2d 388, 393 (1979).

The Act contains numerous requirements for condominium creation and operation. Many of the Act's requirements, both in N.C.G.S. § 47C-2-105 and elsewhere, deal with the contents of a condominium declaration. The Declaration at issue in the current case is a comprehensive thirty-five-page document that closely follows the Act's mandates. Among its other provisions, the Declaration includes: the names of the condominium complex and condominium association, *see* N.C.G.S. § 47C-2-105(a)(1); the name of the county in which the condominium complex is located, *see* N.C.G.S. § 47C-2-105(a)(2); a description of the real estate in the condominium, *see* N.C.G.S. § 47C-2-105(a)(3); the number of existing and potential future units in the condominium, *see* N.C.G.S. § 47C-2-105(a)(4); the boundaries and identifying numbers of each unit, *see* N.C.G.S. § 47C-2-105(a)(5); a list of common elements and areas, *see* N.C.G.S. § 47C-2-105(a)(6); a description of reserved development and declarant rights, *see*

N.C.G.S. § 47C-2-105(a)(8); an allocation to each unit of interests in the common areas, as well as allocations of common expenses and voting rights, *see* N.C.G.S. § 47C-2-105(a)(11), N.C. Gen. Stat. § 47C-2-107 (2005); restrictions on the use, alienation, and occupancy of the units, *see* N.C.G.S. § 47C-2-105(a)(12); a recitation of easements and licenses affecting the property, *see* N.C.G.S. § 47C-2-105(a)(13); and the condominium plat, *see* N.C. Gen. Stat. § 47C-2-109 (2005). In addition to these mandatory requirements, the Declaration also includes a number of nonmandatory sections contemplated by the Act, including: rules regarding unit additions, alterations, and improvements, *see* N.C. Gen. Stat. § 47C-2-111 (2005); rules regarding the relocation of boundaries between units, *see* N.C. Gen. Stat. § 47C-2-112 (2005); rules for amending the Declaration and bylaws, *see* N.C. Gen. Stat. § 47C-2-117 (2005), N.C. Gen. Stat. § 47C-3-106 (2005); procedures for terminating the condominium, *see* N.C. Gen. Stat. § 47C-2-118 (2005); provisions regarding the structure of the condominium association and executive board, *see* N.C. Gen. Stat. §§ 47C-3-101, -102, -103 (2005); provisions for an initial period of declarant control over the condominium association, *see* N.C. Gen. Stat. § 47C-3-103(d) (2005); provisions regarding upkeep and damages, *see* N.C. Gen. Stat. § 47C-3-107 (2005); provisions regarding insurance, *see* N.C. Gen. Stat. § 47C-3-113 (2005); provisions regarding assessments for common expenses, *see* N.C. Gen. Stat. § 47C-3-115 (2005); and provisions for levying against units for unpaid assessments, *see* N.C. Gen. Stat. § 47C-3-116 (2005). It is clear from our review of the Declaration that the Declaration "essentially, in the main, [and] for the most part, satisfies the [Act's requirements]." *Burnette*, 297 N.C. at 532, 256 S.E.2d at 393.

Plaintiffs also argue that the omission of the development time limit was a nonmaterial omission. We agree. There is no evidence in the record that the timing of the construction of Building Two was a disputed issue at any time during the business relationship of Plaintiff and Defendants. Rather, the evidence clearly demonstrates that both parties contemplated and expected that Plaintiff would construct Building Two at an unspecified future time. Plaintiff purchased the property with the intent to construct two condominium buildings thereon. Plaintiff communicated its plan to Defendants. Defendants were actively involved in negotiating and preparing the Declaration and plat. During such negotiations, Defendants made numerous demands of Plaintiff. Some of these demands contemplated the future existence of Building Two, but none of the demands involved the tim-

ing of construction of Building Two. Defendants approved the final plat, which outlined the future site of Building Two. The final Declaration contained a section reserving Plaintiff's future development rights, but it did not set out a time limit for the exercise of those rights. Plaintiff suggests that the parties purposely omitted the timing clause in order to grant Plaintiff flexibility in determining the most opportune time to begin construction on Building Two. Defendants do not dispute this contention. Defendants approved the Declaration with the time limit omitted, and never expressed any concern over construction timing until more than five years after they approved the plat and Declaration.

In sum, other than the omission of a time limit for the exercise of reserved development rights, it appears that the Declaration contains every other relevant component either mandated by the Act or considered to be material by the parties.

C.

Defendants do not argue that Plaintiff failed to substantially comply with the Act. Rather, Defendants contend that the General Assembly did not intend for the Act's "substantial compliance" clause to apply to omissions of development time limits. Defendants point to the mandatory language of N.C.G.S. § 47C-2-105(a)(8), which states that "[t]he declaration for a condominium *must* contain . . . a time limit within which [development] rights must be exercised" (emphasis added). According to Defendants, the General Assembly's use of the word "must" demonstrates the General Assembly's clear and unambiguous intent to make a development time limit a requisite part of a condominium declaration, notwithstanding the Act's "substantial compliance" clause.

In support of this argument, Defendants rely on a case from the Colorado Court of Appeals. In *Silverview v. Overlook at Mt. Crested Butte*, 97 P.3d 252 (Colo. Ct. App. 2004), the Colorado court considered a similar argument regarding the Colorado Common Interest Ownership Act, Colo. Rev. Stat. § 38-33.3-101 et seq. Using language almost identical to N.C.G.S. § 47C-2-105(a)(8), the Colorado statute required that a condominium declaration "*must* contain . . . [a] description of any development rights . . . reserved by the declarant . . . and the time limit within which each of those rights must be exercised." *Silverview*, 97 P.3d at 255 (emphasis in original) (quoting Colo. Rev. Stat. § 38-33.3-205(1)(h) (2003)). The appellant's declaration failed to include a development time limit, and the trial court

held that the omission rendered the appellant's development rights void *ab initio*. *Id.* at 254-55. On appeal, the appellant argued that the omission did not void its development rights. The appellant pointed to another portion of the statute which declared that "[t]itle to a [condominium] is not rendered unmarketable or otherwise affected by reason of an insubstantial failure of the declaration to comply with this article." *Id.* at 255-56 (quoting Colo. Rev. Stat. § 38-33.3-203(4) (2003)). The appellate court disagreed. It found that C.R.S. § 33.3-203(4), by its terms, only applied to disputes concerning title and marketability. Therefore, it was inapplicable because it neither addressed nor excused noncompliance with the statute's development rights provisions. *Id.* at 256. Since the noncompliance provision did not apply, the mandatory language of the statute "unambiguously require[d] any reservation of development rights to include a 'time limit within which each of those rights must be exercised.' " *Id.* at 255 (quoting C.R.S. § 38-33.3-205(1)(h)).

In the case before us, Defendants' reliance on *Silverview* is unavailing. As the Colorado court noted, the noncompliance clause in C.R.S. § 38-33.3-203(4) did not apply to omissions of development rights time limits. Rather, it only applied to instances of statutory noncompliance that implicated title and marketability. *Compare* N.C. Gen. Stat. § 47C-2-103(d) (2005) (containing language identical to C.R.S. § 38-33.3-203(4)). In contrast, N.C.G.S. § 47C-1-104(c) forecloses *any* cause of action that might arise solely due to nonmaterial noncompliance with the Act. It therefore reaches to areas where the Colorado statute did not, including the declaration content requirements set out in N.C.G.S. § 47C-2-105.

Defendants maintain, however, that because the General Assembly used the mandatory language "must contain" in N.C.G.S. § 47C-2-105(a), it clearly did not intend for the "substantial compliance" clause in N.C.G.S. § 47C-1-104(c) to apply to that portion of the Act. We disagree. In *Johnson v. Manning*, 63 N.C. App. 673, 306 S.E.2d 137 (1983), our Court considered whether the contents of a certain business document were sufficient to meet the statutory requirements for a limited partnership agreement. The controlling statute at the time required that "[t]wo or more persons desiring to form a limited partnership *shall* . . . [s]ign and swear to a certificate, which *shall* state" a number of items, including the name, location, character, and financial arrangement of the partnership. N.C. Gen. Stat. § 59-2(a)(1) (1982) (emphasis added), *repealed by* 1985 N.C. Sess. Laws ch. 989, § 2. The statute also required the partnership to

file the agreement with the register of deeds in the county where the partnership had its principal place of business. N.C.G.S. § 59-2(a)(2). The purported partnership agreement failed to include some of the requirements of N.C.G.S. § 59-2(a)(1), and the partners had not filed the agreement as required by N.C.G.S. § 59-2(a)(2). *Johnson*, 63 N.C. App. at 676, 306 S.E.2d at 139. However, the statute excused minor violations of its requirements, declaring that "[a] limited partnership is formed if there has been substantial compliance in good faith with the requirements of [the statute]." N.C. Gen. Stat. § 59-2(b) (1982), *repealed by* 1985 N.C. Sess. Laws ch. 989, § 2. Our Court held that despite the shortcomings in the purported partnership agreement, it satisfied enough of the requirements of N.C.G.S. § 59-2(a) to raise a question of fact as to whether the parties had substantially complied with the statute. *Johnson*, 63 N.C. App. at 676-77, 306 S.E.2d at 139.

Our holding in *Johnson* was predicated upon a recognition that even where the General Assembly uses mandatory language such as "shall" or "must," it may still excuse noncompliance with the use of a "substantial compliance" clause. We therefore find that if the General Assembly did not intend for the "substantial compliance" clause in N.C.G.S. § 47C-1-104(c) to apply to the declaration content requirements of N.C.G.S. § 47C-2-105, it would have excluded that section from its reach. Plaintiff may properly rely on the Act's "substantial compliance" clause to excuse the omission of a development time limit in the Declaration.

D.

The ultimate question, then, is whether Plaintiff substantially complied with all material portions of the Act. We find that Plaintiff's evidence on substantial compliance set out in Part B above "so clearly establishes the fact in issue that no reasonable inferences to the contrary may be drawn." *Burnette*, 297 N.C. at 533, 256 S.E.2d at 393. We therefore hold that Plaintiff has substantially complied with all material portions of the Act as a matter of law. *See id.* at 529-33, 256 S.E.2d at 391-93 (holding that the plaintiff had substantially complied as a matter of law with statutory requirements for public sales of collateral securing unpaid debts). The Act thus prevents Defendants from raising their objection in response to Plaintiff's request for a declaratory judgment regarding its development rights.

We recognize that omission of a development time limit may preclude a finding of substantial compliance in cases where the timing of future construction is a material factor in a condominium project. On

the record before us, however, this case does not present such a situation. We reverse the trial court's grant of summary judgment in favor of Defendants, and remand with instructions for the trial court to enter summary judgment in favor of Plaintiff.

In light of the foregoing, we do not address Plaintiff's remaining assignments of error.

Reversed and remanded.

Judge ELMORE concurs.

Judge TYSON dissents with a separate opinion.

TYSON, Judge dissenting.

The majority's opinion holds plaintiff "substantially complied" with the North Carolina Condominium Act ("the Act") notwithstanding plaintiff's failure to include in the declaration, a mandatory "time limit within which each of [the development] rights must be exercised . . ." as required by N.C. Gen. Stat. § 47C-2-105(a)(8). I disagree and vote to affirm the trial court's decision granting summary judgment in favor of defendants. I respectfully dissent.

I. Standard of Review

"A question of statutory interpretation is ultimately a question of law for the courts." *Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998). This Court reviews the interpretation of a statute *de novo*. *Oxendine v. TWL, Inc.*, 184 N.C. App. 162, 164, 645 S.E.2d 864, 865 (2007).

II. Substantial Compliance

Plaintiff argues the failure to include a time limitation for development rights in the declaration was a nonmaterial omission and it therefore "substantially complied" with the Act. I disagree.

A. North Carolina Law

The General Assembly enacted the North Carolina Condominium Act based upon the Uniform Condominium Act of 1980. According to the official commentary to the Act, the statutory provision at issue is not "significantly different" from the Uniform Act.

N.C. Gen. Stat. § 47C-2-105 (2005) provides, in relevant part:

(a) The declaration for a condominium *must contain*:

. . . .

(8) A description of any development rights and other special declarant rights reserved by the declarant, together with a legally sufficient description of the real estate to which each of those rights applies, and *a time limit within which each of those rights must be exercised.*

(Emphasis supplied). Official Comment 9 to N.C. Gen. Stat. § 47C-2-105 states, "[p]aragraph (a)(8) *requires* the declaration to describe all development rights and other special declarant rights which the declarant reserves. The declaration *must* describe the real estate to which each right applies, and *state the time limit within which each of those rights must be exercised.*" (Emphasis supplied).

The word "must" is synonymous with "shall." *Internet East, Inc. v. Duro Communications, Inc.*, 146 N.C. App. 401, 405-06, 553 S.E.2d 84, 87 (2001). This Court has stated, "[t]he word 'shall' *is defined as 'must'* or 'used in laws, regulations, or directives to express what is mandatory.' " Id. (citation and quotation omitted) (emphasis supplied). The majority's opinion correctly states that delineation of a time limit in N.C. Gen. Stat. § 47C-2-105(a)(8) is a mandatory requirement, but holds, despite the plain language and legislative intent of the statute, that plaintiff has substantially complied with the Act pursuant to N.C. Gen. Stat. § 47C-1-104(c) (2005).

N.C. Gen. Stat. § 47C-1-104(c) states, "[i]f a declarant, in good faith, has attempted to comply with the requirements of this chapter and has substantially complied with the chapter, *nonmaterial errors or omissions* shall not be actionable." (Emphasis supplied). The threshold issue presented is whether the omission of the statutorily required express time limit for future development is nonmaterial. The majority's opinion states plaintiff has substantially complied with the Act because "the Declaration contains every other relevant component either mandated by the Act or considered to be material by the parties." I disagree.

B. *Silverview v. Overlook at Mt. Crested Butte*

This appears to be an issue of first impression in North Carolina. In the absence of controlling authority, we must look to other jurisdictions to review this issue. I find the reasoning and holding in *Silverview v. Overlook at Mt. Crested Butte* to be directly on

point and persuasive. 97 P.3d 252 (Colo. App. 2004), *cert. denied*, No. 04SC179, 2004 WL 1813925, at *1 (Colo., Aug. 16, 2004). In *Silverview*, the Colorado Court of Appeals held, based on the language of Colo. Rev. Stat. § 38-33.3-205 (2003), that the omission of a time limitation on the development rights in the declaration rendered the rights void *ab initio*. In virtually identical language to N.C. Gen. Stat. § 47C-2-105(a)(8), Colo. Rev. Stat. § 38-33.3-205(1)(h) states:

> (1) The declaration must contain:
>
> . . . .
>
> (h) A description of any development rights and other special declarant rights reserved by the declarant, together with a description sufficient to identify the real estate to which each of those rights applies and *the time limit within which each of those rights must be exercised.*

(Emphasis supplied).

In *Silverview*, the Court stated, "the word 'must' connotes a requirement that is mandatory and not subject to equivocation. Thus, in using the word 'must,' the plain language of [Colo. Rev. Stat.] § 38-33.3-205(1)(h) unambiguously requires any reservation of development rights to include a 'time limit within which each of those rights must be exercised.' " 97 P.3d at 255.

The Colorado General Assembly also enacted a statute with language that is similar to N.C. Gen. Stat. § 47C-1-104(c). Colo. Rev. Stat. § 38-33.3-203(4) (2003) states, "[t]itle to a unit and common elements is not rendered unmarketable or otherwise affected by reason of an *insubstantial failure* of the declaration to comply with this article. Whether a substantial failure impairs marketability is not affected by this article." (Emphasis supplied). The majority's opinion correctly states the Colorado Court of Appeals found the statute's noncompliance provision inapplicable because the dispute did not concern title or marketability. *Id.* at 256. However, the Court subsequently states, "even assuming [the noncompliance provision] were to apply, we find Overlook's argument unpersuasive." *Id.*

The Colorado Court of Appeals held that examples of insubstantial defects included omitting the words " 'condominium,' 'cooperative,' or 'planned community' " from the declaration or the failure to include "the plats or plans to comply satisfactorily with the requirement that they be clear and legible." *Id.* The Court further stated,

"*Overlook's mathematical argument that missing only one out of twenty-three requirements must necessarily be an 'insubstantial failure' is overly simplistic.* . . . we [do not] believe that the General Assembly intended an omission that leads to development rights being reserved with no time limitation to be considered insubstantial." *Id.* (emphasis supplied).

The Colorado Court of Appeals relied on two subsections as the basis of its holding:

> (2) . . . This provision does not extend the time limit on the exercise of development rights imposed by the declaration pursuant to section 38-33.3-205(1)(h).
>
> . . . .
>
> (5) If a declarant fails to exercise any development right within the time limit and in accordance with any conditions or fixed limitations described in the declaration pursuant to section 38-33.3-205(1)(h), or records an instrument surrendering a development right, that development right shall lapse . . . .

Colo. Rev. Stat. § 38-33.3-210 (2) and (5) (2003). The Court concluded "[t]hese subsections are consistent with the conclusion that the omission of a time limitation is not 'insubstantial'." *Id.*

C. Analysis

The North Carolina and Colorado General Assemblies enacted virtually identical provisions regarding the mandatory requirements the declarant must comply with in order to reserve future development rights. Although Colorado law is not binding on North Carolina, I find the Colorado Court of Appeals' analysis of virtually identical statutes to be directly on point and persuasive to the facts and legal issue before us.

N.C. Gen. Stat. § 47C-2-110 (2005) is a very similar provision to Colo. Rev. Stat. § 38-33.3-210(2). N.C. Gen. Stat. § 47C-2-110(b) expressly limits future development rights by stating:

> Development rights may be reserved within any real estate added to the condominium if the amendment adding that real estate includes all matters required by, and is in compliance with, G.S. 47C-2-105 and, if a leasehold condominium, G.S. 47C-2-106 and also if the plats and plans include all matters required by G.S. 47C-2-109. *This provision does not extend the limit on the exer-*

> *cise of developmental rights imposed by the declaration pursuant to G.S. 47C-2-105(a)(8).*

(Emphasis supplied). Further, Official Comment 1 to N.C. Gen. Stat. § 47C-2-110 states:

> This section generally describes the method by which any development right may be exercised. Importantly, while new development rights may be reserved within new real estate which is added to the condominium, *the original time limits on the exercise of these rights which the declarant must include in the original declaration may not be extended.* Thus, the development process *may continue only within the self-determined constraints originally described by the declarant.*

(Emphasis supplied).

Although the North Carolina Condominium Act does not have a provision identical to Colo. Rev. Stat. § 38-33.3-210(5), stating failure to exercise the development right within the prescribed time causes the development rights to lapse, I find the addition of the subsection and Official Comment above to be indicative of the General Assembly's intent to require inclusion of a time limitation for future development rights a mandatory and material part of the declaration. The majority's reliance upon N.C. Gen. Stat. § 47C-1-104(c) to excuse the omission is misplaced. This statute expressly applies to only "nonmaterial errors or omissions" and is inapplicable in this case.

Further, the majority's holding excusing plaintiff's omission on the ground that plaintiff otherwise substantially complied with the Act because "the Declaration contains every other relevant component either mandated by the Act or considered to be material by the parties" was expressly disavowed by the Colorado Court of Appeals.

The General Assembly's intended purpose in enacting N.C. Gen. Stat. § 47C-2-105(a)(8) was for the declarant to fully disclose to and inform the buyer, upon purchase, of any future development rights the declarant maintains over the property and the timing in which those rights must be exercised. The buyer can then decide whether to purchase the property based on the present conditions and the disclosed conditions which may exist at a specified time in the future. Based upon the plain and mandatory language of the statute, N.C. Gen. Stat. § 47C-1-104 should not be used to grant plaintiff future development rights it did not expressly reserve to exercise within a stated time period.

III. Conclusion

N.C. Gen. Stat. § 47C-2-105(a)(8) expressly and mandatorily requires the declaration of condominium to include a time limit within which future development rights must be exercised. The failure to include this time limitation is a material omission, which renders the development rights *void ab initio*.

The substantial compliance provision of N.C. Gen. Stat. § 47C-1-104(c) is inapplicable to this mandatory and material provision of the Act. The trial court correctly granted summary judgment in favor of defendants and its order should be affirmed. I respectfully dissent.

FAISON & GILLESPIE, A GENERAL PARTNERSHIP, PLAINTIFF v. BREE A. LORANT AND BREE A. LORANT D/B/A THE LORANT LAW GROUP, DEFENDANT

No. COA07-42

(Filed 18 December 2007)

1. Appeal and Error— record—timeliness—good faith

Although defendants contended that plaintiff did not timely file the record on appeal, plaintiff acted in good faith to verify that all modifications to the proposed record were incorporated to defendants' satisfaction, and promptly filed the record two days after verifying with defendants that the record was settled.

2. Arbitration and Mediation— arbitration—interest award—arbitrator's authority

An arbitrator's award of interest did not exceed the authority expressly conferred on him by the parties' private arbitration agreement where the agreement invited the arbitrator to award the discretionary relief deemed just and proper, and expressly incorporated AAA Rules and North Carolina General Statutes which permit an arbitrator to award remedies deemed just and appropriate. The interest awarded in this case was an element of the remedies sought rather than a separate claim.

Appeal by plaintiff from judgment entered 17 July 2006 by Judge Abraham Penn Jones in Durham County Superior Court. Heard in the Court of Appeals 10 September 2007.

Manning, Fulton & Skinner, PA, by John B. McMillan, Thomas C. Kilpatrick, and Evan B. Horwitz, for plaintiff-appellant.

The Lorant Law Group, by Bree A. Lorant, for defendants-appellees.

MARTIN, Chief Judge.

Plaintiff appeals from the trial court's order of 17 July 2006 modifying a 21 January 2006 arbitration award and denying plaintiff's motion for reconsideration of the trial court's 8 June 2006 order. For the following reasons, we reverse the trial court's order and remand for further proceedings consistent with this opinion.

The parties stipulate that Bree A. Lorant ("defendant") was employed as an associate attorney with the law firm of Faison & Gillespie ("plaintiff") beginning in early 2000. On 15 January 2004, defendant terminated her employment with plaintiff.

Plaintiff contends that defendant systematically removed 63,500 pages of computer data files between October 2003 and December 2003 in anticipation of her departure from plaintiff's firm in January 2004. With the assistance of information technology consultants, plaintiff claims to have recovered most files removed by defendant at a cost of $24,622.44. Plaintiff also contends that defendant began a solo practice—The Lorant Law Group (with Bree A. Lorant, collectively "defendants")—and actively solicited four clients from plaintiff's firm. Plaintiff alleges defendants owe fees and costs for the quantum meruit value of services rendered to those clients by plaintiff. Plaintiff further alleges that defendant Lorant intentionally double-billed three clients during her tenure with plaintiff's firm at a total cost of $594.42.

One week before a scheduled trial, after all claims and counterclaims were fully pled, the parties executed an Agreement for Arbitration ("Agreement") on 7 November 2005. The Agreement included the following provisions:

> D. Following the termination of employment, certain disputes and controversies have arisen between the parties. Such disputes and controversies—all as more fully described in the Complaint and Counterclaim filed by the parties—are the subjects of a presently pending lawsuit [herein "Pending Litigation"] . . . .

E. The parties have agreed to resolve their disputes through binding arbitration.

. . . .

1. **Submission To Binding Arbitration**. The parties hereby agree to submit all claims arising out of the transaction at issue in the Pending Litigation by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association and the terms of this Agreement.

2. **Scope Of Arbitration**. The arbitration shall include all claims and defenses asserted by the parties in the Pending Litigation.

. . . .

5. **Rules Of Arbitration**. The arbitration shall be governed by the Commercial Arbitration Rules of the American Arbitration Association [herein "Governing Arbitration Rules"]. If any other provisions of this Agreement conflict with such rules, then the provisions of this Agreement shall control. The provisions of this Agreement shall also control any matters addressed by it which are not addressed by the Governing Arbitration Rules or as to which the Governing Arbitration Rules permit a variation. If any procedural issues arise that are not addressed by the Governing Arbitration Rules or this Agreement, then such issues shall be resolved in accordance with the provisions of the North Carolina Revised Uniform Arbitration Act, N.C.G.S. § 1-569.1 *et seq*.

. . . .

9. **Governing Law**. The interpretation and enforcement of this Agreement shall be governed by the North Carolina Revised Uniform Arbitration Act, N.C.G.S. § 1-569.1 *et seq*.

. . . .

11. **Entire Agreement**. The parties acknowledge and represent that this Agreement contains the entire agreement between the parties regarding the matters set forth and that it supersedes all previous negotiations, discussions

> and understandings regarding such matters. The terms of this Agreement are contractual and not a mere recital.

By the terms of the Agreement, all claims arising out of the Pending Litigation between the parties were submitted to the arbitrator, retired Superior Court Judge James M. Long.

The arbitration was conducted for two days beginning 19 December 2005. The arbitrator served his Arbitration Decision on 21 January 2006. Plaintiff moved to confirm the Arbitration Decision on 8 February 2006 in the superior court. Defendants submitted a motion to the arbitrator to modify the Arbitration Decision pursuant to N.C.G.S. § 1-569.20 on 16 February 2006. The arbitrator denied defendants' motion to modify the Arbitration Decision on 25 March 2006. Defendants appealed the arbitrator's denial of their motion to modify the Arbitration Decision to the superior court. On 8 June 2006, the superior court granted defendants' motion to modify the Arbitration Decision, striking the grants of interest awarded to plaintiff. On 13 June 2006, plaintiff moved the superior court to reconsider the modification of the Arbitration Decision, and to request that the superior court amend its 8 June 2006 order to make findings of fact and conclusions of law in support of the court's ruling. Defendants filed an amended motion to confirm the superior court's order on 16 June 2006. On 17 July 2006, the superior court entered an order granting defendants' motion to confirm the modified Arbitration Decision pursuant to its 8 June 2006 order.

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[1] We first consider defendants' motion to this Court to dismiss plaintiff's appeal on the grounds plaintiff failed to timely settle and file the record on appeal pursuant to Rules 11 and 12 of the North Carolina Rules of Appellate Procedure. We deny the motion to dismiss plaintiff's appeal.

" 'The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal.' " *Pollock v. Parnell*, 126 N.C. App. 358, 361, 484 S.E.2d 864, 866 (1997) (quoting *Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 567-68 (1984)). "The rules are designed to keep the process of perfecting an appeal flowing in an orderly manner." *Id.* (citing *Craver v. Craver*, 298 N.C. 231, 236, 258 S.E.2d 357, 361 (1979)). However, this Court has held that "when a litigant exercises 'substantial compliance' with the appellate rules, the appeal may not be dismissed for a technical violation of the rules." *Spencer v. Spencer*, 156 N.C. App. 1, 8, 575 S.E.2d 780, 785 (2003).

Rule 11 of the North Carolina Rules of Appellate Procedure provides: "Within . . . 35 days after filing of the notice of appeal if no transcript was ordered, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal." N.C.R. App. P. 11(a) (2007). Rule 11 further provides that, "[w]ithin 30 days . . . after service upon appellee of appellant's proposed record on appeal, that appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal." N.C.R. App. P. 11(c) (2007). Finally, Rule 12 provides that, "[w]ithin 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." N.C.R. App. P. 12(a) (2007).

In the present case, plaintiff filed and served Notice of Appeal on 1 August 2006. On 6 September 2006, plaintiff timely served its proposed record on appeal upon defendants consistent with Rule 11(a). On 28 September 2006, defendants timely served their proposed amendments to the record on appeal upon plaintiff consistent with Rule 11(c). Between 11 October 2006 and 18 October 2006, plaintiff and defendants corresponded regularly by letter and telephone to negotiate settlement of the record on appeal. After plaintiff incorporated modifications requested by defendants, plaintiff sent the proposed record, totaling almost 600 pages, to defendants on 14 November 2006. The parties exchanged e-mails at the end of November 2006. Plaintiff's counsel made several attempts to confirm with defendants that the 14 November 2006 revised record on appeal accurately reflected the parties' intent. However, according to the sworn affidavit of 5 June 2007, defendants could not be reached to address this matter. Further, defendant Lorant was on secured leave between 21 December 2006 and 4 January 2007. One business day after returning from secured leave, plaintiff confirmed with defendants that the proposed record on appeal was satisfactory and filed the settled record on appeal with the Court of Appeals on 10 January 2007.

Defendants contend that the record on appeal was settled on 18 October 2006. For this reason, in order to comply with Rule 12(a), defendants contend that plaintiff should have filed the record on appeal with this Court no later than 2 November 2006, more than two months prior to plaintiff's filing date of 10 January 2007.

However, we conclude that plaintiff acted in good faith to verify that all modifications to the proposed record were incorporated to defendants' satisfaction, and promptly filed the record two days after verifying with defendants that the record was settled. Therefore, defendants' Motion to Dismiss is denied.

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[2] Plaintiff contends on appeal that the trial court's 8 June and 17 July 2006 orders "striking each award for payment of interest to [p]laintiff [in the Arbitration Decision], including contractual and prejudgment interest" were not consistent with facts or law. Plaintiff argues the arbitrator was within the scope of his authority to award interest as a remedy for the claims before him, and that the interest awarded in the Arbitration Decision was an element of damages on claims properly before the arbitrator, pursuant to the parties' Agreement, which included claims for withholding fees based on the quantum meruit value of services rendered, tortious destruction of plaintiff's computer data, double-billing client expense reimbursements, and breach of contract. Defendants argue that the award of interest is not an element of a remedy, but a separate claim beyond the scope of the parties' private arbitration agreement. After careful consideration, we agree with plaintiff.

Our Supreme Court has long held that the right to appeal an arbitration award is limited.

> If an arbitrator makes a mistake, either as to law or fact, it is the misfortune of the party, and there is no help for it. There is no right of appeal, and the Court has no power to revise the decisions of "judges who are of the parties' own choosing." An award is intended to settle the matter in controversy and thus save the expense of litigation. If a mistake be a sufficient ground for setting aside an award, it opens a door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus the object of references would be defeated and arbitration instead of ending would tend to increase litigation.

Patton v. Garrett, 116 N.C. 497, 504, 21 S.E. 679, 682-83 (1895). For these reasons, " '[a]n [arbitration] award is ordinarily presumed to be valid, and the party seeking to set it aside has the burden of demonstrating an objective basis which supports his allegations that one of the[] grounds [for setting it aside] exists.' " *G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., Inc.*, 85 N.C. App. 684, 686, 355 S.E.2d 815, 817 (1987).

"If the dispute [resolved by the arbitrator] is within the scope of the arbitration agreement, then the [trial] court must confirm the [arbitration] award unless one of the statutory grounds for vacating or modifying the award exists" pursuant to N.C.G.S. §§ 1-569.23 and 1-569.24. *Carteret County v. United Contractors of Kinston, Inc.*, 120 N.C. App. 336, 346, 462 S.E.2d 816, 823 (1995) (citing *FCR Greensboro, Inc. v. C & M Investments*, 119 N.C. App. 575, 577, 459 S.E.2d 292, 294 (1995)). " '[O]nly awards reflecting mathematical errors, errors relating to form, and errors resulting from arbitrators exceeding their authority shall be modified or corrected by the reviewing courts.' " *Palmer v. Duke Power Co.*, 129 N.C. App. 488, 496-97, 499 S.E.2d 801, 807 (1998) (quoting *Carolina Virginia Fashion Exhibitors, Inc. v. Gunter*, 41 N.C. App. 407, 414, 255 S.E.2d 414, 419 (1979)) (alteration in original).

An arbitrator's ability to act is both created and limited by the authority conferred on him by the parties' private arbitration agreement. *See Calvine Cotton Mills, Inc. v. Textile Workers Union*, 238 N.C. 719, 722, 79 S.E.2d 181, 183 (1953) (citing *Thomasville Chair Co. v. United Furniture Workers*, 233 N.C. 46, 62 S.E.2d 535 (1950)) ("[A]n arbitrator must act within the scope of the authority conferred on him by the arbitration agreement, and his award is subject to attack for that he, acting under a mistake of law, exceeded his authority . . . ."). Only those claims submitted to the arbitrator may be decided by him.

> Because the duty to arbitrate is contractual, only those disputes which the parties agreed to submit to arbitration may be so resolved. *See Coach Lines v. Brotherhood*, 254 N.C. 60, 67-68, 118 S.E.2d 37, 43 (1961). To determine whether the parties agreed to submit a particular dispute or claim to arbitration, we must look at the language in the agreement, *viz.*, the arbitration clause, and ascertain whether the claims fall within its scope.

Rodgers Builders, Inc. v. McQueen, 76 N.C. App. 16, 23-24, 331 S.E.2d 726, 731 (1985).

In the present case, the trial court struck the interest granted to plaintiff in the Arbitration Decision pursuant to N.C.G.S. § 1-596.24(a)(2) of the Revised Uniform Arbitration Act. Section 1-596.24(a)(2) provides:

> (a) Upon motion made within 90 days after the moving party receives notice of the award pursuant to G.S. 1-569.19 or

> within 90 days after the moving party receives notice of a modified or corrected award pursuant to G.S. 1-569.20, the court shall modify or correct the award if:
>
> . . . .
>
> (2) The arbitrator has *made an award on a claim not submitted to the arbitrator*, and the award may be corrected without affecting the merits of the decision on the claims submitted . . . .

N.C. Gen. Stat. § 1-569.24(a)(2) (2005) (emphasis added). In other words, the trial court determined that the arbitrator made an award "on a claim not submitted to" him, thereby exceeding the scope of his authority conferred by the parties' Agreement.

"[A]n [arbitration] award is always open to attack on the ground that the arbitrators exceeded their powers." *Thomasville Chair Co.*, 233 N.C. at 48, 62 S.E.2d at 537. However, "[t]here have been 'only a few cases in which our courts have held that an arbitrator exceeded his powers.' " *Smith v. Young Moving & Storage, Inc.*, 167 N.C. App. 487, 490, 606 S.E.2d 173, 176 (2004) (quoting *Howell v. Wilson*, 136 N.C. App. 827, 830, 526 S.E.2d 194, 196 (2000)). This Court summarized these exceptional cases as follows:

> In *Wilson Building Co. v. Thorneburg Hosiery Co.*, 85 N.C. App. 684, 355 S.E.2d 815 (1987), we concluded that, because the amount of attorney's fees for debts and obligations is set by statute, the arbitrator exceeded his authority by ordering fees in excess of that amount. More instructive, however, is the case of *FCR Greensboro, Inc. v. C & M Investments*, 119 N.C. App. 575, 459 S.E.2d 292 (1995). In that case, the parties submitted for arbitration the amount of liquidated damages caused by the defendant completing construction of a building after the agreed-upon date. The arbitrator awarded plaintiff these damages, but then also awarded plaintiff two other kinds of damages: (1) liquidated damages caused by delays in starting construction; and (2) reimbursement for certain changes plaintiff made to the sprinkler system that was installed. We held that the arbitrator exceeded his powers by making these additional awards.
>
> These two cases illustrate that an arbitrator exceeds his authority when he arbitrates *additional claims* and matters not properly before him.

Howell, 136 N.C. App. at 830, 526 S.E.2d at 196 (citations omitted). In other words, the arbitrators in these earlier cases acted contrary to the express authority conferred on them by statute and by the language of the parties' private arbitration agreement. However, we do not find this to be true in the present case.

In their arbitration agreement, the parties "agree[d] to submit *all claims* arising out of the transaction at issue in the Pending Litigation" which "include[d] *all claims* and defenses asserted by the parties in the Pending Litigation." (Emphasis added.) The Pending Litigation included "disputes and controversies" pled in plaintiff's filed Amended Complaint and defendants' Answer and Counterclaims. Since the language of the parties' Agreement unambiguously submitted "all claims" for the parties to binding arbitration, and incorporated by reference all remedies requested by the parties in their filed pleadings, we conclude there were no claims nor remedies pled which could not be decided by the arbitrator.

Defendants argue, however, that, like *FCR Greensboro* referenced above, the arbitrator exceeded his authority because the award of interest to plaintiff was an award of damages neither expressly pled nor authorized by the parties' Agreement. We disagree.

Our Supreme Court has stated that " '[t]he prayer for relief does not determine what relief ultimately will be awarded.' Instead, 'the court should grant the relief to which a party is entitled, whether or not demanded in his pleading.' " *Holloway v. Wachovia Bank & Trust Co., N.A.*, 339 N.C. 338, 346, 452 S.E.2d 233, 237-38 (1994) (citation omitted); 61B Am. Jur. 2d *Pleading* § 935 (1999) ("A prayer for general equitable relief justifies a court in granting relief beyond what is asked for in specific prayers, as long as such relief is consistent with the pleadings and the evidence does not surprise the opposing party."). Here, while neither party specifically requested damages that expressly included interest, both parties' filings, which were incorporated by reference in the Agreement, sought discretionary relief which prayed "[f]or such other and further relief as the Court deems just and proper."

Further, the parties agreed that the "interpretation and enforcement of this Agreement shall be governed by the North Carolina Revised Uniform Arbitration Act." The Revised Uniform Arbitration Act, codified in Article 45C of the North Carolina General Statutes, applies to agreements to arbitrate entered into on or after 1 January 2004. *See generally* N.C. Gen. Stat. §§ 1-569.1 to 1-569.31 (2005).

N.C.G.S. § 1-569.21(c) of the Revised Uniform Arbitration Act provides:

> As to all remedies other than those authorized by subsections (a) [(addressing punitive damages)] and (b) [(addressing attorneys' fees, which may *only* be awarded if authorized by law and if the arbitration agreement *expressly* provides for such an award)] of this section, an arbitrator may order *any remedies* the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under G.S. 1-569.22 or for vacating an award under G.S. 1-569.23.

N.C. Gen. Stat. § 1-569.21(c) (2005) (emphasis added).

> This rule follows cases holding that absent clearly restrictive language, an arbitrator must be allowed latitude in fashioning an appropriate remedy. By submitting to arbitration, it is implied that the arbitrator has the power to order an appropriate remedy, even though the contract may be silent as to any specific or general relief the arbitrator may grant. . . . If a contract specifically limits the authority of the arbitrator to grant a particular type of relief, then the remedies are confined to what is stated, but an arbitrator is allowed flexibility in formulating remedies . . . where the contract requiring arbitration was not explicit on the subject of remedies and *did not prohibit the arbitrator's use of a specific remedy*.

21 Samuel Williston, *A Treatise on the Law of Contracts* § 57:111, at 575-76 (Richard A. Lord ed., 4th ed. 2001) (emphasis added) (footnotes omitted).

It is also relevant that the parties contracted to submit to "binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association [("AAA Rules")] and the terms of this Agreement," and provided that, "[i]f any other provisions of this Agreement conflict with [the AAA R]ules, then the provisions of this Agreement shall control." In other words, according to the express language of the parties' Agreement, the Agreement and the AAA Rules were to be read together, and only in the face of a conflict should the Agreement control to the exclusion of the AAA Rules.

Paralleling the language of N.C.G.S. § 1-569.21(c), Rule 43 of the AAA Rules provides, in part:

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.

. . . .

(d) The award of the arbitrator(s) may include:

(i) interest at such rate and from such date as the arbitrator(s) may deem appropriate; and

(ii) an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

Am. Arb. Ass'n, Commercial Arbitration Rules & Mediation Procedures, R. 43 (2005), 2005 WL 5314564 (amended Sept. 1, 2007) (language of relevant rule is unchanged by 2007 amendments). The AAA Rules, like N.C.G.S. § 1-569.21, allow the arbitrator to grant "any remedy" the arbitrator deems "just" and appropriate, with the exception of attorneys' fees, which must be expressly agreed upon by the parties and specifically submitted to the arbitrator for consideration. Additionally, in the AAA Rules, as in the North Carolina General Statutes, there is no limiting or conditional language regarding an arbitrator's decision to award interest to a party—i.e., the parties do not have to expressly agree to submit a remedy of interest to the arbitrator for the arbitrator to have the power to grant such a remedy, provided that an award of interest as a remedy is not expressly limited by the language of the parties' arbitration agreement.

Just as our Supreme Court did in *Calvine Cotton Mills*, we conclude that "[t]he parties could have—but did not—write into the contract a[] limiting provision [on the discretionary remedies available to the arbitrator]." *Calvine Cotton Mills, Inc.*, 238 N.C. at 723, 79 S.E.2d at 184. "In making his award the arbitrator construed the contract, as it was his right and duty to do. He added nothing to the agreement. Instead, he based his conclusions on a permissible construction of the written instrument." *Id.*

Here, the arbitrator awarded backward-looking interest "at the legal rate of 8% per annum" on (1) expenses for recovery of plaintiff's deleted computer records, (2) amounts double-billed to clients, and (3) fees withheld for quantum meruit value of services rendered by defendant while employed by plaintiff. This interest was calculated to

begin on the date on which each breach occurred, and to end on the date of the Arbitration Decision, and totaled $41,874.93. Additionally, the arbitrator awarded forward-looking interest on the total award of $360,541.10 calculated "at the rate of 8% per annum from the date of this decision until paid."

Defendants argue that N.C.G.S. § 24-5 only applies to amounts of judgments which bear interest after "the date of entry of judgment under G.S. 1A-1, Rule 58," *see* N.C. Gen. Stat. § 24-5(a), (b) (2005), and not to arbitration awards that have not yet been confirmed and entered by a trial court. *See* N.C. Gen. Stat. §§ 1-569.22, 1-569.25 (2005); *Palmer*, 129 N.C. App. at 498, 499 S.E.2d at 807 ("We similarly reject plaintiff's argument that the arbitrator's award should be treated like a jury verdict, upon which a judge could then award pre-judgment interest in entering judgment on that verdict. . . . [W]e have found no citation of authority for this proposition."). While defendants do not address the language regarding breaches of contract actions under N.C.G.S. § 24-5(a) which *is* consistent with the arbitrator's award, *see* N.C. Gen. Stat. § 24-5(a) ("[T]he amount awarded on the contract bears interest *from the date of breach*.") (emphasis added), we do not need to reach that issue here.

An arbitrator's award cannot be modified for error of law unless that error caused the arbitrator to act beyond the scope of his authority. "Indeed, 'an arbitrator is not bound by substantive law or rules of evidence, [and] an award may not be vacated merely because the arbitrator erred as to law or fact.' " *Smith*, 167 N.C. App. at 489, 606 S.E.2d at 175 (quoting *Sholar Bus. Assocs. v. Davis*, 138 N.C. App. 298, 301, 531 S.E.2d 236, 239 (2000)); *Gunter*, 41 N.C. App. at 411, 255 S.E.2d at 417-18 ("The general rule is that errors of law or fact, or an erroneous decision of matters submitted to the judgment of the arbitrators, are insufficient to invalidate an award fairly and honestly made."). Again, as our Supreme Court held in *Patton*:

> If an arbitrator makes a mistake, either as to law or fact, it is the misfortune of the party, and there is no help for it. There is no right of appeal, and the Court has no power to revise the decisions of "judges who are of the parties' own choosing."

Patton, 116 N.C. at 504, 21 S.E. at 682.

In the present case, the arbitrator might have presumed that pre-judgment interest applies to arbitration awards, or might have determined that an award of backward-looking interest was within

his discretionary, contractual, and statutory authority. However, the rationale underlying the arbitrator's decision to award interest, and the determination of whether or not the arbitrator acted under mistake of law, are not issues before this Court. We conclude only that the arbitrator did not act under any mistake of law which resulted in his acting in excess of his authority.

Therefore, we hold that, by inviting the arbitrator to award discretionary relief it "deem[ed] just and proper," coupled with the parties' express incorporation of the AAA Rules and the North Carolina General Statutes which permit an arbitrator to award remedies it deems "just and appropriate under the circumstances of the arbitration proceeding," the arbitrator's award of the interest did not exceed the authority expressly conferred on him by the parties' private arbitration agreement.

In the alternative, defendants argue the interest awarded by the arbitrator was not a remedy, but a separate claim not before him under the Agreement. However, we conclude the interest awarded in the Arbitration Decision was an element of the remedies sought, rather than a separate claim.

"Interest is the compensation allowed by law, or fixed by the parties, for the use, or forbearance, or detention of money." *Members Interior Constr. v. Leader Constr. Co.*, 124 N.C. App. 121, 125, 476 S.E.2d 399, 402 (1996) (internal quotation marks omitted). " '[I]nterest . . . 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.' " *Id.* (second alteration in original); 25 Samuel Williston, *A Treatise on the Law of Contracts* § 66:109, at 126-29 (Richard A. Lord ed., 4th ed. 2002) ("[Interest] may be awarded by the law as damages although no agreement for interest has been made by the parties. . . . The purpose of allowing interest as damages is to give the aggrieved party full indemnity for its loss.") (footnotes omitted).

In his Arbitration Decision, the arbitrator identified the pled claims and the corresponding values upon which the interest would apply. Further, the interest calculations appeared in the section of the Arbitration Decision in which the damage awards were listed, which also came after the sections addressing plaintiff's claims and defendants' counterclaims. Therefore, the interest awarded in this case was not a separate claim, but an element of the remedies sought, assessed on values awarded on claims properly before the arbitrator.

For the reasons given, we reverse the trial court's 17 July 2006 order modifying the arbitrator's award, and remand to the Superior Court of Durham County for entry of an order confirming, and entering judgment on, the 21 January 2006 Arbitration Decision in its original form. Our decision renders unnecessary our consideration of plaintiff's remaining assignments of error, and we do not address them.

Reversed.

Judges STROUD and ARROWOOD concur.

CHARLES RAY BILLINGS, EMPLOYEE, PLAINTIFF v. GENERAL PARTS, INC., EMPLOYER, ZURICH AMERICAN, CARRIER, GAB ROBINS, ADMINISTERING AGENT, DEFENDANTS

No. COA07-318

(Filed 18 December 2007)

1. Workers' Compensation— injury by accident arising out of employment—motor vehicle accident—increased risk analysis

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's 2 June 2003 motor vehicle accident arose out of his employment with defendant employer when plaintiff had a blackout while he was returning to his employer's place of business after making a delivery in the employer's pickup truck, because: (1) an injury arises out of employment if an idiopathic condition of the employee combines with risks attributable to the employment to cause the injury; (2) when an employee's duties require him to travel, the hazards of the journey are risks of the employment; (3) the increased risk analysis was not relevant in this case when it is used primarily where an employee interrupts his work for his employer to engage in personal conduct unrelated to the employer's business; and (4) contrary to defendants' inference, our State's acceptance of the increased risk doctrine does not preclude the Commission from relying on *Allred*, 253 N.C. 554 (1960), in its conclusions of law.

2. Workers' Compensation— motor vehicle accident—initial head injury and later subdural hematoma

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee's initial head injury and later subdural hematoma were the result of the 2 June 2003 motor vehicle accident based on plaintiff's medical records and the testimony of treating physicians.

3. Workers' Compensation— medical disability—arising out of and in course of employment

The Industrial Commission did not err in a workers' compensation case by determining that plaintiff's second stroke and resulting medical disability were the result of the 2 June 2003 motor vehicle accident, because (1) a doctor testified and the Commission found that although plaintiff's initial recovery went well, plaintiff's subdural hematomas, resulting medical problems, functional deterioration, and disability were all related to the 2 June 2003 accident; and (2) there was sufficient evidence to support this finding.

Appeal by employer from Opinion and Award entered 24 October 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 September 2007.

Wilson and Reives, PLLC, by E. Neil Morris, for plaintiff-appellee.

Brooks Stevens & Pope, P.A., by Michael C. Sigmon, for defendants-appellants.

MARTIN, Chief Judge.

General Parts, Inc., d/b/a Carquest of Sanford ("defendant-employer"), Zurich American, and GAB Robins (collectively "defendants") appeal an Opinion and Award by the North Carolina Industrial Commission ("Commission") awarding benefits to employee Charles Ray Billings ("plaintiff"). We affirm.

The record reflects that plaintiff was engaged in an employment relationship with defendant-employer on 2 June 2003 as a part-time automotive parts delivery truck driver. The seventy-three-year-old plaintiff had been employed with defendant-employer in this capacity for six years. On that date, plaintiff was returning to defendant-employer's place of business after making a delivery in defendant-

employer's pickup truck. Plaintiff suffered a blackout while operating the truck, ran off the street near a railroad crossing, and struck a light pole, causing the truck to roll over. At the scene, plaintiff was conscious and alert, but complained of head pain. Plaintiff was transported to Central Carolina Hospital ("CCH") where he underwent a CT scan of his head on the same day.

The CT scan noted a "[s]mall focus of increased attenuation identified adjacent to the superior sylvian fissu[r]e which may possibly represent a [cerebral] contusion." On 4 June 2003, plaintiff underwent an MRI of the brain. The MRI noted an "acute punctate right cerebellar infarct" and noted there was neither subdural bleeding nor an acute contusion in the left parietal lobe, but could not exclude the presence of a small contusion. Plaintiff was discharged from CCH on 4 June 2003 with diagnoses of a syncopal episode (i.e., a sudden loss of consciousness) and an acute right cerebellar small lacunar infarct (i.e., a stroke).

After a follow-up appointment on 9 June 2003 with his primary care physician, certified internist Dr. Steven Michael, plaintiff was referred to certified neurologist and neurophysiologist Dr. Mohan C. Deochand for further evaluation. On 12 June 2003, Dr. Deochand saw plaintiff who complained of suffering from headaches for several days after his discharge from the hospital. Dr. Deochand diagnosed plaintiff with a right cerebellar infarct. On 16 June 2003, plaintiff returned to Dr. Deochand complaining of "more bleeding" from his nose.

On 22 July 2003, Dr. Michael saw plaintiff for a checkup. Plaintiff complained of episodes of right facial numbness. On 2 August 2003, Dr. Deochand saw plaintiff who complained of pain and weakness in his legs and difficulty walking. Plaintiff also complained of neck pain radiating into the right side of his head. On 5 August 2003, plaintiff arrived in a wheelchair to see Dr. Michael for complaints of headache with nausea and ongoing muscle weakness. Dr. Michael's neurological exam revealed a slight decrease in the strength of plaintiff's left upper and lower extremities.

On 7 August 2003 at 4:00 a.m., plaintiff was seen at the CCH Emergency Department complaining of a sharp, throbbing headache that woke him up. The following day, he was seen by Dr. Sangeeta Sawhney who admitted plaintiff to CCH's Intensive Care Unit due to complaints of severe headaches and new onset left-sided weakness. An MRI performed that afternoon showed that plaintiff had "obvious

bilateral subdural hematomas present"—i.e., bleeding in the subdural space of the brain—that were larger on the right than the left. The subdural hematomas appeared to be "subacute in nature but age [was] indeterminate." The MRI showed "no other sign of an infarct." Based on his critical condition, plaintiff was transported to Wake Medical Center ("Wake Med") for further treatment. A CT scan done later that evening showed bilateral subdural fluid collections present and noted a subsequent right to left hemispheric shift.

On 9 August 2003, neurosurgeon Dr. Russell Margraf performed a right frontal craniotomy for evacuation and drainage of "acute on subacute subdural hematoma." Dr. Margraf noted that a "considerable amount of dark clot and crank case oil fluid under pressure [was] evacuated" and a drain was sewn into place in plaintiff's head.

On 15 August 2003, a neurological consult was requested after an onset of uncontrolled violent movements in plaintiff's right lower extremities. Neurologist Dr. Susan A. Glenn noted that these movements were consistent with a right lower extremity hemiballismus which "may present a small new stroke, or possibl[e] sequela" of plaintiff's brain injury from the subdural hematomas. A 15 August 2003 MRI reported persistent bilateral subdural hematomas and "acute bilateral posterior cerebral artery territory infarctions" or strokes.

After plaintiff's condition continued to deteriorate, he was admitted and transferred to Wake Med Rehabilitation Hospital ("Wake Med Rehab") on 18 August 2003 for assistance with control of the hemiballismus of the right lower extremity. Plaintiff was noted to be lethargic, disoriented, and incapable of following simple directions. Plaintiff remained at Wake Med Rehab until his discharge and transfer on 5 September 2003 to Laurels of Chatham, a long-term care facility, due to his sharp decline and severe deficits in cognition and mobility. At the time of his discharge from Wake Med Rehab, plaintiff required assistance for feeding, grooming, toileting, and movement. Plaintiff's condition improved during his four-month stay at Laurels of Chatham to allow plaintiff to return home in December 2003, even though he continued to have problems with involuntary movement of his legs. Board certified family medicine specialist Dr. John Corey began treating plaintiff in Laurels of Chatham and continued to see plaintiff after he left the long-term care facility and returned home. Dr. Corey determined that plaintiff was unable to work due to his cognitive impairment and the movement disorders of his legs, and found

that plaintiff was completely and permanently disabled as a result of these medical problems.

On 31 October 2003, defendant-employer denied plaintiff's claim on the grounds that plaintiff's injuries were not the direct result of a work-related accident. After receiving evidence, a deputy commissioner filed an Opinion and Award which determined that plaintiff's injuries were the direct result of a work-related accident and ordered defendants to pay for all existing and future medical expenses incurred as a result of plaintiff's motor vehicle accident, as well as total disability benefits from the date of the accident until the Commission decided otherwise. Defendants appealed to the full Commission. On 24 October 2006, the Commission entered an Opinion and Award affirming the deputy commissioner's decision, with some modifications. This appeal follows.

Our Supreme Court has "repeatedly held 'that our Workers' Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependents, and its benefits should not be denied by a technical, narrow, and strict construction.' " *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Hollman v. City of Raleigh*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968)).

The Industrial Commission and the appellate courts have distinct responsibilities when reviewing workers' compensation claims. *See Deese v. Champion Int'l Corp.*, 352 N.C. 109, 114, 530 S.E.2d 549, 552 (2000). The Industrial Commission is " 'the fact finding body,' " *Adams*, 349 N.C. at 680, 509 S.E.2d at 413 (quoting *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962)), and is " 'the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " *Id.* (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). On appeal, " '[t]he findings of fact by the Industrial Commission are conclusive . . . if supported by any competent evidence.' " *Id.* at 681, 509 S.E.2d at 414 (quoting *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)). These findings " 'are conclusive on appeal . . . *even though there be evidence that would support findings to the contrary*.' " *Id.* (quoting *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965)) (emphasis added). "The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Id.* (citing

Doggett v. South Atl. Warehouse Co., 212 N.C. 599, 194 S.E. 111 (1937)). "An opinion and award of the Industrial Commission will only be disturbed upon the basis of a patent legal error." *Roberts v. Burlington Indus., Inc.*, 321 N.C. 350, 354, 364 S.E.2d 417, 420 (1988) (citing *Hoffman v. Truck Lines, Inc.*, 306 N.C. 502, 505, 293 S.E.2d 807, 809 (1982)). Therefore, this Court " 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. Th[is] [C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (quoting *Anderson*, 265 N.C. at 434, 144 S.E.2d at 274). With these as our guiding principles, we now address defendants-appellants' assignments of error.

Defendants have asserted forty-eight assignments of error relating to three issues: (1) whether plaintiff's 2 June 2003 motor vehicle accident "arose out of" his employment with defendant-employer; (2) whether plaintiff's initial head injury and later subdural hematoma were the result of the 2 June 2003 motor vehicle accident; and (3) whether plaintiff's second stroke and resulting medical disability were the result of the 2 June 2003 motor vehicle accident. Defendants failed to present arguments addressing Assignments of Error 3 and 4 regarding Finding of Fact 4, as well as Assignments of Error 43 through 48 regarding Conclusions of Law 4, 5, 6, and the Commission's Award. These assignments of error are deemed abandoned. N.C.R. App. P. 28(a) (2007) ("Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned.").

I.

[1] Defendants first contend the Industrial Commission erred when it concluded that plaintiff's 2 June 2003 motor vehicle accident arose out of his employment with defendant-employer. We disagree.

"In order to be compensable under the Act, an employee's injury by accident must arise out of and in the scope of employment." *Rackley v. Coastal Painting*, 153 N.C. App. 469, 472, 570 S.E.2d 121, 123 (2002). Our Supreme Court has held that "a determination that an injury arose out of and in the course of employment is a mixed question of law and fact, 'and where there is evidence to support the Commissioner's findings in this regard, [the appellate court is] bound by those findings.' " *Rose v. City of Rocky Mount*, 180 N.C. App. 392, 396, 637 S.E.2d 251, 254 (2006) (quoting *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980)) (alteration in original).

" 'In the course of the employment' is construed to refer to the time, place and circumstances under which the accident occurs." *Warren v. City of Wilmington*, 43 N.C. App. 748, 750, 259 S.E.2d 786, 788 (1979) (citing *Hinkle v. Lexington*, 239 N.C. 105, 79 S.E.2d 220 (1953)). " 'Arising out of' the employment is construed to require that the injury be incurred because of a condition or risk created by the job." *Id.* In other words, "[t]he basic question [to answer when examining the arising out of requirement] is whether the employment was a contributing cause of the injury." *Roberts*, 321 N.C. at 355, 364 S.E.2d at 421 (citing *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 557, 117 S.E.2d 476, 479 (1960)).

"It is well established in North Carolina that the Workers' Compensation Act should be liberally construed and that [w]here any reasonable relationship to employment exists, or employment is a contributory cause, th[is] [C]ourt is justified in upholding the award as arising out of employment." *Hollin v. Johnston Cty. Council on Aging*, 181 N.C. App. 77, 84, 639 S.E.2d 88, 93 (2007) (quoting *Kiger v. Bahnson Service Co.*, 260 N.C. 760, 762, 133 S.E.2d 702, 704 (1963)) (first alteration in original) (internal quotation marks omitted). The employment-related accident " 'need not be the sole causative force to render an injury compensable.' " *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003) (quoting *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 106 (1981)).

Our appellate courts have stated that "[w]hen the employee's idiopathic condition is the sole cause of the injury, the injury does not arise out of the employment." *Mills v. City of New Bern*, 122 N.C. App. 283, 285, 468 S.E.2d 587, 589 (1996) (citing *Vause v. Vause Farm Equip. Co.*, 233 N.C. 88, 92-93, 63 S.E.2d 173, 176 (1951)). However, "[t]he injury *does arise out of* the employment if the idiopathic condition of the employee *combines with* 'risk[s] attributable to the employment' to cause the injury." *Id.* (quoting *Hollar v. Montclair Furniture Co.*, 48 N.C. App. 489, 496, 269 S.E.2d 667, 672 (1980)) (emphasis added) (second alteration in original). "[I]f the employment 'aggravate[s], accelerate[s], or combine[s] with the [employee's preexisting] disease or infirmity to produce' the injury, that injury arises out of the employment." *Id.* (fifth alteration in original). In other words, " 'where the accident and resultant injury arise out of *both* the idiopathic condition of the workman and hazards incident to the employment, the employer is liable. But not so where the idiopathic condition is the *sole cause* of the injury.' " *Vause*, 233 N.C. at 92-93, 63 S.E.2d at 176 (emphasis added).

"[W]hen an employee's duties require him to travel, the hazards of the journey are risks of the employment." *Roberts*, 321 N.C. at 359, 364 S.E.2d at 423 (citing *Hinkle v. Lexington*, 239 N.C. 105, 79 S.E.2d 220 (1953)). " '[A]n injury caused by a highway accident is compensable if the employee at the time of the accident is acting in the course of his employment and in the performance of some duty incident thereto.' " *Id.* (quoting *Hardy v. Small*, 246 N.C. 581, 585, 99 S.E.2d 862, 866 (1957)).

In the present case, the parties stipulated that the accident occurred "in the course of" plaintiff's employment with defendant-employer. The Commission found that plaintiff suffered a syncopal episode (i.e., blackout) while operating defendant-employer's truck, after which time the truck ran off the road, hit a light pole, and flipped over. Plaintiff was not "off-duty and engaged in a purely personal errand when the accident occurred." *Chavis v. TLC Home Health Care*, 172 N.C. App. 366, 385, 616 S.E.2d 403, 417 (2005) (Tyson, J. dissenting). Plaintiff did not get a warning of an approaching seizure and purposefully "pull[] the truck off the road, park[] it, and [lie] down on the seat in a place of apparent safety, with all of the ordinary dangers of his employment suspended and in repose." *Vause*, 233 N.C. at 98, 63 S.E.2d at 180. In this case, plaintiff was returning to defendant-employer's place of business after making a delivery in defendant-employer's pickup truck. The Commission concluded:

> The hazards or risks incidental to plaintiff's employment were a contributing proximate cause of plaintiff's accident and resulting injuries. The risk of driving a truck aggravated, accelerated, or combined with plaintiff's pre-existing condition to produce his injury. Thus, plaintiff's injuries arose out of and in the course of his employment, as they were the result of his June 2, 2003 work-related accident.

(Citations omitted.) The Commission's conclusion was supported by its findings of fact and correct as a matter of law.

In support of their contention that plaintiff's accident did not "arise out of" his employment, defendants alternatively argue that the Commission erroneously relied on *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 117 S.E.2d 476 (1960), and argue that plaintiff's injury does not survive an "increased risk" analysis. Defendants contend that *Allred* relied on the "positional risk" analysis to support its conclusion that the plaintiff's injury was compensable as "arising out of" his employment—a doctrine now rejected by our courts and replaced by

the "increased risk" analysis. While "[w]e agree that the 'increased risk' test and not the 'positional risk' rule is the law of the State," we disagree with defendants' contention that the Commission erroneously applied the latter. *Rose*, 180 N.C. App. at 401, 637 S.E.2d at 257.

Our Supreme Court has relied on the "increased risk" analysis to "determine whether injuries arose out of the claimant's employment" primarily "where an employee interrupts his work for his employer to engage in personal conduct unrelated to the employer's business." *Dodson v. Dubose Steel, Inc.*, 159 N.C. App. 1, 13, 582 S.E.2d 389, 397 (2003) (Steelman, J., dissenting), *rev'd per curiam*, 358 N.C. 129, 591 S.E.2d 548 (2004) (for reasons stated in the concurring and dissenting opinion of Steelman, J.). Here, since plaintiff was returning to defendant-employer's place of business after making a delivery on behalf of defendant-employer in defendant-employer's pickup truck at the time of the accident, an increased risk analysis is not relevant.

We also disagree with defendants' inference that our State's acceptance of the increased risk doctrine precludes the Commission from relying on *Allred* in its conclusions of law. This Court has determined:

> In *Allred*, the claimant was driving a truck for work when he blacked out and hit a pole. The fact that the plaintiff blacked out due to an idiopathic condition and that he was driving a truck for work at the time was sufficient to support a finding that the accident arose out of claimant's employment. No findings were required that the claimant's injury was made more severe or caused solely by the fact that he was driving a truck.

Rackley, 153 N.C. App. at 474, 570 S.E.2d at 125 (citation omitted). We believe the facts of the present case are consistent with this interpretation of *Allred*. Therefore, we affirm the Commission's ruling that plaintiff's 2 June 2003 motor vehicle accident "arose out of" his employment with defendant-employer and find no error.

II.

[2] Defendants next contend that the Industrial Commission erred when it concluded that plaintiff's initial head injury and later subdural hematoma were the result of the 2 June 2003 motor vehicle accident. Again, we must disagree.

Viewed in the light most favorable to plaintiff, the evidence showed that the 2 June 2003 CT scan found the following: "There is

increased attenuation identified adjacent to the superior portion of the left sylvian fissure. This finding may possibly represent a cerebral contusion." The 4 June 2003 MRI brain imaging found, in part: "The head CT previously performed demonstrated a focus of increased attenuation in the left parietal lobe. A small contusion cannot be excluded." This MRI also found that there was "[n]o evidence of left parietal lobe contusion." Since both findings were included in the same MRI report, the Commission was correct to allow for the possibility that a small contusion existed. The Discharge Summary further noted that plaintiff was involved in a motor vehicle accident which "le[d] to closed head trauma with injuries sustained to the left side of his head and a left ear laceration."

Additionally, during his 3 June 2003 examination of plaintiff at CCH, neurologist and neurophysiologist Dr. Deochand testified that plaintiff had "a scalp tenderness over the left temporal parietal region"—a finding that he testified was "significant." He also testified that the 4 June 2003 MRI "could not exclude any contusion over the left parietal region."

Neurosurgeon Dr. Margraf testified, "I think if the CAT scan suggested a small contusion, it's possible that there very well could have been a small contusion there. And the best way to follow that up would be with another CAT scan, not with a[n] MRI scan" because "[a]n MRI scan is very poor at visualizing blood, acute blood, particularly if it's just a small amount . . . [a]nd, really, CAT scan is best." Dr. Margraf further testified that "the MRI scan is maybe not as sensitive at picking up a small amount of acute blood, such as a small contusion, on the convexity."

Next, the Commission found that the "greater weight of the medical evidence" and the testimony of Dr. Margraf and Dr. Freedman supported a finding that plaintiff's subdural hematomas were related to the accident.

Dr. Mitchell Freedman, a board certified neurologist, testified that the type of head trauma plaintiff sustained in the 2 June 2003 motor vehicle accident could facilitate the development of subdural hematomas over a period of a month or two. Dr. Freedman further testified that it was quite "common" that an MRI performed two days following a head trauma would not reflect any evidence of subdural hematomas that may have been facilitated by that head trauma. He testified that subdural hematomas represent a "very slow leak of blood" and develop "very, very insidiously and very slowly." He said

that "very often" the patients who suffer from subdural hematomas have trauma which dates back to "one, two or even three months before the subdurals were found." Dr. Freedman testified:

> Assuming there is no other history of other head injuries, then it is more likely than not that the motor vehicle accident was the cause of the subdural. There does not appear in the medical record to be any other specific head injuries of sufficient magnitude to override or to trump that issue as the cause of the subdural.

Dr. Freedman conceded that subdural hematomas can occur spontaneously, but concluded:

> [I]f you have a man who's had a closed head injury and two months later develops a subdural, . . . and there's no other interceding explanation, clotting disorders, medical problems, other trauma, then I think you have to say that it is more likely than not that the motor vehicle accident was the cause of the subdural.

On cross examination, Dr. Freedman reiterated, "[H]ere's a guy that's in a car accident, hits a light pole. He has a laceration of the ear and then two months later has a subdural. It's kind of a no-brainer."

Dr. Margraf testified that he ordered a CT scan of plaintiff when he first saw him on 8 August 2003. He testified that the CT scan showed that plaintiff had bilateral subdural hematomas involving both the left and right side, where the right subdural hematoma was larger. Dr. Margraf recommended a craniotomy on plaintiff's right side, based on the increased size of the right subdural hematoma, in which he would "start with a relatively simple burr hole for evacuation of the subdural, which is a small removal of bone . . . opening the covering around the brain and draining the subdural liquid to release the pressure." During the surgery, Dr. Margraf found "crank case oil" or dark blood which he described as "a sign of a more chronic subdural, meaning two weeks . . . or older." When asked whether Dr. Margraf had an opinion based on a reasonable degree of medical certainty as to the cause of plaintiff's bilateral subdural hematomas, Dr. Margraf testified, "I believe that the subdurals, given the history, are related to the traumatic event to the head[—i.e., the motor vehicle accident—]which [plaintiff] sustained on . . . [2] June 2003." He testified that it was not unusual that subdural hematomas would not be evident on an MRI scan two days post trauma. Dr. Margraf testified that plaintiff likely had a slowly progressing chronic subdural

hematoma, which could be tolerated for some period of time until the increase in pressure caused him to become symptomatic.

Defendants also rely on *Young v. Hickory Business Furniture*, 353 N.C. 227, 538 S.E.2d 912 (2000), to argue that there was no competent evidence to find causation of plaintiff's subdural hematomas since the cause could not be definitively established. In *Young*, plaintiff claimed she developed fibromyalgia as a result of an employment-related injury. Fibromyalgia is "an illness or condition of unknown etiology" for which "there were no physical tests that one [could] perform, or testing of any kind with regard to chemical abnormality in the body, which would indicate whether a person has fibromyalgia." *Young*, 353 N.C. at 231, 538 S.E.2d at 915. When considering this issue, the Court noted:

> Due to the complexities of medical science, particularly with respect to diagnosis, methodology and determinations of causation, this Court has held that "where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." However, when such expert opinion testimony is based merely upon speculation and conjecture, it can be of no more value than that of a layman's opinion. As such, it is not sufficiently reliable to qualify as competent evidence on issues of medical causation.

Id. at 230, 538 S.E.2d at 915 (citation omitted). In *Young*, the Court found that, because plaintiff's treating rheumatologist was not only unable to determine the cause of plaintiff's fibromyalgia, but also could not definitively diagnose plaintiff with fibromyalgia, the testimony—which was the only evidence offered in support of plaintiff's claim—was "based entirely upon conjecture and speculation." *Id.* at 231, 538 S.E.2d at 915. We do not believe *Young* is analogous to the present case.

Unlike fibromyalgia, there are physical tests which can be performed to indicate whether a person has subdural hematomas, and one of those tests was performed in the present case. The 8 August 2003 MRI clearly indicated that plaintiff had "obvious bilateral subdural hematomas present" which "appear[ed] to be subacute in nature but age [was] indeterminate." Testimony was presented to the Commission that a common cause of subdural hematomas is head trauma like the one suffered by plaintiff in the 2 June accident.

However, defendants contend that testimony from some experts indicated that it was possible that plaintiff could have developed the subdural hematomas as a result of prior undiagnosed small strokes, spontaneous hemorrhaging due to plaintiff's treatment with Plavix following the 2 June 2003 accident, or due to an intervening fall between plaintiff's 4 June MRI and 8 August MRI.

This Court has held that "[s]o long as there is some evidence of substance which directly or by reasonable inference tends to support the findings, this Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary." *Rose*, 180 N.C. App. at 400, 637 S.E.2d at 257 (internal quotation marks omitted). Therefore, based on plaintiff's medical records and the testimony of treating physicians, we hold there is sufficient evidence to support the Commission's findings that plaintiff's initial head injury and later subdural hematoma were the result of the 2 June 2003 motor vehicle accident. We find no error and affirm the Commission's findings.

III.

[3] Finally, defendants contend that the Commission erred when it determined that plaintiff's second stroke and resulting medical disability were the result of the 2 June 2003 motor vehicle accident. Defendants contend that plaintiff's subdural hematoma was diagnosed and treated successfully by Dr. Margraf with the 9 August 2003 craniotomy and evacuation and drainage of the subdural hematoma.

The Commission found that "the August 9, 2003 surgery performed by Dr. Margraf lessened plaintiff's disability, helped effect a cure to his subdural hematomas, and gave him relief from that condition." However, Dr. Margraf testified and the Commission found that, although plaintiff's initial recovery went well, a few days after the craniotomy, plaintiff suffered increased confusion and "began to exhibit some ballistic movements involving the right lower extremity and, to some extent, the right upper extremity." The 15 August 2003 MRI following the 9 August craniotomy "showed a persistence of his bilateral subdural hematomas, although the right subdural was significantly smaller following the craniotomy." Dr. Margraf testified that "the most obvious conclusion" for the cause of the "new infarct [or stroke] could be related to the subdural collection and the shift and pressure that [plaintiff] had associated with the subdural. That would be number one on my list." Finally, Dr. Margraf testified that the subdural hematoma was a "significant contributing factor" to the stroke

suffered by plaintiff on 15 August 2003. The Commission gave "greater weight" to the expert opinion of Dr. Margraf and found that, "[b]ased on the greater weight of the medical evidence, . . . plaintiff's subdural hematomas, resulting medical problems, functional deterioration, and disability are all related to the June 2, 2003 motor vehicle accident that arose out of and in the course of plaintiff's employment."

Therefore, we hold there is sufficient evidence to support the Commission's findings that plaintiff's second stroke and resulting impairment were the result of the 2 June 2003 motor vehicle accident. We affirm the Commission's Opinion and Award.

Affirmed.

Judges STROUD and ARROWOOD concur.

STATE OF NORTH CAROLINA v. JAVONNIE JAMES TATE

No. COA07-314

(Filed 18 December 2007)

1. Sentencing— restitution—consideration of financial resources—ability to pay

The trial court did not err in a robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by a felon case by ordering defendant to pay restitution in the amount of $40,588.60 even though defendant contends it failed to consider defendant's resources as required by N.C.G.S. § 15A-1340.36(a), because: (1) when there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal; (2) although the trial court did not make specific findings of fact concerning defendant's ability to pay restitution, such findings are not required under N.C.G.S. § 15A-1340.36(a), and the record revealed that the trial court considered defendant's financial ability to pay restitution; (3) the trial court was aware of defendant's age, employment situation, and living arrangements; and (4) defendant failed to present evidence showing that he would not be able to make the required restitution payments.

2. Constitutional Law— right to confrontation—hearsay—nontestimonial evidence

The trial court did not err in a robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by a felon case by allowing various law enforcement officers to testify about the assailant's and defendant's shared nickname of "Fats," when such information was provided to the officers by a corporal who did not testify at trial, because: (1) contrary to defendant's contention, the statements do not constitution hearsay which is a threshold condition for a Crawford and Confrontation Clause analysis; (2) the testimony concerning the corporal's identification of "Fats" as defendant was not offered for the truth of the matter asserted, but rather to explain subsequent actions undertaken by officers during the course of the investigation including defendant's inclusion in photographic lineups presented to two victims who both identified defendant as the assailant; and (3) the evidence did not constitute testimonial evidence in violation of defendant's rights under the Confrontation Clause.

Judge HUNTER concurring.

Appeal by defendant from judgments entered 28 July 2007 by Judge A. Baddour in Durham County Superior Court. Heard in the Court of Appeals 18 September 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Donald W. Laton, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

JACKSON, Judge.

Javonnie James Tate ("defendant") appeals from a judgment entered upon convictions for robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by a felon. For the reasons stated herein, we hold no error.

The evidence tended to show that at approximately 4:00 a.m. on 8 September 2005, Steven Lamont Thomas ("Thomas") and Adam Bagby ("Bagby") were standing outside a liquor house in Thomas' neighborhood. Defendant, whom Thomas and Bagby recognized and knew by the nickname "Fats," approached Thomas and demanded

that he relinquish the necklace that he was wearing. Defendant brandished a gun, and Thomas removed the necklace. After taking the necklace from Thomas, defendant shot Thomas. Thomas and Bagby then "took off and started running up the street," and defendant continued shooting at them. Bagby and Thomas hid between houses, and Bagby observed that Thomas "just had a whole bunch of blood coming out of him."

When Durham police officers arrived, Bagby directed them to Thomas' location. Officer N.J. Hamilton ("Officer Hamilton") found Thomas "sitting on the side of [a] house bleeding from his abdomen." Both Bagby and Thomas informed Officer Hamilton that Fats had shot Thomas. When Officer A.C. Rogers ("Officer Rogers") arrived, he found Thomas lying on the ground, bleeding from his stomach, in a significant amount of pain, and "in a chaotic state." Officer Rogers then spoke with several witnesses, including Monica Pettiford, who explained that "some individuals had pulled up in a black sedan, stepped out of the car, interacted with the—the victim. And the shooter, in particular, had stepped out of the vehicle, interacted with the victim, shot him. Then got back into the vehicle and the vehicle fled."

Investigator Michele Soucie ("Investigator Soucie") arrived at the scene of the shooting and spoke first with Officer Hamilton, who informed her that Thomas "had stated that Fats was the one who had shot him." During her investigation, Investigator Soucie saw to the recovery of Thomas' bloody clothes, other items of Thomas' personal property, four shell casings, and a spent round, which was located several feet from Thomas' hat and which appeared to have blood on it. Consistent with the physical evidence, Thomas testified at trial that he was shot four times: "Got two hole coming out my back. Shot four times. And another one right here that came out my leg and took one of my [testicles]."

After collecting physical evidence from the scene, Investigator Soucie spoke with Lieutenant H.D. Alexander, Jr. ("Lieutenant Alexander"), requesting identification of "Fats." Lieutenant Alexander consulted Corporal Pearsall of the Durham City Police Department gang unit. Corporal Pearsall, who did not testify at trial, advised Lieutenant Alexander that defendant had the nickname of "Fats." After locating photographs of defendant, Investigator Vernon Harris ("Investigator Harris") prepared a photographic lineup at Investigator Soucie's request. At the hospital, Investigator Harris showed the lineup to Thomas, and Thomas identified defendant's

photograph as that of the assailant. On 22 September 2005, Investigator Harris showed Bagby the photographic lineup at the police station, and Bagby also identified defendant's photograph as that of the assailant.

On 12 December 2005, defendant was indicted for robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by a felon. On 28 July 2006, a jury found defendant guilty of all charges. The trial court consolidated the assault and robbery charges and sentenced defendant to 100 to 129 months imprisonment, to be followed by a sentence of twelve to fifteen months for the possession of a firearm conviction. Defendant gave timely notice of appeal.

[1] Defendant first contends that the trial court erred in ordering him to pay restitution in the amount of $40,588.60 on the grounds that the court failed to consider defendant's resources as required by North Carolina General Statutes, section 15A-1340.36(a). We disagree.

> Pursuant to section 15A-1340.36(a),
>
> [i]n determining the amount of restitution to be made, the court shall take into consideration the resources of the defendant including all real and personal property owned by the defendant and the income derived from the property, the defendant's ability to earn, the defendant's obligation to support dependents, and any other matters that pertain to the defendant's ability to make restitution, but the court is not required to make findings of fact or conclusions of law on these matters. The amount of restitution must be limited to that supported by the record, and the court may order partial restitution when it appears that the damage or loss caused by the offense is greater than that which the defendant is able to pay. . . .

N.C. Gen. Stat. § 15A-1340.36(a) (2005). Although section 15A-1340.36(a) does not delineate the burdens of proof with respect to an award of restitution, we agree with the analogous federal provision:

> Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the

> financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

18 U.S.C. § 3664(e); *accord State v. Riley*, 167 N.C. App. 346, 349, 605 S.E.2d 212, 215 (2004) ("Because [the defendant] failed to present evidence showing that she would not be able to make the required restitution payments, we find no error.").

In reviewing restitution awards, "the amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing. However, when . . . there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal." *State v. Cousart*, 182 N.C. App. 150, 154, 641 S.E.2d 372, 375 (2007) (internal quotation marks, citations, and alterations omitted). Additionally, we find a decision by the United States Court of Appeals for the Second Circuit instructive:

> The decision to order restitution is "a delicate balancing of diverse, sometimes incomparable factors, some of which not only lack certainty but may indeed be based on mere probabilities, expectations, guesswork, even a 'hunch.' " Because of the nuanced nature of the decision to impose restitution it makes little sense for an appellate court, significantly more removed from the case than the [trial] court, to scrutinize the decision closely. *A [trial] court must be given latitude in the formation of restitution orders in order to protect the victim's interests.*

United States v. Porter, 90 F.3d 64, 68 (2d Cir. 1996) (emphasis added) (quoting *United States v. Atkinson*, 788 F.2d 900, 902 (2d Cir. 1986)); *see also United States v. Fuentes*, 107 F.3d 1515, 1534 (11th Cir. 1997) ("This court takes the speculative nature of a sentencing court's prediction of an indigent defendant's future earnings into account by reviewing such determinations with a deferential standard." (citing *Porter*, 90 F.3d at 68)).[1]

In the case *sub judice*, defendant filed an Affidavit of Indigency, which provided that although he was unemployed, he also had no

1. The federal provision governing restitution factors echoes North Carolina General Statutes, section 15A-1340.36(a). Like our state trial courts, a federal district court must take into consideration when ordering restitution the defendant's (1) financial resources and other assets, (2) projected earnings and other income, and (3) any financial obligations, including obligations to dependents. *See* 18 U.S.C. § 3664(f)(2).

expenses or liabilities. The trial court also heard from defendant's counsel that

> [defendant] is 20 years old. He has lived in Durham at this point for approximately nine, ten years. He does have one child. Prior to him being arrested, [defendant] was working. He was working part-time at Duke University, if I'm not mistaken. He does have support in the community. His mother is present. His child's mother is present, as well.
>
> . . . .
>
> I would also request the Court to consider recommending work release, considering the large amount of restitution that's going to be required for this particular case . . . .

The trial court asked defendant twice if he wished to add anything, and defendant shook his head both times. The trial court then sentenced defendant, specifically noting that "a condition of work release is that [defendant] pay restitution." Although the trial court did not make specific findings of fact concerning defendant's ability to pay restitution, such findings are not required, *see* N.C. Gen. Stat. § 15A-1340.36(a) (2005), and it is clear from the record that the trial court considered defendant's financial ability to pay restitution.

The cases relied upon by defendant are readily distinguishable from the instant case. First, defendant cites to *State v. Smith*, in which this Court noted that "[t]he trial court did not consider *any* evidence of defendant's financial condition. The trial judge stated that he did not know whether defendant had a job." *Smith*, 90 N.C. App. 161, 168, 368 S.E.2d 33, 38 (1988) (emphasis added), *aff'd*, 323 N.C. 703, 374 S.E.2d 866 (1989) (per curiam). Conversely, the trial court in the case *sub judice* was aware of defendant's age, employment situation, and living arrangements. *See Riley*, 167 N.C. App. at 349, 605 S.E.2d at 215 (distinguishing *Smith* and noting that in *Smith*, "the judge did not even know whether the defendant was employed."). Defendant also relies upon *State v. Hayes*, in which the trial court ordered restitution in the amount of $208,899.00, notwithstanding

> evidence which showed that [the defendant] (1) earns approximately $ 800.00 a month bagging groceries and stocking food at Harris Teeter, (2) pays approximately $ 350.00 per month in child support, (3) lives with his mother and shares a car with her, (4) is deaf in one ear and hard of hearing in the other, (5) has recently

completed bankruptcy proceedings, and (6) has substantial medical problems, including a recent brain tumor.

Hayes, 113 N.C. App. 172, 174-75, 437 S.E.2d 717, 719 (1993). On appeal, this Court held that "common sense dictates that this defendant will be unable to pay this amount." *Id.* at 175, 437 S.E.2d at 719. Unlike the defendant in *Hayes*, however, defendant in the instant case "failed to present evidence showing that []he would not be able to make the required restitution payments." *Riley*, 167 N.C. App. at 349, 605 S.E.2d at 215 (distinguishing *Hayes*). The trial court twice asked defendant if he wished to add anything to what his counsel stated with respect to his financial situation. Defendant declined the trial court's invitations, and we cannot conclude that the record demonstrates and that "common sense dictates" that defendant is unable to pay $40,588.60 in restitution as ordered by the trial court. The record demonstrates that the trial court properly considered defendant's financial ability to pay restitution, and therefore, the trial court complied with the requirements under section 15A-1340.36(a). Accordingly, defendant's assignment of error is overruled.

[2] Defendant next contends that the trial court erred in allowing various law enforcement officers to testify about the assailant's and defendant's shared nickname of "Fats," when such information was provided to the officers by Corporal Pearsall, who did not testify at trial. Defendant argues that the admission of such testimony was inadmissible hearsay and violated his rights under the Confrontation Clause. We disagree.

"It is well-settled that *de novo* review is ordinarily appropriate in cases where constitutional rights are implicated." *State v. Thorne*, 173 N.C. App. 393, 396, 618 S.E.2d 790, 793 (2005) (citing *Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 338, 554 S.E.2d 331, 332 (2001)). "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2005). Additionally, to the extent defendant failed to object at trial to portions of testimony challenged on appeal, defendant assigns plain error to the admission of such testimony. 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." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485

U.S. 1036, 99 L. Ed. 2d 912 (1988). Before we determine whether or not to engage in plain error analysis, we first must determine whether the admission of the testimony constitutes error. *See State v. Cummings*, 361 N.C. 438, 470, 648 S.E.2d 788, 807 (2007) ("[B]efore engaging in plain error analysis it is necessary to determine whether the instruction complained of constitutes error.").

"Under the Confrontation Clause of the Sixth Amendment, a defendant is guaranteed the right to effectively cross-examine a witness . . . ." *Thorne*, 173 N.C. App. at 396, 618 S.E.2d at 793 (citing *United States v. Abel*, 469 U.S. 45, 50, 83 L. Ed. 2d 450, 456 (1984)). In *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), the United States Supreme Court

> held that where testimonial evidence is at issue, it is only admissible based on a finding that the witness is unavailable for trial and that the defendant has had a prior opportunity for cross-examination. Where non-testimonial evidence is involved, however, the ordinary rules of evidence apply in regards to admissibility.

State v. Ferebee, 177 N.C. App. 785, 788, 630 S.E.2d 460, 462 (2006) (citing *Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203). "Statements are testimonial if they were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *State v. Sutton*, 169 N.C. App. 90, 96, 609 S.E.2d 270, 275 (internal quotation marks and citation omitted), *disc. rev. denied*, 359 N.C. 642, 617 S.E.2d 658 (2005). Once this Court determines that a statement was testimonial, "[w]e [then] must determine . . . whether the trial court properly ruled the declarant was unavailable[] and . . . whether defendant had an opportunity to cross-examine the declarant." *State v. Allen*, 171 N.C. App. 71, 74-75, 614 S.E.2d 361, 364-65 (internal quotation marks and citation omitted), *appeal dismissed and disc. rev. denied*, 360 N.C. 66, 621 S.E.2d 878 (2005).

Here, Investigator Soucie testified that Lieutenant Alexander advised her "about Fats's identity as being Javonnie Tate," and defendant objected on hearsay grounds. The trial court overruled the objection but issued a limiting instruction, instructing the jury to "consider that statement for corroborative purposes only." Investigator Soucie also testified, without objection, that she spoke directly with Corporal Pearsall "to corroborate the identity of Fats" and that Corporal Pearsall advised her that "Fats" was defendant.

Lieutenant Alexander later testified, without objection, that (1) Investigator Soucie asked him if he had obtained any information "about who might have done the shooting"; (2) he informed Investigator Soucie that he had been given a nickname of "Fats" for the assailant; (3) he advised Investigator Soucie that defendant had the nickname "Fats"; and (4) he came by that information through Corporal Pearsall.

Defendant contends that "the information provided by Corporal Pearsall to [Lieutenant] Alexander and eventually to the jury through [Lieutenant] Alexander and Investigator Michele Soucie was testimonial in nature and thus violative of the Confrontation Clause." Contrary to defendant's contention, however, Corporal Pearsall's statements to Lieutenant Alexander and Investigator Soucie do not constitute hearsay, a threshold condition for a *Crawford* and Confrontation Clause analysis. *See Crawford*, 541 U.S. at 59 n.9, 158 L. Ed. 2d at 198 (noting that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted"). As our Supreme Court has explained, " '[i]f a statement is offered for any purpose other than that of proving the truth of the matter stated, it is not objectionable as hearsay.' " *State v. Chapman*, 359 N.C. 328, 354, 611 S.E.2d 794, 815 (2005) (quoting *State v. Irick*, 291 N.C. 480, 498, 231 S.E.2d 833, 844-45 (1977)).

This Court recently found no Confrontation Clause violation when testimony by detectives referenced statements made by a confidential informant on the grounds that "the evidence was introduced to explain the officers' presence at the location of a drug sale, not for the truth of the matter asserted." *State v. Wiggins*, 185 N.C. App. 376, 383, 648 S.E.2d 865, 871 (2007) (citing *State v. Leyva*, 181 N.C. App. 491, 500, 640 S.E.2d 394, 399 (2007)). Much as in *Leyva* and *Wiggins*, the testimony in the instant case—*i.e.*, the testimony concerning Corporal Pearsall's identification of "Fats" as defendant—was not offered for the truth of the matter asserted but rather to explain subsequent actions undertaken by police officers during the course of the investigation. As noted in the direct examination of Lieutenant Alexander:

> [PROSECUTOR]: So, basically, you were able to advise her who that person was?
>
> [LIEUTENANT ALEXANDER]: Yes.

[PROSECUTOR]: And she was able to direct her investigation?

[LIEUTENANT ALEXANDER]: Yes.

Specifically, the testimony at issue was offered to explain defendant's inclusion in the photographic lineups presented to Thomas and Bagby, in which Thomas and Bagby both identified defendant as the assailant. As clarified in the direct examination of Investigator Soucie:

[PROSECUTOR]: And based on your conversation with Corporal Pearsall, what, if anything, did you do?

[INVESTIGATOR SOUCIE]: Created a photo array—two photo arrays, actually, photo array A and B, one to show the victim and one to show the witness.

The testimony about which defendant complains did not constitute hearsay and, therefore, did not constitute testimonial evidence in violation of defendant's rights under the Confrontation Clause. Accordingly, defendant's assignment of error is overruled.

Defendant's remaining assignments of error not set forth in his brief are deemed abandoned. *See* N.C. R. App. P. 28(b)(6) (2006).

No Error.

Judge WYNN concurs.

Judge Hunter concurs in a separate opinion.

HUNTER, Judge, concurring.

I agree with the majority's holding and conclusions and write separately only to expand on the discussion of a defendant's ability to pay restitution in relation to the award granted by the trial court.

The statute governing the calculation of restitution states as follows:

In determining the amount of restitution to be made, the court *shall take into consideration* the resources of the defendant including all real and personal property owned by the defendant and the income derived from the property, the defendant's ability to earn, the defendant's obligation to support dependents, and any other matters that pertain to the defendant's ability to make restitution, but the court is not required to make findings of fact

> or conclusions of law on these matters. The amount of restitution must be limited to that supported by the record, and the court *may* order partial restitution when it appears that the damage or loss caused by the offense is greater than that which the defendant is able to pay. If the court orders partial restitution, the court *shall* state on the record the reasons for such an order.

N.C. Gen. Stat. § 15A-1340.36(a) (2005) (emphasis added). While the statute makes mandatory the court's consideration of a defendant's resources and ability to pay, it simply permits the court to order partial restitution where it appears the defendant cannot pay the full amount. That is, while the court is required to consider the defendant's ability to pay, it is *not* required to modify the restitution amount on that basis. Indeed, if it does so modify the amount, it is required to specifically state its justification for so doing.

Further, the purpose of ordering that an injured party be paid restitution is surely to make the victim whole[2] again in terms of economic loss. Although our case law does not explicitly state this purpose, a great many other states that have considered this concept have. *See*, *e.g.*, *Fore v. State*, 858 So. 2d 982, 985 (Ala. App. 2003) (" 'one of the purposes of restitution is to make the victim whole' "); *Dorris v. State*, 656 P.2d 578, 584 (Alaska App. 1982) ("the purpose of the restitution statute is to make the victim whole"); *State v. Reynolds*, 832 P.2d 695, 698 (Ariz. App. Div. 1 1992) ("a trial court is required to determine the full amount of the victim's loss to make the victim whole"); *Simmons v. State*, 205 S.W.3d 194, 197 (Ark. App. 2005) ("[t]he purpose of restitution is to make the victim whole with respect to the financial injury suffered as a result of the victim's crime") (emphasis omitted); *Cumhuriyet v. People*, 615 P.2d 724, 726 (Colo. 1980) ("[r]estitution . . . is intended to make the victim whole"); *Gonzalez v. State*, 948 So. 2d 892, 895 (Fla. 2007) ("the trial court is granted discretion in determining a restitution amount to make the victim whole"). The only way to truly make victims whole under this statute is to calculate the amount of restitution to reflect the victim's economic loss. Modifying that amount based on a defendant's ability to pay transfers focus from the damage done to the victim to the defendant's financial concerns.

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2. As in this Court's previous holdings, the term "whole again" here refers to remuneration for economic damages such as medical bills and loss of wages, not compensation for pain and suffering. *See*, *e.g.*, *State v. Wilson*, 158 N.C. App. 235, 241, 580 S.E.2d 386, 390 (2003) (concluding that "pain and suffering is an impermissible basis for restitution" under the applicable statutes).

Take for example a victim who is assaulted and has medical and expenses and loss of income totaling $50,000.00. At the time the restitution award is calculated, the defendant has zero or a token amount of assets or income. If the award is calculated based primarily on his ability to pay, the restitution award will be set at zero or, at best, a minor sum. Five years later, when the defendant is released from prison, he finds employment with an annual salary of $50,000.00, or inherits $500,000.00 from a relative, or otherwise obtains a substantial amount of money in a lump sum or steady stream. It would be patently unfair for the defendant to have all these assets but not allow the victim to recover from the defendant. The victim could theoretically sue to pursue those assets, but at that point the statute of limitations would have run; regardless, the victim should not have to again bring suit or risk losing her rights, given that she has already been to court when restitution was originally set in the criminal case.

Thus, the clear language of the statute and the policy reasons behind its creation both show that a defendant's ability to pay should be of secondary concern in calculating the amount of restitution to be paid. As such, I believe the best practice is for courts to calculate the amount of restitution based *primarily*, though not *solely*, on the victim's economic loss.

A restitution award based in large part on a defendant's ability to pay deprives the award of any semblance of actual restitution. I believe the legislature intended that courts should consider calculating restitution awards to reflect the full amount of economic damage done. If the courts focus on a defendant's ability to pay on the day of the judgment, most victims will receive little to no money as restitution. I do not interpret that to be the intent of the Legislature.

I agree with the majority that the federal statute 18 U.S.C. § 3664(e) is instructive on this point, providing as it does that "[t]he burden demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant." I believe further that the duty of the trial court is simply to consider all evidence presented by a defendant concerning his ability to pay, but not to seek out and demand that evidence where a defendant does not produce it.

This Court has on the same date produced two opinions[3] on this point of law. For the sake of clarity and consistency, I believe the

3. *See State v. Person*, 187 N.C. App. 512, 653 S.E.2d 560 (2007).

issue of restitution to a victim by the defendant merits review by our Legislature.

STATE OF NORTH CAROLINA v. CLYDE EDWARD SPENCER

No. COA07-522

(Filed 18 December 2007)

1. Larceny— sufficiency of evidence—testimony of coconspirators

The trial court did not err in a prosecution for breaking and entering, larceny, and other charges by denying defendant's motions to dismiss for insufficient evidence. The testimony of two indicted co-conspirators was sufficient to support defendant's convictions.

2. Larceny— county in which crime occurred—a matter of venue

The trial court did not err by denying defendant's motion to set aside a larceny conviction where the indictment alleged that the crime occurred in Cleveland County while the proof indicated that the crime occurred in Gaston County. The place for returning an indictment is a matter of venue, and the variance between the indictment and the proof is not material.

3. Appeal and Error— Rule 2—manifest injustice

Appellate Rule 2 was invoked to prevent manifest injustice and consider whether defendant could be convicted of both larceny and possession of the same stolen property.

4. Larceny— possession of stolen property and larceny—judgment arrested

Judgment was arrested on convictions for felonious possession of stolen property where defendant was also convicted of larceny of the same property.

5. Sentencing— prior record level—stipulation

Sufficient evidence existed to show that defendant stipulated to his prior record level pursuant to N.C.G.S. § 15A-1340.14(f)(1), and the trial court did not err by determining defendant to be a prior record level IV offender.

6. Sentencing— habitual felon—clerical error

While there was a clerical error in finding defendant to be a violent habitual felon, he was properly sentenced in the presumptive range and the error was not prejudicial.

7. Appeal and Error— preservation of issues—assignment of error abandoned—lack of evidence

An argument that defense counsel was ineffective because he failed to inform defendant about the possible maximum sentence was deemed abandoned where defendant did not present evidence tending to show that he was not fully informed.

Judge JACKSON concurs.

Appeal by defendant from judgments entered 16 November 2006 by Judge Karl Adkins in Cleveland County Superior Court. Heard in the Court of Appeals 15 November 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General E. Burke Haywood, for the State.

Richard E. Jester, for defendant-appellant.

TYSON, Judge.

Clyde Spencer ("defendant") appeals from judgments entered after a jury found him to be guilty of breaking and entering, larceny after breaking and entering, and felonious possession of stolen property in file 06-CRS-053923 and felony larceny and felonious possession of stolen property in file 06-CRS-053924. Defendant pled guilty to attaining habitual felon status in file 06-CRS-4758. We find no error in part, arrest judgment and vacate in part, and remand for resentencing and correction of clerical error.

I. Background

On 23 June 2006, Sidney Gary's ("Gary") and Lynn and Melanie Hayes' ("the Hayes") homes were broken into and several items were stolen. Eric Barnes ("Barnes"), a next door neighbor, notified Kings Mountain police officers after he had encountered a suspicious male asking to borrow his gas can. Barnes observed a different male walking in the rain, coming from the direction of the Hayes' home, wearing khaki shorts and no shirt. Shortly thereafter, the male "who [was] supposedly out of gas, crank[ed] his truck up." Barnes called the police and reported that there was a suspicious green Chevrolet truck

in the area. At approximately 8:30 p.m., Officer Taylor Myers ("Officer Myers") responded to the call. As Officer Myers proceeded to Crescent Hill Road, Officer Scott Bailey ("Officer Bailey") notified her that he had stopped the suspicious vehicle.

Subsequently, Officers Myers and Bailey received a second call stating an unknown subject, who was wearing khaki shorts and no shirt, was running through the yards of homes on Crescent Lane towards South Cansler Street. This area is less than a half of a mile from where Officer Bailey had stopped the suspicious vehicle. As Officer Myers proceeded toward that area, she saw Donald Bell ("Bell") standing outside in his yard. Bell advised Officer Myers a light in the Hayes' home was on, although the family was out of town. Bell also stated he had observed three suspicious subjects sitting in a green Chevrolet truck, stopped directly in front of the Hayes' home. Officer Myers and Bell went next door to investigate and discovered a broken window and a brick lying on the den floor. Officer Myers entered the Hayes' home and photographed each room.

Officer Bailey stopped the suspicious vehicle within a half block of the Hayes' home. Todd Bryan ("Bryan") and Judy Shinn ("Shinn") were the truck's only occupants. Bryan and Shinn both appeared to be under the influence of crack cocaine. After conducting a search of the vehicle, Officer Bailey recovered DVDs, CDs, a PlayStation, a jewelry box, a laptop computer, a green duffle bag, and a gas can. Officer Bailey ordered the truck towed to the police department where an inventory was taken of the vehicle's contents. (T 86, 108) Gary and the Hayes identified several items located in the truck as belonging to them.

Bryan and Shinn were arrested and taken into custody. At some point during the evening, Shinn stated to a police officer that they had left defendant behind at the scene. Bryan was charged with and pled guilty to two counts of possession of stolen property. Shinn was charged with and pled guilty to one count of possession of stolen property.

On 2 July 2006, Officer Kevin Putnam ("Officer Putnam") responded to a call regarding a break-in at the home of Amy Beam ("Beam") in Gastonia. Someone had broken the glass in her rear door, entered Beam's home, and stole several items including a purse, a checkbook, and her identification card. The vehicle involved in the break-in was identified as an older model white Chevrolet or GMC

truck. On 5 July 2006, Officer Putnam spotted the vehicle parked in a driveway. Defendant and another occupant were inside the vehicle. Defendant was arrested and taken into custody.

Bryan testified for the State pursuant to his plea agreement. Bryan stated he had met defendant in a drug rehabilitation program. In the last week of May 2006, defendant asked Bryan to give him a ride to his parent's home in Shelby. Bryan and defendant "ended up in Gastonia" where they began a two-week drug "binge." Bryan testified that during this "binge," he and defendant stole various items and traded the property for drugs. Bryan and defendant met Shinn at a drug house the day the crimes in question occurred.

On the evening of 23 June 2006, Bryan dropped defendant off in a Kings Mountain neighborhood, parked his truck up the street, and waited for defendant to return. Bryan testified it was understood that he would "drop[] [defendant] off, [defendant] would break into a house, [Bryan] would come pick him up and [they] would get the stuff, take it and sell it." While awaiting defendant's return, Bryan's truck ran out of gas. After searching for gas for thirty to forty-five minutes, Bryan saw defendant walking down the street at the same time a police officer was patrolling the area. Bryan entered his vehicle and attempted to leave the scene, but Officer Bailey initiated a stop. Bryan testified he did not see defendant put property in his truck and did not know how the Hayes' property ended up there. Bryan testified defendant was wearing khaki shorts and no shirt during the night the crimes in question occurred.

Bryan also testified while he and defendant were in jail, defendant asked if Bryan "would take [the] charges for him." Initially, Bryan agreed and wrote a statement confessing that he had broken into Gary's and the Hayes' homes. Bryan later recanted the earlier confession.

Shinn also testified for the State pursuant to her plea agreement. Shinn stated she had met Bryan at a friend's home and asked him to "give her a ride" in exchange for gas money. Bryan and Shinn drove to a store to meet defendant. Defendant had purchased a "crack rock" and "split it three ways." Bryan, Shinn, and defendant drove to a home on Ozark Avenue in Gaston County. Shinn testified Bryan and defendant entered the home and emerged with DVDs, a PlayStation, a camera and video games. Defendant stated the items belonged to him, and he had to take them to Kings Mountain.

The group then drove to Kings Mountain. Shinn testified Bryan took defendant to a home where he knocked on the door for approximately twenty minutes. Defendant walked around to the back of the home and tripped a security alarm. Bryan attempted to leave the area, but ran out of gas. Shinn testified she did not see defendant put property in Bryan's truck while it was parked in the Kings Mountain neighborhood.

Gary testified that he discovered his home had been broken into in the early morning hours of 23 June 2006. The perpetrators of the crime had gained access to his home through the window in his children's room. Gary also testified that he did not know Bryan, Shinn, or defendant and he had not given anyone permission to enter his home and remove his possessions.

Defendant entered a plea of not guilty to all charges. (T 4) In file 06-CRS-53923, the jury found him to be guilty of: (1) breaking and entering the Hayes' home; (2) larceny after breaking and entering the Hayes' home; and (3) felony possession of stolen property from the Hayes' home. In file 06-CRS-53924, the jury found defendant to be guilty of: (1) felonious larceny from Gary's home and (2) felonious possession of stolen property from Gary's home. Defendant pled guilty to attaining habitual felon status.

The trial court consolidated all counts on the individual indictments and entered one judgment on each indictment. In file 06-CRS-53923, defendant was sentenced to an active minimum term of 133 to a maximum of 169 months imprisonment. In file 06-CRS-53924, defendant was sentenced to an active minimum term of 107 to a maximum of 138 months imprisonment, to be served consecutively with the sentence above. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) denying his motions to dismiss; (2) incorrectly calculating his prior record level; and (3) finding him to be a violent habitual felon. Defendant also argues he received ineffective assistance of counsel.

III. Motions to Dismiss

Defendant argues the trial court erred by denying his motions to dismiss at the close of the State's evidence and again at the close of all the evidence. We disagree.

A. Standard of Review

This Court has stated:

> The standard for ruling on a motion to dismiss is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

State v. Wood, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005) (internal citations and quotations omitted).

B. Sufficiency of the Evidence

[1] Defendant argues the trial court erred by denying his motions to dismiss based on insufficiency of the evidence. Defendant's only argument pertaining to this assignment of error is "[t]he State provided only the testimony of indicted co-conspirators implicate [sic] [defendant] for the crimes in this case."

"It is well settled in North Carolina that uncorroborated accomplice testimony is sufficient to sustain a conviction." *State v. Wallace*, 104 N.C. App. 498, 503, 410 S.E.2d 226, 229 (1991), *disc. rev. denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992). Bryan and Shinn testified consistently regarding defendant's participation in the crimes committed. This accomplice testimony is sufficient to support the denial of defendant's motions to dismiss. The trial court did not err by denying defendant's motions. *Wood*, 174 N.C. App. at 795, 622 S.E.2d at 123. This assignment of error is overruled.

C. Bill of Indictment

[2] Defendant argues "there was no proof that one of the crimes occurred in Cleveland County." Defendant asserts his conviction of larceny in file 06-CRS-053924, must fail because the indictment alleged the crime occurred in Cleveland County, while the proof at trial indicated the crime actually occurred in Gaston County. We disagree.

N.C. Gen. Stat. § 15A-631 (2005) states, "the place for returning a presentment or indictment is a matter of venue and not jurisdiction." This Court has held "[q]uestions of venue . . . are waived by the failure to make a pretrial motion, even if the problem of venue arises from a variance between the indictment and the proof at trial." *State v. Brown*, 85 N.C. App. 583, 587-88, 355 S.E.2d 225, 229 (citations omitted), *disc. rev. denied*, 320 N.C. 172, 358 S.E.2d 57 (1987). Here, defendant failed to make a pretrial motion regarding venue. Defendant wavied any question of venue. *Id.*

Further, a variance between an indictment and the proof at trial is not always fatal. *State v. Furr*, 292 N.C. 711, 721, 235 S.E.2d 193, 200 (citations omitted), *cert. denied*, 434 U.S. 924, 54 L. Ed. 2d 281 (1977). "A variance regarding the place of the crime is not material where it is not descriptive of the offense, is not required to be proven as laid to show the court's jurisdiction, and does not mislead the defendant or expose him to double jeopardy." *Brown*, 85 N.C. App. at 588, 355 S.E.2d at 229 (citation omitted). Here, where defendant was charged with felony larceny in Cleveland County, and the State's proof of the offense tended to show it occurred in Gaston County, the variance is not material. This assignment of error is overruled.

D. Convictions of Both Larceny and Possession of Stolen Property

[3] Defendant argues he cannot be convicted for both larceny and possession of the same stolen property. We agree.

Defendant failed to set out an assignment of error in the record on appeal pertaining to this argument. Defendant has raised this issue on appeal for the first time in his brief. Rule 10(a) of the North Carolina Rules of Appellate Procedure provides, in relevant part, "[e]xcept as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule. . . ." N.C.R. App. P. 10(a) (2008). Violation of the Rules of Appellate Procedure will subject an appeal to dismissal. *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999).

In light of our Supreme Court's decision in *State v. Hart*, we must determine whether to invoke and apply Appellate Rule 2 despite defendant's appellate rules violation. 361 N.C. 309, 644 S.E.2d 201 (2007). The decision whether to invoke Appellate Rule 2 is discretionary and is to be limited to "rare" cases in which a fundamental

purpose of the appellate rules is at stake. *Id.* at 315-16, 644 S.E.2d at 205. Appellate Rule 2 has most consistently been invoked to prevent manifest injustice in criminal cases in which substantial rights of a defendant are affected. *Id.* at 316, 644 S.E.2d at 205. Under these facts, we find it appropriate to invoke Appellate Rule 2 and review the merits of defendant's argument.

[4] It is well established in North Carolina that "though a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he may be convicted of only one of those offenses." *State v. Andrews*, 306 N.C. 144, 148, 291 S.E.2d 581, 584 (citations and quotations omitted), *cert. denied*, 459 U.S. 946, 74 L. Ed. 2d 205 (1982); *see also State v. Perry*, 305 N.C. 225, 235, 287 S.E.2d 810, 816 (1982) ("Our review of the legislative history and case law background against which our possession statutes were enacted and our analysis of its internal provisions lead us to the conclusion that . . . the Legislature did not intend to punish an individual for larceny of property and the possession of the same property which he stole.").

In *State v. Dow*, this Court stated: "where judgment must be arrested upon one of two sentences of equal severity because of a double jeopardy violation, the sentence which appears later on the docket, or is second of two counts of a single indictment, or is the second of two indictments, will be stricken." 70 N.C. App. 82, 87, 318 S.E.2d 883, 887 (1984) (internal citation and quotion omitted). The trial court's judgment must be arrested in one of the two cases where a defendant has been convicted of both larceny and possession of the same stolen property. *Id.*

Applying these rules, we arrest the defendant's convictions of felonious possession of stolen property in files 06-CRS-053923 and 06-CRS-053924 and remand for resentencing in accordance with this opinion.

IV. Prior Record Level

[5] Defendant argues the trial court erred in calculating his prior record level. We disagree.

N.C. Gen. Stat. § 15A-1340.14(f) (2005) provides:

> A prior conviction shall be proved by any of the following methods:
>
> (1) *Stipulation of the parties.*

(2) An original or copy of the court record of the prior conviction.

(3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.

(4) Any other method found by the court to be reliable.

(Emphasis supplied).

Here, defendant's prior record level was properly proven by stipulation. Included in the record on appeal is form AOC-CR-600 entitled "Prior Record Level For Felony Sentencing." In Section I, defendant was found to have accumulated eleven points for prior felony convictions and was classified as a prior record level IV. (R. 20) Section III is entitled "Stipulation" and states:

> The prosecutor and defense counsel . . . *stipulate* to the accuracy of the information set out in Sections I. and IV. of this form, including the classification and points assigned to any out-of-state convictions and *agree with the defendant's prior record level* or prior conviction level as set out in Section II.

(Emphasis supplied). Both the assistant district attorney and defense counsel signed this stipulation.

Further, defense counsel failed to object to the following exchange between the assistant district attorney and the trial court:

> Your Honor, the State would tender the [d]efendant as a Level 4 for sentencing purposes, exempting the convictions that have been used to indict the [d]efendant as a habitual felon. I've crossed those out on the worksheet *which [defense counsel] and [defendant] have reviewed.* . . . I've calculated and *defense counsel has stipulated* that his record Level is 4 with 11 prior conviction points, and we would submit [defendant] as a prior record Level 4 as a habitual felon.

(Emphasis supplied).

Sufficient evidence in the record tends to show defendant stipulated to his prior record level pursuant to N.C. Gen. Stat. § 15A-1340.14(f)(1). The trial court did not err by determining defendant to be a prior record level IV offender. This assignment of error is overruled.

V. Judgment and Commitment Orders

[6] Defendant argues the trial court erred by finding defendant to be a violent habitual felon. The State acknowledges this clerical error. We agree.

Here, the two Judgment and Commitment orders erroneously indicate the trial court made "no written findings because the prison term imposed is: . . . for an adjudication as a violent habitual felon." The transcript indicates and the State concedes, this finding is incorrect. Based on the record, the trial court should have indicated defendant: (1) pled guilty to attaining habitual felon status and (2) was sentenced in the presumptive range. Because defendant was properly sentenced as an habitual felon, these clerical errors are not prejudicial. Upon remand, the trial court is to correct these clerical errors in judgments 06-CRS-053923 and 06-CRS-053924.

VI. Ineffective Assistance of Counsel

[7] Defendant argues his trial counsel was ineffective because he failed to fully inform defendant of the possible maximum sentence he faced before trial. We dismiss this assignment of error.

Where defendant cites no authority or presents no argument pertaining to the assignment of error in his brief, it is deemed abandoned pursuant to N.C.R. App. 28(b)(6) (2008). Here, defendant presents no evidence tending to show he was not fully informed of the possible maximum sentence prior to trial. Defendant acknowledges "the Record on Appeal and transcript do not contain enough evidence for [defendant] to present a meritorious argument on this issue before this Court." This assignment of error is deemed abandoned and is dismissed. *Id.*

VII. Conclusion

The trial court erred by convicting defendant for both larceny and felony possession of the same stolen property. We arrest judgment and vacate defendant's convictions and sentences for felony possession of stolen property in 06-CRS-053923 and 06-CRS-053924 and remand for resentencing. During remand, the trial court is to correct clerical errors regarding defendant's habitual felon status.

Defendant's prior record level was properly stipulated to by defendant pursuant to N.C. Gen. Stat. § 15A-1340.14(f). Defendant's assignment of error regarding ineffective assistance of counsel is deemed abandoned and dismissed pursuant to N.C.R. App.

P. 28(b)(6). Defendant's remaning convictions are undisturbed. We find no error in part, arrest and vacate judgment in part, and remand for resentencing and correction of clerical error in accordance with this opinion.

No Error in Part, Arrest and Vacate Judgment in Part, and Remanded.

Judge STROUD concurs.

Judge JACKSON concurs by separate opinion.

JACKSON, Judge, concurs by separate opinion.

Although I concur fully with the majority opinion, I write separately to express my opinion that while not all Appellate Rules violations warrant dismissal, neither do they all require a determination of whether to invoke Rule 2.

In *State v. Hart*, 361 N.C. 309, 644 S.E.2d 201 (2007), our Supreme Court reminded this Court 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 (emphasis added). Therefore, when Rules violations are not so egregious as to warrant dismissal, sanctions "may be appropriate." This leaves open the possibility that sanctions may not be appropriate when the violations are minor.

"[T]he 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 (citations omitted). "Rule 2 must be applied cautiously." *Id.* at 315, 644 S.E.2d at 205. "Before exercising Rule 2 to prevent a manifest injustice, both [the Supreme] Court and the Court of Appeals must be cognizant of the appropriate circumstances in which the extraordinary step of suspending the operation of the appellate rules is a viable option." *Id.* at 317, 644 S.E.2d at 206.

Because Rule 2 is an "extraordinary step," I do not believe that it should be invoked every time there are Rules violations which fail to rise to the level of requiring dismissal. Just as sanctions may not be appropriate even for minor Rules violations, Rule 2 also may not be appropriate when the Rules violations are minor.

Since *Hart*, this Court has declined to dismiss an appeal and reached the merits of the case without invoking Rule 2 on several occasions. *See State v. Parker*, 187 N.C. App. 131, 135, 653 S.E.2d 6, 8 (2007) (chastising defense counsel for failing to state the appropriate standard of review pursuant to Rule 28(b)(6)); *Cotter v. Cotter*, 185 N.C. App. 511, 648 S.E.2d 552 (2007) (declining to dismiss, sanction, or invoke Rule 2 when the only violation was failure to state the standard of review pursuant to Rule 28(b)(6)); *State v. Burke*, 185 N.C. App. 115, 648 S.E.2d 256 (2007) (same when the violation of Rule 28(b)(6) was failing to cite the record page upon which the stated assignment of error was found); *Peverall v. County of Alamance*, 184 N.C. App. 88, 645 S.E.2d 416 (2007) (taxing printing costs to plaintiff's counsel for three violations of Rule 28(b)(6) and a violation of Rule 10(c)(1)); and *McKinley Bldg. Corp. v. Alvis*, 183 N.C. App. 500, 645 S.E.2d 219 (2007) (taxing printing costs to defendants' counsel for violations of Rules 28(b)(4), 28(b)(6), and 10(c)(1)).

I would reserve the invocation of Rule 2 for those cases in which the very nature of the particular Appellate Rule violation requires its use. One example of such a violation is the one in the case *sub judice*. Here, if we were to decline to invoke Rule 2, there would be no assignment of error to address.

THE NORTH CAROLINA STATE BAR, PLAINTIFF v. MARK A. KEY, ATTORNEY, DEFENDANT

No. COA06-1666

(Filed 18 December 2007)

1. Attorneys— discipline—violation of Revised Rules of Professional Conduct—sufficiency of findings of fact

The Disciplinary Hearing Commission did not err in a disciplinary case based upon a violation of the North Carolina Revised Rules of Professional Conduct by determining its findings of fact numbers 28, 29, and 35 were supported by substantial evidence, because: (1) in regard to number 28, it was uncontroverted that the attorney never sought or obtained permission from the court to withdraw, and it was properly classified as a finding of fact even though it was more in the nature of an ultimate finding of fact since it was based upon other evidentiary facts; (2) in regard

to numbers 28 and 29, it was uncontroverted that the attorney left a client who did not have the money to pay him at the courthouse without representation knowing that a probation matter was scheduled for hearing; and uncontested findings of fact numbers 22, 24, 25, 26, 27, and 34 support numbers 28 and 29; and (3) in regard to number 35, it was uncontroverted that the attorney was required to make three additional court appearances to resolve his client's absconder violation and was required to appear at the disciplinary hearing before a judge, and the portion of the finding stating the client was adversely affected by the attorney's refusal to appear on her behalf was an ultimate finding of fact based upon the balance of the finding.

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

Although defendant attorney assigned error to findings of fact twelve and fifteen in a legal malpractice case, these assignments of error are deemed abandoned, because defendant failed to argue these issues and failed to cite any authority as required by N.C. R. App. P. 28(b)(6).

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

Although defendant attorney presented argument in his brief concerning finding of fact 26 in a legal malpractice case, this issue is not properly before the Court of Appeals, because: (1) defendant did not assign error to this finding as required by N.C. R. App. P. 10(a); and (2) the Court of Appeals declined to invoke the provisions of N.C. R. App. P. 2 to consider this argument.

4. Attorneys— discipline—violation of Revised Rules of Professional Conduct

The Disciplinary Hearing Commission did not err in a disciplinary case by concluding that defendant attorney violated Rules 1.16, 1.3, and 8.4(d) of the North Carolina Revised Rules of Professional Conduct, because there was a rational basis in the evidence supporting DHC's conclusion that: (1) the attorney violated Rules 1.3 and 8.4 by refusing to appear on his client's behalf at a probation violation hearing after he had entered a general appearance since willful refusal to appear in contravention of N.C.G.S. § 15A-143 violated the Rule of Diligence to the client and amounted to conduct that has a reasonable likelihood of prejudicing the administration of justice; and (2) the attorney violated

Rule 1.16(c) by failing to seek the court's permission before effectively concluding his representation of the client because she did not have his $200.00 fee for the additional hearing.

Appeal by defendant from Order of Discipline entered 8 June 2006 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 30 August 2007.

The North Carolina State Bar, by Deputy Counsel David R. Johnson, for plaintiff-appellee.

Mark A. Key, pro se.

STEELMAN, Judge.

Because there was substantial evidence from which the Disciplinary Hearing Commission of the North Carolina State Bar could conclude that defendant violated N.C. Rev. R. Prof. Conduct 1.16, 1.3, and 8.4 in violation of the terms of a 2003 Consent Order of Discipline, we affirm the Disciplinary Hearing Commission.

I: Procedural History

On 9 December 2005, the North Carolina State Bar ("Bar") filed a motion for Order to Show Cause against defendant Mark Anthony Key ("Key"), alleging that Key had failed to comply with a 2003 Consent Order of Discipline by violating the North Carolina Revised Rules of Professional Conduct. Key is an attorney whose license to practice law in the State of North Carolina was suspended for two years in 2003. That suspension had been stayed for three years. The facts upon which the Show Cause order was based arose from Key's representation of Tammy Faircloth on a series of probation violation matters in the Superior Court of Wake County in 2005.

This matter was heard by the Disciplinary Hearing Commission ("DHC") of the State Bar on 5 May 2006. On 26 June 2006, the DHC entered an Order of Discipline, lifting the stay of the suspension of Key's license for a period of ninety days. Key appeals.

II: Factual Background

On 8 August 2005, Key appeared in the Superior Court of Wake County, representing Faircloth on two probation violations. At the time of the hearing, Faircloth was served with a third probation violation, for absconding supervision ("the absconder violation"). Key requested that Judge Abraham Penn Jones "consider disposing of [all]

charges in one order." Although Key thought that all three charges had been resolved, Judge Jones' written order did not include a disposition of the absconder violation. In late August, Faircloth's probation officer told her that a hearing had been scheduled for 12 September 2005. Faircloth relayed this information to Key, who agreed to appear on Faircloth's behalf.

Faircloth and Key appeared before Judge Stafford G. Bullock on 12 September 2005, where Key admitted the absconder violation on her behalf. Key did not in any manner limit his representation. When the court refused to provide assurances that it would follow a recommendation of the probation officer, Key moved to continue Faircloth's case. The motion was granted, and the hearing was rescheduled for 10 October 2005. Following the continuance, Faircloth agreed to pay Key an additional $200 fee to represent her on the absconder violation.

In preparation for the 10 October 2005 hearing, Key issued a subpoena for a probation officer from Cumberland County to be present at the hearing. On 10 October 2005, Faircloth and her probation officer were present in the courtroom for calendar call. In the common area outside the courtrooms, Faircloth told Key that she did not have the $200 for his fee. Key then released the Cumberland County probation officer from the subpoena, advising the officer that he had not been "fully retained" and would not be representing Faircloth. Shortly thereafter, Key left the Wake County Courthouse to attend a conference at his daughter's school.

When Faircloth's case was called for hearing, Key was not present. Judge Thomas D. Haigwood instructed the courtroom clerk, Sonya Clodfelter, to call Key and tell him that his presence was required in court to resolve Faircloth's absconder violation. After a series of phone calls between Clodfelter and Key, in which Key adamantly stated that he did not represent Faircloth, Judge Haigwood agreed to continue the matter until 9:30 a.m. on 11 October 2005. When Clodfelter called Key back to inform him of the continuance, he became angry and, when told that the judge may issue a show cause order or a bench warrant, stated that "he didn't give a s——" what the judge did.

On 11 October 2005, Key appeared before Judge Haigwood. Both Faircloth and her probation officer also returned to court that morning for the rescheduled hearing. Judge Haigwood continued the matter and issued an order directing Key to show cause why he should

not be held in contempt of court. A second show cause order was subsequently issued on 31 October 2005 directing Key to show cause why he should not be subject to attorney discipline by the court for violating provisions of the Revised Rules of Professional Conduct.

On 15 November 2005, following a two-day hearing, Judge Donald W. Stephens entered two orders, one of criminal contempt and one of attorney discipline. Key appealed these matters to this Court. *See State v. Key*, 182 N.C. App. 624, 643 S.E.2d 444 (affirming the trial court's contempt judgment), *disc. rev. denied*, 361 N.C. 433, 649 S.E.2d 398 (2007); *In re Key*, 182 N.C. App. 624, 643 S.E.2d 452 (affirming the trial court's order of discipline and sanctions), *disc. rev. denied*, 361 N.C. 428, 648 S.E.2d 506 (2007).

III: Standard of Review

By statute, judicial review of a disciplinary order is limited to "matters of law or legal inference." N.C. Gen. Stat. § 84-28(h) (2005). In examining the record, the reviewing court applies a "whole record" test, which requires this Court to determine that there is "substantial evidence to support the findings, conclusions and result." *N.C. State Bar v. DuMont*, 304 N.C. 627, 643, 286 S.E.2d 89, 98-99 (1982) (citing G.S. § 150A-51(5)). The reviewing court follows a three-step process to determine "if the lower body's decision has a 'rational basis in the evidence.' " *N.C. State Bar v. Talford*, 356 N.C. 626, 634, 576 S.E.2d 305, 311 (2003).

> (1) Is there adequate evidence to support the order's expressed finding(s) of fact?
>
> (2) Do the order's expressed findings(s) of fact adequately support the order's subsequent conclusion(s) of law? and
>
> (3) Do the expressed findings and/or conclusions adequately support the lower body's ultimate decision?

Id. Section (3) is not at issue in this case.

"In applying the whole record test to the facts disclosed by the record, a reviewing court must consider the evidence which in and of itself justifies or supports the administrative findings and must also take into account the contradictory evidence or evidence from which conflicting inferences can be drawn." *DuMont*, 304 N.C. at 643, 286 S.E.2d at 98-99 (citing *Thompson v. Wake County Bd. of Educ.*, 292

N.C. 406, 233 S.E.2d 538 (1977)). However, the mere presence of contradictory evidence does not eviscerate challenged findings, and the reviewing court may not substitute its judgment for that of the committee. *N.C. State Bar v. Leonard*, 178 N.C. App. 432, 439, 632 S.E.2d 183, 187 (2006), *disc. rev. denied*, 361 N.C. 220, —— S.E.2d —— (2007); *N.C. State Bar v. Nelson*, 107 N.C. App. 543, 550, 421 S.E.2d 163, 166 (1992), *aff'd per curiam*, 333 N.C. 786, 429 S.E.2d 716 (1993). "[S]upporting evidence is substantial if a reasonable person might accept it as adequate backing for a conclusion." *Talford*, 356 N.C. at 632, 576 S.E.2d at 309-10 (citing *DuMont*, 304 N.C. at 643, 286 S.E.2d at 98-99).

IV. Duty of Attorney in Criminal Cases

An attorney's duty to a client in a criminal case is set forth in N.C.G.S. § 15A-143:

> An attorney who enters a criminal proceeding without limiting the extent of his representation pursuant to G.S. 15A-141(3) undertakes to represent the defendant for whom the entry is made at all subsequent stages of the case until entry of final judgment, at the trial stage.

Id. (2005).

It is well-settled that an attorney's responsibilities extend not only to his client but also to the court. *Smith v. Bryant*, 264 N.C. 208, 211, 141 S.E.2d 303, 306 (1965).

> An attorney not only is an employee of his client but also is an officer of the court. This dual relation imposes a dual obligation. To the client who refuses to pay a fee the attorney must give specific and reasonable notice so that the client may have adequate time to secure other counsel and so that he may be heard if he disputes the charge of nonpayment. To the court, which cannot cope with the ever-increasing volume of litigation unless lawyers are as concerned as is a conscientious judge to utilize completely the time of the term, the lawyer owes the duty to perfect his withdrawal in time to prevent the necessity of a continuance of the case.

Id. (internal citations omitted). *See also State v. Crump*, 277 N.C. 573, 591, 178 S.E.2d 366, 377 (1971) (attorney has an independent obligation to the court to continue to represent a client until the court grants permission to withdraw).

V. Findings of Fact

[1] In his first argument, Key contends that findings of fact 28, 29, and 35 were not supported by the evidence, and that findings of fact 28 and 35 are actually conclusions of law. We disagree.

The challenged findings of fact are as follows:

> 28. Key did not seek or obtain the Court's permission to withdraw as Faircloth's attorney, nor did he take any steps to protect Faircloth's interests before he effectively concluded his involvement in the case.
>
> 29. As a result of Key's refusal to complete his representation, Faircloth was left without representation at the Oct. 10, 2005 hearing on the absconder violation.
>
> . . . .
>
> 35. Faircloth was adversely affected by Key's refusal to appear on her behalf in that she was required to return to court on Oct. 11 and by the fact that she was also subpoenaed to testify at a disciplinary hearing regarding Key conducted by the Court on Nov. 14 and 15, 2005.

Key argues that there was "absolutely no evidence" that he refused to appear in court or that Faircloth was "adversely impacted." Key contends that he never refused to appear and "made a number of efforts to protect [his client's] interest." We review the whole record to determine whether there is substantial evidence to support these findings. *See DuMont*, 304 N.C. at 643, 286 S.E.2d at 98-99.

Before analyzing each of the challenged findings of fact, we note that there are a number of findings of fact contained in the Order of Discipline, which are unchallenged on appeal by Key, and deal with facts that are the same or similar to those contained in the challenged findings of fact. These are:

> 21. Key did not limit the scope of his representation of Faircloth during the hearing before Judge Bullock on Sept. 12.
>
> 22. The hearing on the absconder violation was rescheduled for Oct. 10, 2005.
>
> . . . .
>
> 24. On Oct. 5, 2005, Key issued a subpoena to [probation officer] Porter to appear at the Oct. 10 hearing.

25. Before court began on the afternoon of Oct. 10, 2005, Key knew that the matter on the calendar was the absconder violation charge.

26. Shortly before court was to commence on Oct. 10, Faircloth told Key that she did not have the additional $200 fee. Key left the courtroom area, and told Faircloth that he was not going to return to court because she had not paid his fee.

27. Thereafter, Key told Porter than he (Key) had not been "fully retained" by Faircloth and released Porter from the subpoena.

. . . .

32. Judge Haigwood ordered Key to return to court on Oct. 11 to handle Faircloth's case.

. . . .

34. Because Key failed to handle Faircloth's case on Oct. 10, and did not return to court that day, Faircloth's case was continued until the following day.

These unchallenged findings of facts are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

A. Finding of Fact 28

We have reviewed the record in this case and find that there is adequate and substantial evidence contained therein to support this finding. It is uncontroverted that Key never sought or obtained permission from the court to withdraw as Faircloth's attorney. It is further uncontroverted that he left Faircloth alone and without representation at the Wake County Courthouse on 10 October 2005, knowing that the probation matter was scheduled for hearing. In addition, findings of fact 22, 24, 25, 26, 27, and 34, uncontested on appeal, are evidentiary facts that support finding of fact 28. Key also contends that finding of fact 28 is really a conclusion of law.

> 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, see *Plott v. Plott*, 313 N.C. 63, 74, 326 S.E.2d 863, 870 (1985), or the application of legal principles, see *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 657-58 (1982), is more properly classified a conclusion of law. Any determination reached through 'logical reasoning from the evidentiary facts' is more properly

> classified a finding of fact. *Quick*, 305 N.C. at 452, 290 S.E.2d at 657-58 (quoting *Woodard v. Mordecai*, 234 N.C. 463, 472, 67 S.E.2d 639, 645 (1951)).

In re Helms, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997).

> There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts.

Woodard v. Mordecai, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951) (internal citations omitted). Moreover, classification of an item within the order is not determinative, and, when necessary, the appellate court can reclassify an item before applying the appropriate standard of review. *See Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675 (classifying the trial court's neglect, reasonable efforts, and best interest determinations as conclusions of law).

We hold that the DHC properly classified finding of fact 28 as a finding of fact, although since it is based upon other evidentiary facts, it is more in the nature of an ultimate finding of fact, and that the finding is adequately supported by substantial evidence.

B. Finding of Fact 29

We have reviewed the record in this case and find that there is adequate and substantial evidence contained therein to support this finding. It is uncontroverted that Key left Faircloth alone and without representation at the Wake County Courthouse on 10 October 2005, knowing that the probation matter was scheduled for hearing. In addition, findings of fact 22, 24, 25, 26, 27, and 34, uncontested on appeal, are evidentiary facts that support finding of fact 29.

C. Finding of Fact 35

We have reviewed the record in this case and find that there is adequate and substantial evidence contained therein to support this finding. It is uncontroverted that Faircloth was required to make three additional court appearances to resolve her absconder violation and was required to appear at the disciplinary hearing before Judge Stephens.

The portion of finding of fact 35 stating that "Faircloth was adversely affected by Key's refusal to appear on her behalf" is an ulti-

mate finding of fact, based upon the balance of finding of fact 35. *See Woodard v. Mordecai*, 234 N.C. at 470, 67 S.E.2d at 644.

[2],[3] Key assigned error to findings of fact twelve and fifteen, "in support of which no reason or argument is stated or authority cited." Pursuant to N.C.R. App. P. 28(b)(6) (2007), we deem these assignments of error to be abandoned. Key presented argument in his brief concerning finding of fact 26, to which he did not assign error. Without a proper assignment of error, this finding is not properly before this Court. N.C.R. App. P. 10(a) (2007). We decline Key's invitation to invoke the provisions of Rule 2 of the Rules of Appellate Procedure to consider his arguments concerning finding of fact 26.

This argument is without merit.

VI: Rules of Professional Conduct

[4] In his second argument, defendant contends that he did not violate Rules 1.16, 1.3, and 8.4(d) of the Revised Rules of Professional Conduct, that the evidence supports his position that no violation of the rules occurred, and that the DHC erred in concluding that such violations occurred. We disagree.

With respect to Rules 1.3 and 8.4, Key contends that: (1) this case presents a matter of first impression before this Court; (2) the comments following Rule 1.3 suggest that a violation of diligence occurs when there is a *pattern* of negligent conduct and his refusal to appear on October 10 fails to establish such a violation; (3) the sole basis for the Rule 8.4 charge is "the unsupported allegation that he 'refused to appear' in court on October 10, 2005[;]" and (4) rather than a "refusal to appear," the evidence demonstrates his diligence on Faircloth's behalf. Finally, he argues that mere refusal to appear does not constitute a violation of Rule 8.4 for three reasons: (1) these circumstances are insufficiently egregious, (2) Key had a "good faith" belief that no legal obligation existed, and (3) DHC failed to adduce evidence of harm to Faircloth or of a reasonable likelihood of prejudice to the administration of justice.

The Order of Discipline contained the following conclusions of law:

> 2. Key entered a general appearance regarding the absconder violation pending against Faircloth on Sept. 12, 2005. Consequently, he could not properly refuse to appear at the Oct. 10, 2005 hearing on the grounds that she had not paid his fee, without first seeking permission to withdraw from the court.

3. Key's conduct as set out herein violated the Revised Rules of Professional Conduct in the following respects:

a. By refusing to appear on Faircloth's behalf at the Oct. 10, 2005 hearing, Key neglected a client matter in violation of Rule 1.3, and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d).

b. By failing to seek Court permission before effectively concluding his representation of Faircloth, Key violated Rule 1.16(c).

The North Carolina Revised Rules of Professional Conduct govern proper terms of an attorney's representation of clients.

Rule 1.16. Declining or terminating representation.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client, or:

. . . .

(6) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled[.]

. . . .

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client[.] . . . .

N.C. Rev. R. Prof. Conduct 1.16 (2005).

Rule 1.3 requires a lawyer to "act with reasonable diligence and promptness in representing a client." N.C. Rev. R. Prof. Conduct 1.3 (2005). Rule 8.4 proscribes a lawyer from engaging "in conduct that is

prejudicial to the administration of justice." N.C. Rev. R. Prof. Conduct 8.4(d) (2005). Comment 4 to the rule states:

> [4] A showing of actual prejudice to the administration of justice is not required to establish a violation of Paragraph (d). Rather, it must only be shown that the act had a reasonable likelihood of prejudicing the administration of justice. . . . The phrase "conduct prejudicial to the administration of justice" in Paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings.

Id, Cmt. 4.

Under the second prong of *Talford*, we must determine whether the order's expressed findings of fact adequately support its subsequent conclusions of law.

> [I]n order to satisfy the evidentiary requirements of the whole-record test in an attorney disciplinary action, the evidence used by the DHC to support its findings and conclusions must rise to the standard of clear, cogent, and convincing. Ultimately, the reviewing court must apply all the aforementioned factors in order to determine whether the decision of the lower body, e.g., the DHC, has a rational basis in the evidence.

Talford, 356 N.C. at 632, 576 S.E.2d at 310 (internal quotations and citations omitted). Upon review of the record, we find that the evidence relied upon by the DHC in reaching its conclusions of law was "clear, cogent, and convincing."

Having considered the evidence supporting the DHC's findings, as well as any evidence from which conflicting inferences could be drawn, we hold that there is a rational basis in the evidence supporting the DHC's conclusion that Key violated Rules 1.3 and 8.4 by refusing to appear on Faircloth's behalf at the 10 October 2005 hearing. Willful refusal to appear in contravention of N.C.G.S. § 15A-143 violates the Rule of Diligence to the client and amounts to conduct that has a "reasonable likelihood of prejudicing the administration of justice." *See* N.C. Rev. R. Prof. Conduct 8.4, Cmt. 4.

Regarding conclusion of law 3(b), we note that the plain language of Rule 1.16(c) states: "A lawyer *must* comply with applicable law requiring notice to or permission of a tribunal when terminating rep-

resentation." N.C. Rev. R. Prof. Conduct 1.16(c) (2005) (emphasis added). Unlike other rules, Rule 1.16 makes no mention of a "scienter" or "intent" requirement, either in its text or comments. *Cf.* N.C. Rev. R. Prof. Conduct 1.3, cmt. 7 (suggesting an "element of intent or scienter"). Key undertook Faircloth's representation when he appeared and entered admissions on her behalf at the 12 September 2005 hearing, and did not seek or obtain the court's permission to withdraw. Consequently, we find that there is a rational basis in the evidence for the DHC to have concluded that Key violated Rule 1.16(c) by failing to seek the court's permission before effectively concluding his representation of Faircloth.

This argument is without merit.

Defendant's brief addresses only nine of twenty-one original assignments of error. Pursuant to N.C.R. App. P. 28(b)(6) (2007), the remaining assignments of error are deemed to be abandoned.

AFFIRMED.

Judges ELMORE and GEER concur.

STATE OF NORTH CAROLINA v. WILLIAM THOMAS McCALLUM

No. COA07-527

(Filed 18 December 2007)

1. Criminal Law— prosecutor's comments—defendant's closing argument—supporting evidence

The trial court did not err by denying defendant's motion for a mistrial based upon the prosecutor's comments during defense counsel's closing arguments. The prosecutor's comments referred only to defendant's failure to present evidence to support his claim of a false confession, not to defendant's failure to testify.

2. Robbery— indictment—allegations of value—surplusage

The trial court did not err in a prosecution for armed robbery by permitting the State to amend the indictments to remove the allegations concerning the amount of money taken. The allegations of value were merely surplusage.

3. Criminal Law— continuance denied—changed indictments

The trial court did not abuse its discretion by denying defendant's motion for a continuance after the court allowed the State to amend the indictments. The amendments did not constitute substantial alterations and defendant had timely notice of the charges against him.

4. Criminal Law— testimony about unrelated crime—mistrial denied

The trial court did not err by failing to declare a mistrial after a detective testified about defendant's statement concerning an unrelated robbery. The court instructed the jury to disregard the statement, and defendant did not demonstrate that the statement had any impact on the trial.

5. Criminal Law— juror allegedly sleeping—mistrial denied

The trial court did not abuse its discretion in an armed robbery prosecution by not granting a mistrial after a juror allegedly fell asleep. Based on the juror's responses, statements by counsel, and the court's own observations, the court determined that the juror had not been asleep. Furthermore, the evidence presented while the juror was allegedly asleep was not critical to either defendant or the State.

Appeal by defendant from judgments entered 3 May 2006 by Judge Robert F. Floyd, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 15 November 2007.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Daniel D. Addison, for the State.

Sofie W. Hosford, for defendant-appellant.

JACKSON, Judge.

William Thomas McCallum ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of five counts of robbery with a dangerous weapon and five counts of conspiracy to commit robbery with a dangerous weapon. For the following reasons, we hold no error.

The State presented evidence of five separate armed robberies of different convenience stores occurring over a span of approximately four weeks. Defendant admitted to participating in each rob-

bery and volunteered details of the robberies with little or no prompting by the police.

First, Gilford Locklear, Jr. ("Gilford Locklear"), a cashier at the Graceland Food Mart convenience store ("the Graceland store"), testified that at approximately 9:30 p.m. on 26 March 2004, he was sitting at the register and talking to the stock person and a regular customer when two tall black males entered the store. Both men had their faces covered, with the taller of the two concealing his face with a bandana; Gilford Locklear was unable to determine what the shorter man was using to conceal his face. The shorter of the two men was carrying a handgun, and after pointing the gun at Gilford Locklear, the man ordered the stock person and customer to the floor. Meanwhile, the taller man took money out of the register and demanded cigarettes. The two men left after approximately two minutes, at which point Gilford Locklear pressed the panic button, locked the door, and called the police.

Defendant later admitted to the police that he participated in the robbery of the Graceland store. He explained in both an interview and a written statement that he was at the home of his cousin, Dellery Moore ("Moore"), when Moore and Derrick Vaught ("Vaught") discussed robbing a store. Defendant drove Moore and Vaught in his Cadillac to the Graceland store. Defendant stated that he did not want to go inside. Moore and Vaught went inside and robbed the store, and the three of them later split the proceeds, with defendant receiving $100.00 for driving.

The next armed robbery occurred on 31 March 2004 at the Community Stop Number 4 convenience store ("the Community Stop store"). Kellie Thompson ("Thompson"), the store clerk, testified that two black males entered the Community Stop store at approximately 9:30 p.m. One of the men was carrying a shotgun and had a yellow bandana covering his face. He put the shotgun in Thompson's face and demanded money. Thompson emptied the cash register and helped put the money into a bag. Thompson pushed the panic button, and after the men left the store, Thompson called the police. Thompson estimated that between $280.00 and $300.00 was stolen from the register.

Defendant admitted to the police that on the evening of 31 March 2004, he was with Moore and Vaught in Vaught's automobile, with Moore driving. This time, defendant entered the store, carrying a shotgun. Defendant held the gun while Vaught took the money. After

leaving the Community Stop store and returning to Vaught's house, the three men split the money taken during the robbery.

On 5 April 2004, at approximately 10:30 p.m., Lisa Jones ("Jones") and Jerry Russ ("Russ") were working at the Sun-Do Magnolia BP convenience store ("the Sun-Do Magnolia store"). Jones, the cashier, and Russ, the stock person, were cleaning the store when two black males entered, one wearing a yellow bandana and the other wearing a stocking on his head. One of the men put a gun to Jones' head and demanded money; Russ, meanwhile, was cleaning a restroom in the back of the store. Jones took the money out of the register and was instructed to place it inside of a bag; she also gave the man the money she had set aside for the morning shift. Russ came out of the bathroom, and after being seen by the taller man, locked himself inside a storage room. After the men left, Russ called the police and the store manager.

Once again, defendant admitted his participation to the police, stating that he was with Vaught and Moore when Vaught began talking about robbing a store. The three men drove in defendant's automobile to the Sun-Do Magnolia store, and defendant dropped off Vaught and Moore outside. Defendant waited in the vehicle during the robbery, and afterwards, defendant drove Vaught and Moore back to Vaught's house, where the three men split the money.

On 12 April 2004, Paula K. Lovett ("Lovett") and James D. Locklear ("James Locklear") were working at the Sun-Do Kwik Stop BP convenience store ("the Kwik Stop store") as the cashier and stock person, respectively. At approximately 9:00 p.m., two tall black males, wearing hats and scarves, entered the Kwik Stop store, pointed a gun at Lovett, and demanded money. Lovett gave them all the money in both the cash register and the cabinet below the cash register. Lovett described one of the men as approximately six feet, two inches tall, wearing a tan bandana over his face, and she described the other as approximately five feet, nine inches tall, wearing a white bandana over his face. James Locklear described one of the men as heavy set and the other as short, and stated that both were wearing masks over their faces.

Larry Haywood ("Haywood"), a nearby resident, saw a Cadillac drive onto his street near the Kwik Stop store. Haywood watched as the car parked, and a few minutes later, observed two black males running through a field and hopping in the car, which then quickly departed. Roger Jones ("Jones"), who also lived near the Kwik Stop

store, observed a Cadillac parked next to his house. Jones saw a black male sitting in the back seat and asked him why he was in Jones' yard. The passenger stated that he had run out of gas. Jones began walking toward the Kwik Stop store, when two other black males ran past him. Jones testified that one was tall and the other was short.

Defendant admitted to the police to participating in the 12 April 2004 robbery of the Kwik Stop store. Defendant stated that he was with Moore that evening, and that Moore was driving defendant's Cadillac. Moore parked in a yard behind the store, and Moore and defendant went inside the store. Defendant stated that although he participated in the robbery, Moore held the gun and took the money.

The fifth robbery occurred on 20 April 2004 at the Sun-Do Kwik Stop convenience store in Allenton ("the Allenton store"). Emily Covey ("Covey"), the store clerk, testified that at approximately 10:00 p.m., two young black males ran into the store and pointed a gun at her and her co-worker. The gunman had a gray hood over his face and demanded that Covey give him money from the cash register. After Covey gave him the money from the register, the gunman demanded money from a cigar box on the counter. Covey showed the man that the box was empty, and the two men left the store. Covey and her co-worker observed the automobile in which the robbers left, noting the make and model of the vehicle as well as its license plate number.

Defendant admitted to the police that on 20 April 2004, he went to the Allenton store, along with Moore and Vaught, and "checked it out so [they] could come back and rob it later." They returned thirty minutes later in Vaught's automobile, and Moore was armed with Vaught's pistol. Moore and defendant entered the store, and Moore held the gun while defendant took the money. Vaught, Moore, and defendant drove back to Vaught's house, where they split the money.

After the police traced the automobile used on 20 April 2004 to Moore and Vaught, both men were arrested. On 13 May 2004, defendant turned himself in to the police, and on 9 August 2004, defendant was indicted for five counts of robbery with a firearm and five counts of conspiracy to commit robbery with a firearm. A jury found defendant guilty on all counts, and the trial court sentenced defendant to five consecutive terms of sixty-four to eighty-six months imprisonment. Defendant gave timely notice of appeal.

[1] In his first argument, defendant contends that the trial court erred in denying his motion for a mistrial based upon comments made by the prosecutor during defense counsel's closing arguments. We disagree.

The standard of review from the denial of a motion for mistrial is abuse of discretion. *See State v. Gilbert*, 139 N.C. App. 657, 672, 535 S.E.2d 94, 102 (2000). " 'An abuse of discretion occurs only upon a showing that the judge's ruling was so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* (quoting *State v. Dial*, 122 N.C. App. 298, 308, 470 S.E.2d 84, 91, *disc. rev. and cert. denied*, 343 N.C. 754, 473 S.E.2d 620 (1996)).

The following exchange took place during defense counsel's closing argument:

> [DEFENSE COUNSEL]: Reasonable doubt. That's why I say, ladies and gentlemen, when you look at those statements, there's something the state calls false confession, something—
>
> [PROSECUTOR]: Objection, Your Honor, we need to be heard.
>
> THE COURT: Sustained.
>
> [PROSECUTOR]: Your Honor, we would request an instruction to the jury since the defendant did not put on any evidence—
>
> [DEFENSE COUNSEL]: Objection.
>
> [PROSECUTOR]: —as to such thing as a false confession.
>
> THE COURT: Let me see counsel.

Following an off-the-record bench conference, the trial court sustained the objection and instructed defense counsel to continue with his closing argument.

Our Supreme Court has explained that "[a] statement that may be interpreted as commenting on a defendant's decision not to testify is improper if the jury would naturally and necessarily understand the statement to be a comment on the failure of the accused to testify." *State v. Mitchell*, 353 N.C. 309, 326, 543 S.E.2d 830, 840-41, *cert. denied*, 534 U.S. 1000, 151 L. Ed. 2d 389 (2001). Here, defendant contends that "[t]he prosecutor's comment apparently referred to the fact that [defendant] did not present any evidence to support his claim that his statements were false. This was a direct comment on his failure to testify . . . ." Contrary to defendant's contention, however, the

prosecutor's statement was not a direct comment on defendant's failure to testify because there are various methods, other than testimony by a defendant, by which a defendant may attempt to prove that he made a false confession. Specifically, defendant could have presented testimony—lay or expert—as to his mental state,[1] and it is possible that he could have presented physical or documentary evidence, such as evidence of intoxication, concerning his mental state at the time of his confessions.[2] Here, the prosecutor's comments referred only to defendant's failure to present evidence to support his claim of a false confession, not to defendant's failure to testify. *Compare Ben-Yisrayl v. Davis*, 431 F.3d 1043, 1049 (7th Cir. 2005) (noting that the prosecutor improperly stated in closing arguments, "Let the Defendant tell you why somebody would freely and voluntarily confess," and holding that the prosecutor's comments did not constitute harmless error), *reh'g en banc denied*, No. 03-3169, 2006 U.S. App. LEXIS 2454 (7th Cir. 2006). Accordingly, defendant's assignment of error is overruled.

[2] Defendant next contends that the trial court erred in permitting the State to amend the indictments to remove the allegations concerning the amount of money taken during the robberies. Specifically, defendant contends that the amendments constituted substantial alterations of the indictments. We disagree.

A criminal bill of indictment is sufficient "if it express[es] the charge against the defendant in a plain, intelligible, and explicit manner." N.C. Gen. Stat. § 15-153 (2005). "Specifically, the indictment must allege all of the essential elements of the crime sought to be charged." *State v. Westbrooks*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996). North Carolina General Statutes, section 15A-923(e) provides

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1. *See, e.g.*, *Shellenberger v. State*, 150 N.W. 643, 645 (Neb. 1915) ("For the defense, one group of witnesses was called to prove that defendant was weak-minded, or defective mentally, and that he had a mania or predisposition to make false confessions that he was implicated in serious crimes."); *State v. Romero*, 81 P.3d 714, 716 n.1 (Ore. Ct. App. 2003) (noting that "[expert] testimony has been offered in an effort to demonstrate that some police interrogation techniques produce false confessions."), *disc. rev. denied*, 95 P.3d 729 (Or. 2004).

2. *Cf. Townsend v. Sain*, 372 U.S. 293, 308 n.5, 9 L. Ed. 2d 770, 783 (1963) ("Unfortunately, persons under the influence of drugs are very suggestible and may confess to crimes which they have not committed." (internal quotation marks and citation omitted)), *overruled in part on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1, 118 L. Ed. 2d 318 (1992); *Pecoraro v. Walls*, 286 F.3d 439, 446 (7th Cir.) (acknowledging that persons under the influence of drugs or alcohol may be more likely to falsely confess, but noting that there is little evidence of substance-induced false confessions), *cert. denied*, 537 U.S. 956, 154 L. Ed. 2d 306 (2002).

that "[a] bill of indictment may not be amended." N.C. Gen. Stat. § 15A-923(e) (2005). This provision has been interpreted to mean that "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). A "non-essential variance is not fatal to the charged offense," and any "averment unnecessary to charge the offense . . . may be disregarded as inconsequential surplusage." *State v. Grady*, 136 N.C. App. 394, 396-97, 524 S.E.2d 75, 77, *appeal dismissed and disc. rev. denied*, 352 N.C. 152, 544 S.E.2d 232 (2000). Therefore, " '[a]llegations [added to, deleted from, or modified in an indictment] beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage.' " *Westbrooks*, 345 N.C. at 57, 478 S.E.2d at 492 (alterations added) (quoting *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972)). Ultimately, "[i]n 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.' " *Silas*, 360 N.C. at 380, 627 S.E.2d at 606 (quoting *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (2003)).

In the instant case, the State moved on the day of trial to remove from the indictments the value of property purportedly taken during the robberies. The trial court granted the State's motion, and the amendments left four of the indictments alleging that defendant took an unspecified amount of "U.S. Currency."[3]

Although defendant contends that this amendment constituted a substantial alteration, the State correctly argues that the allegation of the value of the property constituted mere surplusage. Defendant was indicted for robbery with a firearm, and the essential elements of this offense "are (1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of firearms or other dangerous weapon, implement or means; and (3) danger or threat to the life of the victim." *State v. Joyner*, 295 N.C. 55, 63, 243 S.E.2d 367, 373 (1978) (internal quotation marks omitted). It is well-established that "[i]n an indictment for armed robbery, 'the kind and value of the property taken is not material.' " *State v. Oliver*, 334 N.C. 513, 526, 434 S.E.2d 202, 208 (1993) (quoting *State v. Guffey*, 265 N.C. 331, 333, 144 S.E.2d 14, 16 (1965)). Therefore, the amendments to the indictments did not constitute substantial alterations,

3. The indictment in 04 CRS 53240 still alleged that defendant took "five hundred dollars in United States currency" and "checks totaling five hundred dollars." Only the total value of property taken from the Graceland store—*i.e.*, $1,021.00—was redacted.

and defendant properly was indicted for and convicted of robbery with a firearm. *See State v. Estes*, 186 N.C. App. 364, 372, 651 S.E.2d 598, 603 (2007) (finding no substantial alteration and noting that "[d]efendant had timely notice of the charges brought against him to enable him to adequately prepare his defense for trial. Defendant was not convicted of a crime different from that alleged in the bill of indictment." (internal citation omitted)). Accordingly, defendant's assignment of error is overruled.

[3] In his next argument, defendant contends that the trial court erred in denying his motion for continuance after the court allowed the State's motion to amend the indictments. We disagree.

"[A] motion for continuance is ordinarily addressed to the sound discretion of the trial court. In such cases, the trial court's ruling will not be disturbed unless it is manifestly unsupported by reason, which is to say it is so arbitrary that it could not have been the result of a reasoned decision." *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998). As discussed *supra*, the amendments to the indictments did not constitute substantial alterations. Since defendant had timely notice of the charges against him, the trial court did not abuse its discretion in denying defendant's motion to continue. Accordingly, defendant's assignment of error is overruled.

[4] Defendant next argues that the trial court erred in failing to declare a mistrial after Detective Terry Parker ("Detective Parker") testified before the jury about defendant's statement concerning an unrelated robbery. We disagree.

On direct examination, Detective Parker of the Lumberton Police Department read from a written statement taken from defendant concerning defendant's involvement in the five robberies. After reading defendant's statements with respect to three of the five robberies, Detective Parker read defendant's statement concerning an unrelated robbery: "On another night I was with Carry [defendant's cousin] who helped me rob the St. Pauls Sun-Do. Vaught was also with me." Defense counsel objected because this robbery was not one of the robberies for which defendant had been indicted. After a discussion with counsel outside the presence of the jury, the trial court ruled that Detective Parker's testimony as to the portion of defendant's statement concerning the St. Paul's robbery was inadmissible pursuant to Rule 404(b) of the North Carolina Rules of Evidence. The trial court denied defense counsel's motion for a mistrial, but instructed the jury "to disregard the last statement, or answer, given by this witness."

Defendant contends that the trial court's instruction was insufficient to cure the error and that the statement substantially and irreparably prejudiced defendant. Specifically, defendant argues that if the jury "believed that he was responsible for yet another robbery, [the jury] might tend to believe he committed all of these crimes."

Contrary to defendant's contention, defendant has failed to demonstrate that the statement read by Detective Parker had any impact on the trial. The trial court instructed the jury to disregard the statement, and "our legal system through trial by jury operates on the assumption that a jury is composed of men and women of sufficient intelligence to comply with the court's instructions and they are presumed to have done so." *State v. Glover*, 77 N.C. App. 418, 421, 335 S.E.2d 86, 88 (1985). As our Supreme Court has explained, "[w]hen the trial court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured." *State v. Black*, 328 N.C. 191, 200, 400 S.E.2d 398, 404 (1991). In *Black*, a detective read from a statement of the defendant's girlfriend, "part of which indicated that the defendant had been involved with drugs in the past." *Id.* at 199-200, 400 S.E.2d at 403. The defendant objected, and the trial court sustained the objection and instructed the jury to disregard the statement. The trial court, however, refused to declare a mistrial, and our Supreme Court found that "[t]he trial court did not abuse its discretion by denying the defendant's motion for a mistrial." *Id.* at 200, 400 S.E.2d at 404.

Similarly, in the case *sub judice*, Detective Parker's statement concerning an unrelated robbery may have been inadmissible, but there is no indication that the statement prejudiced defendant. "Whether instructions can cure the prejudicial effect of such statements must depend in large measure upon the nature of the evidence and the particular circumstances of the individual case." *State v. Hunt*, 287 N.C. 360, 375, 215 S.E.2d 40, 49 (1975). Here, defendant admitted to participating in each of the five armed robberies, and it is unreasonable to conclude that Detective Parker's testimony concerning a sixth robbery, particularly after the trial court instructed the jury to disregard the testimony, could have had an impact on the outcome of defendant's trial. Accordingly, defendant's assignment of error is overruled.

[5] Finally, defendant contends that the trial court abused its discretion in denying his motion for mistrial after one of the jurors allegedly fell asleep during the trial. We disagree.

During the State's direct examination of Vernon Johnson, defense counsel called to the trial judge's attention the condition of juror number six. The trial judge asked the juror, "[A]re you all right, sir?" The juror responded, "Yeah," and the judge asked him if he needed a break. Juror number six replied, "No, I'm steady." The State continued presenting its evidence, and after the jury was excused for a morning break, the trial judge asked the attorneys if they wished to address the matter involving juror number six. Defense counsel stated that he believed that the juror had been asleep for two or three minutes and that he heard the juror snoring. The trial judge responded that he had been observing the jury regularly and stated, "I don't think it could have been two or three minutes because I just looked at the jury within less than a minute prior to that." The judge stated that he observed that the juror had been leaning over at the time but did not appear to be asleep. The prosecutor stated that she did not hear any snoring and noted that when the juror was called by the court, he immediately responded. Defense counsel requested that the juror be removed and moved for a mistrial. The trial judge indicated to counsel that he would make further inquiry of the juror, but after further consideration during recess, the judge explained that he would not make any additional inquiry as to juror number six and denied defendant's motion for a mistrial.

On appeal, defendant contends that because juror number six appeared to have fallen asleep, his right to be tried by a jury of twelve persons was violated. *See State v. Hudson*, 280 N.C. 74, 79, 185 S.E.2d 189, 192 (1971). It is well-established that

> "[t]he trial court's discretion in supervising the jury continues beyond jury selection and extends to decisions to excuse a juror and substitute an alternate. These kinds of decisions relating to the competency and service of jurors are not reviewable on appeal absent a showing of abuse of discretion, or some imputed legal error."

State v. Lovin, 339 N.C. 695, 715-16, 454 S.E.2d 229, 241 (1995) (quoting *State v. Davis*, 325 N.C. 607, 628, 386 S.E.2d 418, 429 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990)).

Much as in *Lovin*, there was a showing in the instant case "that a juror might have been inattentive to parts of the case, but the . . . observations of the court support the conclusion that the juror could perform his duties." *Id.* at 716, 454 S.E.2d at 241. The trial court inquired of the juror, and based upon the juror's response, statements

by counsel, and the court's own observations of the juror, the trial court determined that the juror had not been asleep. Furthermore, a trial court must declare a mistrial only when a defendant has been substantially or irreparably prejudiced, and in the instant case, defendant has failed to explain how he was prejudiced. In fact, as the trial court noted on the record, the evidence presented while juror number six allegedly was asleep was foundational in nature and was not critical to either defendant or the State. Accordingly, defendant's assignment of error is overruled.

Defendant has failed to present arguments with respect to assignments of error numbers 1, 2, 3, 6, 9, 10, 12, and 13. Accordingly, these assignments of error are deemed abandoned. *See* N.C. R. App. P. 28(b)(6) (2006).

No Error.

Judges TYSON and STROUD concur.

IN THE MATTER OF: R.B.B., MINOR

No. COA07-727

(Filed 18 December 2007)

1. Termination of Parental Rights— combined with abuse hearings—reunification efforts futile or dangerous

The trial court did not err by simultaneously conducting all adjudicatory and dispositional hearings related to both a child abuse and neglect petition and the termination of parental rights where the court found that reunification efforts would be dangerous or futile. The importance of clarity of findings and conclusions was emphasized.

2. Termination of Parental Rights— reunification efforts not required—threat of harm to child

The trial court properly complied with N.C.G.S. § 7B-507 in a child abuse and termination of parental rights proceeding where it did not require DSS to use reasonable efforts for reunification. The court found that the threat of harm to the child made it too dangerous to use reasonable efforts to reunify the child with respondent.

3. Termination of Parental Rights— basis—detailed findings of abuse

The trial court did not err by finding and concluding that respondent's parental rights should be terminated. Although respondent contended that the termination was based on a felony child abuse charge, it is clear that the trial court based the termination on detailed findings and conclusions as to the ongoing, severe, and repeated abuse of the child.

4. Termination of Parental Rights— best interests of child—factors

The trial court did not abuse its discretion by finding and concluding that it was in a child's best interests to terminate parental rights where the court properly considered the factors enumerated in N.C.G.S. § 7B-1110(a).

Appeal by respondent from order filed 5 April 2007 by Judge William G. Stewart in Nash County District Court. Heard in the Court of Appeals 14 November 2007.

Jayne B. Norwood for petitioner-appellee Nash County Department of Social Services for petitioner-appellee.

North Carolina Guardian ad Litem Program, by Pamela Newell Williams, for the juvenile.

Annick Lenoir-Peek for respondent-appellant.

BRYANT, Judge.

A.C.[1] (respondent) appeals from a 5 April 2007 order of adjudication of abuse and neglect and termination of parental rights as to her minor son, R.B.B. For the reasons stated herein, we affirm.

R.B.B. was born in early 2006. In the first seven months of his life, respondent had taken R.B.B. to numerous medical appointments for wellness checkups and for physical conditions, including vomiting, colds and bleeding gums. In July 2006, Dr. Shandal Emanuel, a pediatrician, examined R.B.B. for the first time at his six-month wellness checkup. At that time, R.B.B. weighed below the fifth percentile on the pediatric growth chart after a continual decline from a normal weight at his three-month checkup. On 14 August 2006, R.B.B. had a fever and was vomiting. Respondent took him to see Dr. Emanuel

1. Initials are used throughout to protect the identity of the juvenile.

who noticed R.B.B. "had a bruise on the left temple area as well as two 1/2cm ulcerated lesions on the right lower abdomen that was suspicious for a burn." Dr. Emanuel prescribed antibiotics; however R.B.B.'s condition did not improve, he continued to lose weight, and on 18 August 2006, Dr. Emanuel admitted R.B.B. to the hospital for "evaluation of dehydration, fever and vomiting." While at the hospital, a chest x-ray revealed R.B.B. had broken ribs. A full skeletal survey revealed "multiple healed fractures including [right and left] healed [] spiral tibia fracture[s]."

On 18 August 2006, based on the investigation of R.B.B.'s injuries, a non-secure custody order of R.B.B. was obtained by Nash County Department of Social Services (DSS-petitioner-appellee). On 21 August 2006, DSS filed a juvenile petition alleging R.B.B. to be abused and neglected. DSS gained non-secure custody of R.B.B. on 21 August 2006 and R.B.B. was placed in foster care the next day. Based upon the Nash County Sheriff Department's investigation of R.B.B.'s injuries, respondent and her live-in boyfriend (Josh Robles) were each charged with three counts of felonious child abuse.

At a 19 September 2006 hearing, the trial court determined R.B.B. would remain in the custody of DSS. At that hearing, respondent waived future hearings to determine R.B.B.'s custody. During the subsequent three months, multiple continuances were issued for the abuse and neglect adjudication hearing. On 22 December 2006, DSS filed a motion to terminate parental rights. After entering foster care, R.B.B. gained weight, began reaching developmental milestones for his age and did not sustain any broken bones. The consolidated hearing for the abuse and neglect proceeding and the termination of parental rights proceeding was held on 8 and 9 February 2007. Specifically, the trial court found:

> 43. R.B.B. has been in foster care since August 22, 2006 when he was released from Nash General Hospital. He was seen by his Pediatrician Dr. Emmanuel [sic] on September 12, 2006 and by that date had gained ten ounces. When the child was placed in foster care . . . he could not roll over and could not sit alone [and] . . . by the age of nine months was sitting alone without support. He is now pulling up, crawling and will take a few steps if his hands are held. The child initially had no facial expression and had a flat effect. He has now "blossomed" and responds as a normal thirteen month old. He continues to gain weight, is no longer on special formula

and is not experiencing gastrointestinal problems. He has had no broken bones while in foster care. He is bonded to his foster parents.

44. The Court heard and considered evidence put forth by the Respondent mother as to the steps she has taken since the child was removed from her care to demonstrate that she earnestly desires to be reunited with her child, however, the age of the child, the detailed admission of her frustration with the baby's crying, the number of injuries, the extent of the injuries, her knowledge of the danger of leaving the baby with [her boyfriend] and her insistence on continuing to do so when friends and family members encouraged her not to do so outweigh any potential benefits that this Court can find to the reunification process. The Court is equally [as] concerned by the mother's recent minimization to the mental health therapist of the seriousness of the injuries and their origin.

The trial court concluded R.B.B. to be neglected and abused and ordered respondent's parental rights terminated. From this 5 April 2007 order, respondent appeals.

Respondent argues the trial court erred by: (I) simultaneously conducting all adjudicatory and dispositional hearings related to both the abuse and neglect petition and the termination of parental rights petition; (II) failing to require DSS to use reasonable efforts for reunification; (III) failing to pursue a separate disposition other than termination of parental rights; (IV) finding and concluding respondent's parental rights should be terminated; (V) basing the termination of parental rights on a felonious child abuse charge; and (VI) finding and concluding termination of respondent's parental rights was in the best interest of R.B.B.

I & III

[1] Respondent argues that the trial court erred by simultaneously conducting all adjudicatory and dispositional hearings related to both the abuse and neglect petition and the termination of parental rights petition. We disagree.

After an appropriate party files a juvenile petition alleging that a minor is abused, neglected, or dependent, the trial court must hold an adjudicatory hearing "designed to adjudicate the existence or nonexistence of any of the conditions alleged in [the] petition." N.C. Gen. Stat. § 7B-802 (2005). The allegations in the petition must be proved

by clear and convincing evidence. N.C. Gen. Stat. § 7B-805 (2005). If the trial court finds the allegations proved by clear and convincing evidence, it must issue an adjudicatory order containing an affirmative statement of the standard of proof used. N.C. Gen. Stat. § 7B-807 (2005). The trial court will then hold a dispositional hearing and has broad discretion to craft a disposition designed to serve the juvenile's best interests. N.C. Gen. Stat. §§ 7B-901, -903, -905 (2005).

Likewise, a termination of parental rights action involves a two-step process. After an appropriate party files a termination petition, the trial court must hold an adjudicatory hearing to determine whether grounds for termination exist. N.C. Gen. Stat. § 7B-1109(e) (2005); *see* N.C. Gen. Stat. § 7B-1111(a) (listing the various findings that may serve as grounds for termination). A finding that the parent has either abused or neglected the juvenile may serve as grounds for termination. *Id.* However, the trial court may make such a finding in the N.C.G.S. § 7B-1109 adjudicatory hearing without having previously adjudicated the juvenile abused or neglected in a prior abuse, neglect, or dependency action. *See In re Faircloth*, 153 N.C. App. 565, 571, 571 S.E.2d 65, 69 (2002) ("An adjudicatory hearing on abuse and neglect allegations is not a condition precedent to a termination hearing. . . . [S]uch a hearing on abuse and neglect may well [be] merely redundant with parts of [a] termination hearing."). The burden is on the petitioner to prove the allegations of the termination petition by clear, cogent, and convincing evidence. N.C.G.S. § 7B-1109(f) (2005). If the trial court finds the allegations proved by clear and convincing evidence, it must issue an adjudicatory order containing an affirmative statement of the standard of proof used. *See In re Church*, 136 N.C. App. 654, 657, 525 S.E.2d 478, 480 (2000) (holding "we read [section N.C.G.S. § 1109(f)] to require the trial court to affirmatively state in its order the standard of proof utilized in the termination proceeding"). The trial court then proceeds to the disposition stage where it must determine whether termination of parental rights is in the best interests of the child. N.C. Gen. Stat. § 7B-1110 (2005). If the trial court so determines, it may issue a termination of parental rights order. *Id.*

While the juvenile code contemplates two different stages in a termination action, it does not explicitly require that the two stages be conducted at two separate hearings. Indeed, our Court has previously held that a trial court may combine the N.C.G.S. § 7B-1109 adjudicatory stage and the N.C.G.S. § 7B-1110 dispositional stage into one hearing, so long as the trial court applies the correct eviden-

tiary standard at each stage and the trial court's orders associated with the termination action contain the appropriate standard-of-proof recitations:

> [A]lthough the court is required to apply different evidentiary standards at each of the two stages, we discern no requirement from the statutes . . . that the stages be conducted at two separate hearings. Moreover, since a proceeding to terminate parental rights is heard by the judge, sitting without a jury, it is presumed, in the absence of some affirmative indication to the contrary, that the judge, having knowledge of the law, is able to consider the evidence in light of the applicable legal standard and to determine whether grounds for termination exist before proceeding to consider evidence relevant only to the dispositional stage.

In re White, 81 N.C. App. 82, 85, 344 S.E.2d 36, 38 (1986); *see In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 6 (2004) ("However, so long as the [trial] court applies the different evidentiary standards at each of the two stages, there is no requirement that the stages be conducted at two separate hearings.").

We must now consider whether a two-stage termination hearing may also be held concurrently with an N.C.G.S. § 7B-802 adjudicatory hearing on an abuse, neglect, or dependency petition. "When a petition for termination of parental rights is filed in the same district in which there is pending an abuse, neglect, or dependency proceeding involving the same juvenile, the court on its own motion or motion of a party may consolidate the action[.]" N.C. Gen. Stat. § 7B-1102(c) (2005). Respondent argues that if a trial court consolidates an abuse, neglect, or dependency adjudication with termination proceedings, then DSS is not required to attempt reunification efforts, thereby sending "a signal that DSS does not need the trial court's permission in establishing a permanent plan of care prior to deciding unilaterally to seek a case plan of termination of parental rights." We disagree.

In cases (such as this) where the trial court has found that reunification efforts would be dangerous or futile under N.C.G.S. § 7B-507(b), the juvenile code presents no obstacle to simultaneous hearings on an abuse, neglect, and dependency petition and a termination of parental rights petition. Indeed, judicial economy and efficiency may be best served by a consolidated hearing in cases where the evidence necessary to support a finding that a juvenile is abused or neglected may be nearly identical to the evidence necessary to support a finding that grounds for termination exist. *See* N.C. Gen.

Stat. § 7B-1100(2) (the spirit and intent of juvenile code is to "[r]ecognize the necessity for any juvenile to have a permanent plan of care *at the earliest possible age*") (emphasis added).

Here, the trial court properly concluded that reunification efforts would be dangerous due to a continuing threat of immediate harm to R.B.B. Specifically, the trial court found "the age of the child, the detailed admission of [respondent's] frustration with the baby's crying, the number of injuries, the extent of the injuries, [respondent's] knowledge of the danger of leaving the baby with [her boyfriend] and her insistence on continuing to do so when friends and family members encouraged her not to do so outweigh any potential benefits that this Court can find to the reunification process." The trial court concluded that grounds existed to terminate respondent's parental rights under N.C. Gen. Stat. § 7B-1111(a)(1) by finding and concluding R.B.B. was abused and neglected based on clear, cogent and convincing evidence. The trial court then separately concluded that it is "in the best interest[s] of the child . . . that the parental rights of [respondent] be terminated with regard to R.B.B. and that the permanent plan of adoption be pursued immediately." It is clear the allegations in both the abuse and neglect petition and the termination petition relied on much of the same evidence.

We emphasize how important it is for the trial court, when issuing its orders, to indicate the appropriate standard at each phase of the proceedings regardless of whether or not the hearings are conducted separately or, as in this case, consolidated into one hearing. *Shepard*, 162 N.C. App. at 221, 591 S.E.2d at 6 ("However, so long as the [trial] court applies the different evidentiary standards at each of the [] stages, there is no requirement that the stages be conducted at two separate hearings."). For purposes of ultimate clarity in consolidated hearings, trial courts are encouraged to either: (a) issue separate orders addressing the separate components of the consolidated hearings; or (b) sub-divide a single order into independent sections addressing each component of the consolidated hearing, with each section containing its own evidentiary standard recitation, findings of fact, conclusions of law, and appropriate order. Accordingly, while we caution the trial court on the importance of clarity of findings of fact and conclusions of law in consolidated hearings, we hold that in the instant case, the trial court did not err by simultaneously conducting all adjudicatory and dispositional hearings related to both the abuse and neglect petition and the termination of parental rights petition. These assignments of error are overruled.

II

[2] Respondent argues the trial court erred by failing to require DSS to use reasonable efforts for reunification. North Carolina General Statutes, Section 7B-507 states the trial court's order placing or continuing placement of a juvenile with DSS must contain findings regarding reasonable efforts to reunify the juvenile with the parent unless the court is ordering that such reunification efforts cease. N.C. Gen. Stat. § 7B-507 (2005). "Where efforts to prevent the need for the juvenile's placement were precluded by an immediate threat of harm to the juvenile, the court may find that the placement of the juvenile in the absence of such efforts was reasonable." N.C. Gen. Stat. § 7B-507(a) (2005).

In finding of fact two of the order on "Need for Continued Custody Abuse, Neglect" filed 19 September 2006, the trial court found:

> 2. Pursuant to N.C.G.S. § 7B-506, the Court makes the following findings of fact as to the efforts, if any, which have been made to prevent or eliminate the need for placement of the juvenile into custody. The Department was precluded by an immediate threat of harm to the juvenile and placement of the juvenile in the absence of such efforts was reasonable.

In finding of fact forty-two of the "Adjudication, Disposition and Termination of Parental Rights Order" filed 5 April 2007:

> 42. The child's injuries were of such a serious nature that the Department was precluded from making reasonable efforts to prevent or eliminate the need for the placement of the juvenile outside of the home.

Here, the trial court repeatedly found that the immediate threat of harm to R.B.B. outweighed the reasonable efforts to reunify him with respondent. Due to the severe abuse by the mother and the mother's reaction to the boyfriend's abuse, the trial court determined it was not in the best interests of the child to order DSS to use reasonable efforts to reunify R.B.B. with respondent, as it was too dangerous to do so. The trial court properly complied with N.C.G.S. § 7B-507. This assignment of error is overruled.

IV & V

[3] Respondent argues the trial court erred by finding and concluding respondent's parental rights should be terminated and basing the termination on a felonious child abuse charge. We disagree.

In determining whether a termination of parental rights is proper, we review whether there is an evidentiary support for the trial court's findings and whether the trial court's conclusions are supported by its findings. *In re Gleisner*, 141 N.C. App. 475. 480, 539 S.E.2d 362, 356 (2000). The trial court's findings must be based upon clear, cogent and convincing evidence. *In re Smith*, 146 N.C. App. 302, 304, 552 S.E.2d 184, 186 (2001). A trial court only needs to find one statutory ground for termination before proceeding to the dispositional phase of the hearing. N.C. Gen. Stat. § 7B-1111(a) (2005); *In re Shermer*, 156 N.C. App. 281, 285, 576 S.E.2d 403, 406 (2003). According to N.C. Gen. Stat. § 7B-101(1), an abused juvenile is:

> Any juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker: a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means; b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means[.]

N.C.G.S. § 7B-101(1) (2005).

The trial court found and concluded R.B.B. was an abused juvenile. Dr. Emanuel testified that R.B.B.'s injuries were not accidental and that "someone . . . physically abused this child." In her statement to the police, respondent admitted throwing R.B.B. in the air, hitting R.B.B.'s head against a wall, and that during diaper changes, she "gets frustrated so she takes [R.B.B.'s] legs and picks [him] up and twists" his legs. Respondent stated R.B.B.'s injuries "came from her" and she knew what she was doing to R.B.B. was wrong. Respondent's live-in boyfriend said he did not want to babysit R.B.B. because he had an anger problem; however respondent continued to allow him to care for R.B.B. even after she knew R.B.B. had been injured while left in her boyfriend's care. Where, as here, it is clear the trial court based the termination on detailed findings and conclusions as to the ongoing, severe and repeated abuse of R.B.B., respondent's argument that the termination was based solely on felonious child abuse *charges* lacks merit. These assignments of error are overruled.

VI

[4] Respondent argues the trial court erred by finding and concluding it was in the child's best interests to terminate respondent's parental rights. We disagree.

§ 7B-1110. Determination of best interests of the juvenile

(a) After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest. In making this determination, the court shall consider the following:

(1) The age of the juvenile.

(2) The likelihood of adoption of the juvenile.

(3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.

(4) The bond between the juvenile and the parent.

(5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2005). We review the trial court's conclusion that a termination of parental rights would be in the best interest of the child on an abuse of discretion standard. *In re V.L.B.*, 168 N.C. App. 679, 684, 608 S.E.2d 787, 791 (2005) (citation omitted). "Abuse of discretion exists when the challenged actions are manifestly unsupported by reason." *Barnes v. Wells*, 165 N.C. App. 575, 580, 599 S.E.2d 585, 589 (2004) (internal quotation marks omitted).

In the case *sub judice*, the trial court, in its discretion, properly considered the factors enumerated in N.C.G.S. § 7B-1110(a) (2005). Specifically, the trial court found R.B.B. "is very bonded to his foster parents" and that given the "age of the child" returning R.B.B. to respondent would not be in his best interest. The trial court found R.B.B. did not develop as many illnesses in foster care as when in respondent's custody and that R.B.B.'s "current placement is appropriate and is in the best interest of the child." The trial court's order to terminate respondent's parental rights was not an abuse of discretion. This assignment of error is overruled.

Affirmed.

Judges McGEE and HUNTER concur.

CURL v. AMERICAN MULTIMEDIA, INC.

[187 N.C. App. 649 (2007)]

LATTICE CURL AND WIFE, EVELYN CURL, LEWIS BOGER AND WIFE, KATHY BOGER, PLAINTIFFS v. AMERICAN MULTIMEDIA, INC., AMI, A.M.I., INC., AMERICAN MEDIA INTERNATIONAL, LLC, AMERICAN MEDIA INTERNATIONAL, LTD., BURLINGTON PROPERTY, LLC, BILL AND PEGGY BRITT LIMITED PARTNERSHIP, BILLY B. BRITT, PEGGY G. BRITT, DEFENDANTS

EARL G. BROWN, EMMA L. BROWN, RICHARD B. EVANS, PEGGY F. EVANS, CATHERINE ANN EVANS, RICHARD TIM EVANS, CLARENCE FARRELL, KATHRYN FARRELL, ROBERT POWELL, SR. AND RUTH MAXINE POWELL, PLAINTIFFS v. AMERICAN MULTIMEDIA, INC., AMI, A.M.I., INC., AMERICAN MEDIA INTERNATIONAL, LLC, AMERICAN MEDIA INTERNATIONAL, LTD., BURLINGTON PROPERTY, LLC, BILL LIMITED PARTNERSHIP, BILLY B. BRITT, PEGGY G. BRITT, DEFENDANTS

No. COA07-444

(Filed 18 December 2007)

1. Appeal and Error— motion to amend record—motion to dismiss based on appellate rules violations

Defendants' first motion to amend the record in order to add the affidavit of a geologist who worked with defendants is granted, and defendants' second motion to dismiss plaintiffs' appeal for violation of the Rules of Appellate Procedure in a case seeking damages for the contamination of plaintiffs' wells with certain toxic chemicals is denied.

2. Appeal and Error— appealability—interlocutory order—grant of partial summary judgment—dismissal of remaining claims without prejudice makes a final order

Defendants' motion seeking dismissal of plaintiffs' appeal in a case seeking damages for the contamination of plaintiffs' wells with certain toxic chemicals on the basis that it is from an interlocutory order is denied because: (1) plaintiffs voluntarily dismissed without prejudice their remaining claims for property damage against defendants under N.C.G.S. § 1A-1, Rule 41 after the entry of partial summary judgment, thus making the trial court's grant of partial summary judgment a final order; and (2) although defendants contend *Hill v. West*, 177 N.C. App. 132 (2006), compels dismissal in the instant case, inasmuch as the holding in *Hill* was apparently based in part on appellants' manipulative behavior and failure to follow the Rules of Appellate Procedure, *Hill's* holding is restricted to the facts of that case.

3. Oil and Gas— toxic contamination of wells—personal injury claims—new causes of action—partial summary judgment

The trial court did not err in an action seeking damages for the contamination of plaintiffs' wells with toxic chemicals by entering partial summary judgment in favor of defendants on plaintiffs' personal injury claims for monetary damages under the strict liability provision of the Oil Pollution and Hazardous Substance Control Act set forth in N.C.G.S. § 143-215.93 based upon loss of chance of continued health/increased risk of serious disease, right not to be compelled to undergo heightened medical monotoring, and instilling fear of cancer or other deadly disease because: (1) none of the three claims proposed by plaintiff under the strict liability statute were asserted in their complaint; (2) plaintiffs have no recognized present injury ; and (3) recognition of a new cause of action is a policy decision within the province of the legislature.

4. Emotional Distress— intentional infliction—toxic chemicals in wells—absence of evidence of mental condition

Plaintiffs failed to produce evidence that they had suffered from or had been diagnosed with or treated for any "severe and disabling emotional or mental condition" required to establish the severe emotional distress element of a claim for the intentional infliction of emotional distress from the alleged contamination by defendants of their wells with toxic chemicals.

Appeal by Plaintiffs from judgment entered 15 January 2007 by Judge W. Osmond Smith, III, in Alamance County Superior Court. Heard in the Court of Appeals 31 October 2007.

Pulley, Watson, King & Lischer, P.A., by Guy W. Crabtree, Mark E. Fogel and Richard N. Watson; and Hopf & Higley, P.A., by James F. Hopf and Donald S. Higley, II, for Plaintiff-Appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Robert J. King III, and Alexander Elkan; and Northern Blue, LLP, by J. William Blue, Jr., for Defendant-Appellees.

ARROWOOD, Judge.

This appeal arises from a lawsuit seeking damages for the contamination of Plaintiffs' wells with certain toxic chemicals. Plaintiffs appeal from entry of partial summary judgment. We affirm.

The Plaintiffs are individuals who are current or former residents of Hahn Road, in Burlington, North Carolina. Defendants are individuals and corporations with a present or former interest in property located near Hahn Road. Defendants' property has had soil and groundwater contamination with chlorinated solvents, including trichloroethene ("TCE") and tetrachloroethene ("PCE"), both of which are harmful to the human body. TCE and PCE contamination has also occurred in Plaintiffs' wells.

In March 2003 Plaintiffs filed suit against Defendants, alleging that Defendants were liable for contamination of their wells and asserting claims of negligence, negligence *per se*, strict liability under N.C. Gen. Stat. § 143-215.93, nuisance, trespass, and *res ipsa loquitor*. Based on these claims, Plaintiffs sought damages for medical expenses, pain and suffering, the increased likelihood of future disease, the cost of medical monitoring that was recommended as a result of Plaintiffs' increased risk of disease, their fear of future disease and diminished quality of life, the cost of remediation to their properties, the diminution in the value of their properties, and the cost of alternative water supplies.

On 11 December 2006 the trial court granted Defendants' motion for partial summary judgment, and dismissed all claims against Defendants David J. Forsyth and Jerry C. Jones, Jr., who are not parties to this appeal. In an order entered 15 January 2007, the trial court dismissed Plaintiffs' personal injury claims for monetary damages for medical expenses, medical monitoring, pain and suffering, diminished quality of life, the increased chances that Plaintiffs would contract serious illness, and claims based on allegations of psychic or emotional injury. The trial court denied Defendants' motion for entry of summary judgment on Plaintiffs' claims for property damages, including their claims of negligence, negligence *per se*, nuisance, trespass, *res ipsa loquitor*, and strict liability to the extent that they sought damages for diminution of property value, costs of remediation, costs of obtaining alternative water supplies, and other property damage. From this order, Plaintiffs have appealed.

Standard of Review

[1] Preliminarily, we note that Defendants have filed several appellate motions. The first of these, Defendants' motion to amend the record in order to add the affidavit of Walter Beckwith, a geologist who worked with Defendants, is hereby granted. The second motion,

seeking dismissal of Plaintiffs' appeal for violation of the Rules of Appellate Procedure, is denied.

[2] Defendants' third motion, seeking dismissal of Plaintiffs' appeal as interlocutory, is also denied. "A judgment is either interlocutory or the final determination of the rights of the parties." N.C. Gen. Stat. § 1A-1, Rule 54(a) (2005). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950).

In the instant case, the trial court entered an order of partial summary judgment, leaving Plaintiffs' claims for property damage still pending. "A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal." *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). However, after the entry of partial summary judgment, Plaintiffs dismissed their remaining claims against Defendants, pursuant to N.C. Gen. Stat. § 1A-1, Rule 41 (2005). N.C. Gen. Stat. §1A-1, Rule 41(a)(1) (2005) provides in pertinent part that:

> [A]n action or any claim therein may be dismissed by the plaintiff . . . by filing a notice of dismissal at any time before the plaintiff rests his case[.] . . . Unless otherwise stated . . . the dismissal is without prejudice[.] . . . [and] a new action based on the same claim may be commenced within one year after such dismissal[.] . . .

All the Plaintiffs dismissed their remaining claims; some did so without prejudice and others entered dismissals with prejudice. After entry of voluntary dismissal there was nothing further that the trial court could do in the case, although certain Plaintiffs retained the right to refile their claims within a year of entering dismissal. We find *Combs & Assocs. v. Kennedy*, 147 N.C. App. 362, 555 S.E.2d 634, (2001), to be instructive in this situation. In *Combs*, as in the instant case, the plaintiff took a voluntary dismissal without prejudice of its remaining claim. The Court held:

> Ordinarily, an appeal from an order granting summary judgment to fewer than all of a plaintiff's claim is premature and subject to dismissal. However, since the plaintiff here voluntarily dismissed the claim which survived summary judgment, any rationale for

> dismissing the appeal fails. Plaintiff's voluntary dismissal of this remaining claim does not make the appeal premature but rather has the effect of making the trial court's grant of partial summary judgment a final order.

Id. at 367, 555 S.E.2d at 638. Citing several other cases, the *Combs* Court noted further that its holding:

> comports with the procedural posture of appeals this Court has initially dismissed as being interlocutory and then subsequently heard on appeal following voluntary dismissals. In *Whitford v. Gaskill*, 119 N.C. App. 790, 460 S.E.2d 346 (1995), . . . the trial court granted partial summary judgment in plaintiff's favor. The defendant appealed and this Court dismissed the appeal as interlocutory[.] . . . [P]laintiff voluntarily dismissed her claim for damages. This Court then allowed the defendant's renewed appeal of the trial court's summary judgment order. Similarly, in *Berkeley Federal Savings Bank v. Terra Del Sol, Inc.*, 119 N.C. App. 249, 457 S.E.2d 736 (1995), *disc. rev. denied*, 342 N.C. 639, 466 S.E.2d 276 (1996), the trial court granted the plaintiff [partial] summary judgment[.] . . . This Court initially dismissed defendants' appeal as interlocutory, only to allow the appeal following plaintiff's voluntary dismissal of its remaining claims.

Id. at 367-68, 555 S.E.2d at 639. We agree with the Court in *Combs* that our holding on this issue is in accord with precedent. Additionally in *Brown v. Woodrun Ass'n*, 157 N.C. App. 121, 577 S.E.2d 708 (2003), this Court ruled on an appeal in which:

> [The] Superior Court . . . granted partial summary judgment in favor of plaintiffs on all issues other than damages. . . . [D]efendant appealed to this Court. We remanded the case to the lower court as interlocutory and not appealable because there were remaining factual issues to decide. . . . [P]laintiffs voluntarily dismissed their damages claim without prejudice[.] . . . Thereafter, defendant gave notice of appeal to this Court[.]

Id. at 123-24, 577 S.E.2d at 710; *see also, e.g.*, *Rouse v. Pitt County Memorial Hospital*, 343 N.C. 186, 470 S.E.2d 44 (1996) (appeal of partial summary judgment dismissed as interlocutory by this Court, which subsequently hears appeal after plaintiff takes voluntary dismissals, both with and without prejudice, of remaining claims). We conclude that, following the dismissal of Plaintiffs' remaining claims, their appeal was no longer interlocutory.

Defendants, however, ask us to dismiss Plaintiffs' appeal as interlocutory, based on the holding in a recent case, *Hill v. West*, 177 N.C. App. 132, 627 S.E.2d 662 (2006). In *Hill*, following dismissal of plaintiffs' appeal from partial summary judgment as interlocutory, appellants took a voluntary dismissal without prejudice of their remaining claims against defendants. Plaintiffs then filed a second appeal, which this Court dismissed. Defendants herein argue that *Hill* compels dismissal in the instant case. We note, however, that *Hill* did not attempt to distinguish its holding from the significant body of case law holding *contra*. Moreover, the Court in *Hill* stated several reasons for the dismissal, including plaintiffs' repeated failure to comply with the North Carolina Rules of Appellate Procedure, and the Court's perception that the appellants were "manipulating the Rules of Civil Procedure in an attempt to appeal the 2003 summary judgment that otherwise would not be appealable." *Id.* at 135, 627 S.E.2d at 665. Inasmuch as the holding in *Hill* was apparently based in part on the appellants' "manipulative" behavior and failure to follow the Rules of Appellate Procedure, we conclude that *Hill's* holding is restricted to the facts of that case. Defendants' motion is denied.

Summary judgment is properly entered "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). Further:

> The purpose of [summary judgment] is to avoid a formal trial where only questions of law remain and where an unmistakable weakness in a party's claim or defense exists. This Court has . . . instructed that "an issue is genuine if it is supported by substantial evidence," which is that amount of relevant evidence necessary to persuade a reasonable mind to accept a conclusion[.] . . . "[A]n issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action."

Liberty Mut. Ins. Co. v. Pennington, 356 N.C. 571, 579, 573 S.E.2d 118, 123-24 (2002) (quoting *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002); and *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972)) (citations omitted).

"On appeal of a trial court's allowance of a motion for summary judgment, we consider whether, on the basis of materials supplied to the trial court, there was a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. Evidence presented by the parties is viewed in the light most favorable to the non-movant." *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (citing *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)).

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[3] Plaintiffs argue that the trial court erred as a matter of law by granting summary judgment for Defendants on Plaintiffs' personal injury claims. Plaintiffs have not identified factual disputes, but instead argue that summary judgment was improper as a matter of law. We disagree.

Plaintiffs first discuss the relationship between their claims and the Oil Pollution and Hazardous Substances Control Act ("OPHSCA"), N.C. Gen. Stat. § 143-215.75 (2005) *et seq.* N.C. Gen. Stat. § 143-215.93 (2005) provides in pertinent part: "Any person having control over oil or other hazardous substances which enters the waters of the State in violation of this Part shall be strictly liable, without regard to fault, for damages to persons or property, public or private, caused by such entry[.]" On the basis of § 143-215.93, Plaintiffs "ask the Court to enforce the plain language of OPHSCA and apply its strict liability standard to personal injury claims."

Plaintiffs are correct that the cited statute imposes strict liability for personal and property damage on violators of OPHSCA. However, the standard of liability assumes relevance only in the context of a valid claim of personal injury. In that regard, Plaintiffs ask this Court to

> recognize in toxic contamination cases at least these three causes of action, all of which are firmly rooted in traditional tort law: (1) infliction of a loss of chance of continued health/increased risk of serious disease; (2) an invasion of personal autonomy, specifically of the right not to be compelled to undergo heightened medical monitoring for the remainder of their lives; and (3) the instilling of fear of cancer or other deadly disease.

We are sympathetic to Plaintiffs' situation. Although none of the Plaintiffs is presently diagnosed with an illness caused by exposure to TCE or PCE, there is evidence that their exposure to these chemicals increased their future risk of serious illnesses, including certain can-

cers. These claims are not totally novel; Plaintiffs in many jurisdictions have raised similar claims. *See*, *e.g.*, 32 Wm. Mitchell L. Rev. 1095 (2006), NOTE: A FIFTY-STATE SURVEY OF MEDICAL MONITORING AND THE APPROACH THE MINNESOTA SUPREME COURT SHOULD TAKE WHEN CONFRONTED WITH THE ISSUE. However, for several reasons, we elect not to create these new causes of action.

Firstly, none of the three causes of action proposed by Plaintiffs were asserted in their complaint, which sought damages only for negligence; negligence *per se*; statutory strict liability; nuisance; trespass; and *res ipsa loquitur*. "This Court has long held that issues and theories of a case not raised below will not be considered on appeal[.]" *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001) (citing *Smith v. Bonney*, 215 N.C. 183, 184-85, 1 S.E.2d 371, 371-72 (1939); *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). "Because the pertinent allegations have not been withdrawn or amended, the pleadings have a binding effect as to the underlying theory of plaintiff's [] claim." *Anderson v. Assimos*, 356 N.C. 415, 417, 572 S.E.2d 101, 102 (2002).

Moreover, the "recognition of a new cause of action is a policy decision which falls within the province of the legislature. 'The excelsior cry for a better system in order to keep step with the new conditions and spirit of a more progressive age must be made to the Legislature, rather than to the courts.' " *Ipock v. Gilmore*, 85 N.C. App. 70, 73, 354 S.E.2d 315, 317 (1987) (quoting *Henson v. Thomas*, 231 N.C. 173, 176, 56 S.E.2d 432, 434 (1949)).

For example, consider Plaintiffs' argument that the "policy objectives of OPHSCA compel the recognition of 'increased risk of disease' as a present injury." Sound policy reasons might be advanced either in favor of or opposition to the creation of this cause of action, and if such a claim were recognized, other policy questions would arise. The questions would include the following inquiries: What statistical chance of future illness or percent increase in that likelihood would trigger the cause of action? Would secondary causes of increased risk, such as cigarette smoking, preclude recovery? Would plaintiffs be required to demonstrate present physical effects, such as decreased immune function or increased cellular concentration of a toxin? Similar questions would arise upon recognition of the costs of future medical monitoring as a basis for damages. Would Defendants be liable for the costs of all "medically recommended" monitoring, or would Plaintiffs have to meet some other standard?

The cases cited by Plaintiffs in support of these damages all involve future damages claimed in connection with a recognized present injury. However, these cases do not address or support a freestanding claim for future medical expenses in the absence of a present injury.

Clearly, recognition of the increased risk of disease as a present injury, or of the cost of medical monitoring as an element of damages, will present complex policy questions. We conclude that balancing the humanitarian, environmental, and economic factors implicated by these issues is a task within the purview of the legislature and not the courts. Accordingly, we decline to create the new causes of action or type of damages urged by Plaintiffs.

[4] Regarding Plaintiffs' claims for their increased fears and anxiety, our common law has long recognized claims for negligent and intentional infliction of emotional distress. We again note that Plaintiffs failed to bring claims for either of these. Further, Plaintiffs failed to produce evidence to support these claims.

"The essential elements of a claim for intentional infliction of emotional distress are '(1) extreme and outrageous conduct by the defendant (2) which is intended to and does in fact cause (3) severe emotional distress.' " *Holloway v. Wachovia Bank and Trust Co.*, 339 N.C. 338, 351, 452 S.E.2d 233, 240 (1994) (quoting *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981)). "In this context, the term 'severe emotional distress' means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990) (citations omitted).

None of the North Carolina cases cited by Plaintiffs suggest that a different standard might be applicable. Rather, Plaintiffs have cited cases that address issues other than the existence of severe emotional distress, wherein the presence of either a physical injury or severe emotional injury had been established. Nor are we persuaded by Plaintiffs' citations from other jurisdictions that the element of severe emotional distress is "unnecessary in toxic exposure cases[.]"

Plaintiffs produced no evidence that any Plaintiff had suffered from or was diagnosed with or treated for a "severe and disabling emotional or mental condition." We conclude that the trial court did

not err by granting summary judgment on their claims for damages for their emotional distress.

Finally, Plaintiffs argue that the trial court committed "an error of law" by granting summary judgment of Plaintiffs' claims for personal injuries associated with their claims of trespass and nuisance. As discussed above, we have concluded that Plaintiffs failed to forecast evidence of any type of personal injury that has been recognized as compensable in North Carolina.

We conclude that the trial court did not err and that its order of partial summary judgment for Defendants should be

Affirmed.

Judges CALABRIA and STEPHENS concur.

DAVID DECKER AND WIFE SUSAN DECKER v. HOMES, INC./CONSTRUCTION MANAGEMENT & FINANCIAL GROUP, AN INDIANA CORPORATION, DON JONES, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, DON HEATHERLY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, AND BRUCE STORM, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY

No. COA06-150

(Filed 18 December 2007)

1. Judgments— motion to set aside entry of default—good cause standard

The trial court erred in a breach of contract, breach of warranty, negligence, fraud, unfair and deceptive trade practices, slander of title, and punitive damages case arising out of the construction of a new home by applying an incorrect legal standard in ruling on defendants' motion to set aside entry of default, and the case is remanded for reconsideration by the trial court as to whether defendants have shown good cause to set aside the default, because: (1) when one party fails to file an answer and the trial court enters a judgment determining the issue of liability but ordering a trial on the issue of damages, the judgment is only an entry of default rather than a default judgment; (2) in the instant case the trial court entered default judgment against defendants on the issue of liability and directed that the case be

set for a jury trial on the issue of damages, and defendants filed a motion to set aside entry of default and purported default judgment before the case went to trial; and (3) the trial court applied the incorrect standard of excusable neglect, whereas the appropriate standard was to determine whether defendant had shown good cause for setting aside the default under N.C.G.S. § 1A-1, Rule 55(d).

2. Damages and Remedies— unfair and deceptive trade practices damages—punitive damages

The trial court did not abuse its discretion by denying defendants' motion for a new trial under N.C.G.S. § 1A-1, Rule 59 on the issue of compensatory damages, but erred on the issues of unfair and deceptive trade practices damages and punitive damages, because: (1) although defendants contend the trial court erred by applying the law of contracts to the case since they allege they are a supplier only and not a general contractor, the issue of liability had been previously determined by the entry of default; (2) although defendants contend the compensatory damages award was excessive and unfounded, there was nothing to indicate the trial court abused its discretion, and the trial court was in a better position to determine whether the jury award was excessive since it actively participated in the proceedings; (3) in regard to damages for unfair and deceptive trade practices, plaintiffs failed to show damages arising from the claim of lien defendants filed on their real property, and there was no evidence introduced of damages incurred by plaintiffs as a result of the false representation by defendants giving rise to the unfair and deceptive trade practices claim separate and apart from the damages arising out of their breach of contract claim; and (4) it was error for the trial court to submit the question of punitive damages to a jury without affording defendant the opportunity to present evidence under N.C.G.S. § 1D-35. If upon retrial the trial court denies the motion to set aside entry of default and plaintiffs are awarded both punitive damages and unfair and deceptive trade practices damages in a new trial, plaintiffs must elect between these two remedies.

Appeal by defendants from judgment entered 24 January 2005 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 6 February 2007.

Dungan & Associates, P.A., by Shannon Lovins & Robert E. Dungan, for plaintiffs-appellees.

Ferikes & Bleynat, PLLC, by Edward L. Bleynat, Jr., for defendants-appellants.

STEELMAN, Judge.

When the trial court applies the incorrect standard in deciding a motion to set aside an entry of default, we are required to remand the case to the trial court for application of the correct standard.

I. Factual Background

On 8 June 2001, Daniel and Susan Decker (plaintiffs) entered into an agreement to pay Homes, Inc./Construction Management & Financial Group (Homes, Inc.) to construct a new home. Homes, Inc. represented that plaintiffs would be able to move into their new home within nine months. Within eight weeks of entering into the agreement, there were delays in the commencement of construction of the home. Plaintiffs became concerned as to whether construction draws were being properly applied to the work being performed. Subcontractors refused to finish work because they were not being paid by Homes, Inc. As late as January of 2003, some eighteen months after entering into the agreement, there was no certificate of occupancy for the home. Plaintiffs refused to pay monies to Homes, Inc. and had to pay subcontractors directly. In March of 2003, Homes, Inc. and Don Jones (Jones), a principal of Homes, Inc., filed a claim of lien on plaintiffs' property.

Plaintiffs filed suit against Homes, Inc., Jones and Don Heatherly in the Superior Court of Buncombe County on 6 January 2004.[1] This complaint asserted the following claims: (1) breach of contract; (2) breach of warranty; (3) negligence; (4) fraud; (5) unfair and deceptive trade practices; (6) slander of title; (7) punitive damages; and (8) declaratory and injunctive relief pertaining to the claim of lien. On 24 February 2004, the Clerk of Court entered an entry of default against all three defendants.

On 6 April 2004, plaintiffs filed a First Amended Verified Complaint, which added Bruce Storm (Storm) as a party defendant. The amended complaint also added allegations that Homes, Inc. was

1. Heatherly subsequently filed bankruptcy and was voluntarily dismissed from the case on 16 November 2004.

under-capitalized, was dominated and controlled by the individual defendants, and that the corporate identity of Homes, Inc. should be ignored. It also added a claim for civil conspiracy against the individual defendants. On 29 June 2004, the Clerk of Court entered default as to the Amended Complaint as to all defendants.

On 5 November 2004, plaintiffs filed a motion for entry of a default judgment. On 16 November 2004, the Honorable Ronald K. Payne entered default judgment "on the issue of liability in favor of Plaintiffs against Defendants Homes, Inc./Construction Management & Financial Group, Don Jones, and Bruce Storm," and directed that the case be set for trial on damages at the 18 January 2005 term of court.

On the morning that the trial was to commence, 18 January 2005, defendants filed a Motion to Set Aside Entry of Default and Default Judgment. This motion was denied in open court on 18 January 2005 by Judge Downs. The case proceeded to trial before a jury solely on the issue of damages. On 19 January 2005, the jury returned a verdict in favor of plaintiffs, awarding compensatory damages in the amount of $270,570.35, damages for unfair and deceptive trade practices of $107,408.71, and punitive damages in the amount of $250,000.00. Plaintiffs elected to treble the unfair trade practices damages in lieu of the punitive damages awarded by the jury. On 24 January 2005, Judge Downs entered judgment in the amount of $592,796.48 against defendants and further ordered that defendants' claim of lien be stricken. On 21 March 2005, the trial court awarded attorney's fees to plaintiffs' counsel. On 29 March 2005, the trial court denied defendants' motions for a new trial, relief from judgment, and to set aside default judgment. Defendants appeal.

II. Setting Aside Entry of Default

[1] In their first argument, defendants contend that the trial court erred in denying their motion to set aside entry of default and default judgment. We hold that the trial court applied an incorrect legal standard in ruling on this motion and we remand this portion of the case for further proceedings.

"We have previously clarified that when one party fails to file an answer and the trial court enters a judgment determining the issue of liability but ordering a trial on the issue of damages, the judgment is only an entry of default rather than a default judgment." *Moore v. Sullivan*, 123 N.C. App. 647, 649, 473 S.E.2d 659, 660 (1996).

In the instant case, Judge Payne entered default judgment against defendants on the issue of liability and directed that the case be set for a jury trial on the issue of damages. Before the case went to trial, defendants filed a motion to set aside entry of default and default judgment. In denying defendants' motion to set aside the entry of default judgment, Judge Downs applied the standard of excusable neglect, and determined that defendants' conduct did not rise to the level of excusable neglect.

In *Pendley v. Ayers*, 45 N.C. App. 692, 263 S.E.2d 833 (1980), the Clerk of Court entered default against defendant. Subsequently, a trial judge entered an order granting judgment against defendant as to liability and setting the matter for trial on the issue of damages. Defendant moved to set aside the entry of default and "purported judgment." This motion was denied based upon the failure of defendant to show excusable neglect. In *Pendley*, we held:

> Judge Howell was required to find whether defendant had shown good cause for setting aside the default. The test applied by Judge Howell related to setting aside a final judgment. For this reason, his order must be vacated, and the cause is remanded for a hearing to determine whether defendant has shown good cause sufficient enough to set aside the default.

Pendley, 45 N.C. App. at 696, 263 S.E.2d at 835.

The facts of the instant case are in all relevant aspects identical to those in *Pendley*. Our holding in that case is binding precedent which we are obliged to follow. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

The order denying the motion to set aside the entry of default must be vacated, and this matter remanded for reconsideration by the trial court as to whether defendants have shown good cause to set aside the default.

In the event that the trial court denies defendants' motion to set aside the entry of default, we address defendants' remaining arguments.

III. Motion for New Trial

[2] In their second argument, defendants contend that the trial court erred in denying their motion for a new trial under Rule 59 of the North Carolina Rules of Civil Procedure.

A. Standard of Review

"It has long been the rule in this State that a motion to set aside the verdict and for a new trial is 'addressed to the sound discretion of the trial judge, whose ruling, in the absence of abuse of discretion, is not reviewable on appeal.' " *Glen Forest Corp. v. Bensch*, 9 N.C. App. 587, 589, 176 S.E. 2d 851, 853 (1970) (quoting *Pruitt v. Ray*, 230 N.C. 322, 52 S.E. 2d 876 (1949)). "[A]n appellate court should not disturb a *discretionary* Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *In re Will of Buck*, 350 N.C. 621, 625, 516 S.E.2d 858, 861 (1999) (citations and quotations omitted).

N.C. R. Civ. P. 59 provides in relevant part:

> (a) Grounds.—A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:
>
> (1) Any irregularity by which any party was prevented from having a fair trial;
>
> . . .
>
> (5) Manifest disregard by the jury of the instructions of the court;
>
> (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
>
> (7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;
>
> (8) Error in law occurring at the trial and objected to by the party making the motion, or
>
> (9) Any other reason heretofore recognized as grounds for new trial.

N.C. R. Civ. P. 59 (2005).

B. Scope of Trial Following Entry of Default

"When default is entered due to defendant's failure to answer . . . the substantive allegations raised by plaintiff's complaint are no longer in issue, and, for the purposes of entry of default and default judgment, are deemed admitted." *Blankenship v. Town & Country Ford, Inc.*, 174 N.C. App. 764, 767, 622 S.E.2d 638, 640 (2005) (citations and quotations omitted). Upon entry of default, the defendant will have no further standing to defend on the merits or contest the

plaintiff's right to recover. *Spartan Leasing, Inc. v. Pollard*, 101 N.C. App. 450, 460, 400 S.E.2d 476, 482 (1991). If a trial on the issue of damages takes place, the only question for determination is the amount of damages. *Bowie v. Tucker*, 206 N.C. 56, 59-60, 173 S.E. 28, 30 (1934). "[A] judgment by default and inquiry establishes a right of action in plaintiff of the kind stated in the complaint and entitl[es] plaintiff to nominal damages, but . . . [t]he facts and attendant circumstances giving character to the transaction and relevant as tending to fix the *quantum* of damages, must be shown . . ." *De Hoff v. Black*, 206 N.C. 687, 689-90, 175 S.E. 179, 180 (1934).[2] At a damages hearing following entry of default, evidence showing how the injury occurred is competent, not to exculpate defendants from liability, but to allow the jury to make a rational decision as to the amount of damages to be awarded. *De Hoff*, 206 N.C. at 690, 175 S.E. at 180.

C. Admission of Evidence

Defendants contend that the trial court erred in applying the law of contracts to the case. We disagree.

At trial, defendants objected to the admission into evidence of plaintiffs' Exhibit 2, entitled "Purchase Agreement," on the grounds that the document was not the complete and final agreement between the parties. Defendants subsequently attempted to cross-examine Mr. Decker using the back page of the purchase agreement. Counsel for plaintiff objected to the question, and the objection was sustained. Defendants made no proffer of this evidence to the court, the court sustained plaintiffs' objection, and refused to allow defendants to use the document to cross-examine Mr. Decker.

The record reveals that defendants sought to have this evidence admitted for the purpose of contesting liability, not damages. Defendants sought to establish that they were not, in fact, a general contractor, but instead were a "supplier only" and, as such, their liability to plaintiffs was limited. However, the issue of liability had been previously determined by the entry of default. Thus, defendants had no standing to defend the case on the merits. *See Spartan*, 101 N.C. App. at 460, 400 S.E.2d at 482 and *De Hoff*, 206 N.C. at 690, 175 S.E. at 180. We hold that the trial court did not abuse its discretion in denying defendants' motion for a new trial on this ground. This argument is without merit.

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2. We note that while the terminology used in the older cases of "default and inquiry" is no longer applicable under the North Carolina Rules of Civil Procedure, the underlying legal concepts and analysis remain valid.

D. Compensatory Damages

Defendants contend that the compensatory damages award was excessive and unfounded, and that they are entitled to a new trial. Defendants contend that plaintiffs' evidence showed approximately $180,000.00 in compensatory damages, and that the award of $270,570.35 "bears no relationship to plaintiffs' evidence . . . ." We disagree.

"The trial court may grant a new trial due to 'excessive or inadequate damages appearing to have been given under the influence of passion or prejudice[.]' " *Guox v. Satterly*, 164 N.C. App. 578, 581, 596 S.E.2d 452, 454 (2004) (quoting N.C. R. Civ. P. 59(a)(6) (2003)). "A motion for a new trial on the grounds of [excessive] damages is addressed to the sound discretion of the trial court[,] [and that] . . . discretion is practically unlimited." *Id.* at 581, 596 S.E.2d at 454-55 (citations and quotations omitted).

The evidence presented at trial set forth with sufficient particularity the compensatory damages suffered by plaintiffs. At the time the parties entered into the contract, defendants provided plaintiffs with a "Summary Sworn Construction Statement," representing that the cost to complete construction of plaintiffs' home would not exceed $240,000.00, which purported to include construction costs and land acquisition. Plaintiffs' Exhibit 1 showed a breakdown of plaintiffs' damages suffered as a result of the poor construction of plaintiffs' home, showing total damages of $185,692.40. Jim Anthony, a licensed home inspector, testified regarding the severe construction defects to plaintiffs' home. Jonathon Frock, a general contractor licensed in North Carolina, also testified as to plaintiffs' substantial damages. Mr. Frock prepared a spreadsheet and a narrative to demonstrate the severe defects to plaintiffs' home and the anticipated costs to repair those defects, which was approximately $85,000.00. Mr. Frock testified that this was a conservative estimate, and that some of the costs could double once the repairs commenced.

"The trial judge, who actively participated in the trial and had first-hand knowledge of the proceedings, was clearly in a much better position than this Court to determine whether the jury award was excessive." *Lovell v. Nationwide Mut. Ins. Co.*, 108 N.C. App. 416, 426, 424 S.E.2d 181, 188 (1993) (citation omitted). There is nothing in the instant case to indicate that the trial judge abused his discretion. This argument is without merit.

E. Unfair and Deceptive Practices Damages

Defendants contend that the trial court erred in denying their motion for new trial on the grounds that plaintiffs' evidence at trial was insufficient to justify the verdict. We agree.

The entry of default established the liability of defendants under a theory of unfair and deceptive trade practices. However, in order to recover damages arising from an unfair and deceptive trade practices claim, a plaintiff must prove actual injury as a proximate result of the violation of N.C. Gen. Stat. § 75-1.1. *Bailey v. Le Beau*, 79 N.C. App. 345, 352, 339 S.E.2d 460, 464 (1986) ("[P]laintiff must prove not only that defendants violated G.S. 75-1.1, but also that plaintiff has suffered actual injury as a proximate result of defendants' misrepresentations."). Further, "[w]here the same source of conduct gives rise to a traditionally recognized cause of action, as, for example, an action for breach of contract, and as well gives rise to a cause of action for violation of G.S. 75-1.1, damages may be recovered either for the breach of contract, or for violation of G.S. 75-1.1, but not for both." *Marshall v. Miller*, 47 N.C. App. 530, 542, 268 S.E.2d 97, 103 (1980), *modified and aff'd*, 302 N.C. 539, 276 S.E.2d 397 (1981).

In the instant case, plaintiffs failed to show damages arising from the claim of lien defendants filed on their real property. Further, there was no evidence introduced of damages incurred by plaintiffs as a result of the false representations by defendants giving rise to the unfair and deceptive trade practices claim separate and apart from the damages arising out of their breach of contract claim. Plaintiffs are entitled to one recovery for the same alleged wrongful conduct, but not multiple recoveries under theories of breach of contract and unfair and deceptive trade practices. *Marshall*, 47 N.C. App. at 542, 268 S.E.2d at 103; *United Lab. v. Kuykendall*, 335 N.C. 183, 191-92, 437 S.E.2d 374, 379 (1993). The entry of default established the liability of defendants under each of these theories, but did not entitle plaintiffs to a double recovery.

We hold that the trial court erred in denying defendants' motion for a new trial on the issue of unfair and deceptive trade practices damages. The damages awarded for unfair and deceptive trade practices must be vacated and the matter remanded for a new trial on the issue of damages arising from this claim.

F. Punitive Damages

Defendants contend that since they did not have an opportunity to present evidence on the issue of punitive damages, they are entitled to a new trial on punitive damages. We agree.

In *Hunter v. Spaulding*, 97 N.C. App. 372, 379, 388 S.E.2d 630, 635 (1990), we held that it was error for a trial court to submit the question of punitive damages to a jury without affording defendant the opportunity to present evidence in a case where default was entered as a discovery sanction. This is because of the peculiar nature of punitive damages. While the entry of default established the basis for punitive damages under N.C. Gen. Stat. § 1D-15 (2005), it did not establish the factors which the jury was to consider in determining the amount of punitive damages under N.C. Gen. Stat. § 1D-35 (2005). During the retrial on punitive damages, both plaintiffs and defendants may present evidence pursuant to N.C. Gen. Stat. § 1D-35.

Upon retrial, if plaintiffs are awarded both punitive damages and unfair and deceptive trade practices damages, plaintiffs must elect between these two remedies. *Ellis v. Northern Star Co.*, 326 N.C. 219, 227, 388 S.E.2d 127, 132 (1990).

IV. Summary of Holdings

Defendants' motion to set aside entry of default is remanded to the trial court for consideration under the correct standard of good cause shown pursuant to N.C. R. Civ. Pro. 55(d). In the event that the trial court denies the motion to set aside entry of default, there must be a new trial on unfair and deceptive trade practices damages and punitive damages. In the event that plaintiffs are awarded both unfair and deceptive trade practices damages and punitive damages, they must elect between the two damages awards.

Assignments of error listed in the record but not argued in appellants' brief are deemed abandoned. N.C. R. App. P. 28(b)(6) (2007).

VACATED and REMANDED in part, AFFIRMED in part.

Judges WYNN and JACKSON concur.

KARYN WINDERS, EMPLOYEE, PLAINTIFF-APPELLEE v. EDGECOMBE COUNTY HOME HEALTH CARE, EMPLOYER, AND SEDGWICK CLAIMS MANAGEMENT SERVICES, CARRIER, DEFENDANTS-APPELLANTS

No. COA07-489

(Filed 18 December 2007)

1. Workers' Compensation— back injury—pool therapy

There was competent evidence in the record in a workers' compensation case involving a back injury to support the Industrial Commission's finding that pool therapy is a compensable medical treatment or service.

2. Workers' Compensation— back injury—pool therapy—frequency

Industrial Commission findings in a workers' compensation case that plaintiff needs pool therapy five days a week for a back injury were not supported by the evidence.

3. Workers' Compensation— back injury—pool therapy—cost of home pool

The Industrial Commission erred by mandating that a back-injury plaintiff receive the daily cost of a home pool on the days she could not use the YMCA or a similar facility for valid reasons.

Appeal by defendants from opinion and award of the Full Commission of the North Carolina Industrial Commission entered 5 February 2007 by Commissioner Bernadine S. Ballance. Heard in the Court of Appeals 1 November 2007.

Edwards and Ricci, P.A., by Roberta L. Edwards and Jonathan H. Winstead, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Robert C. Kerner, Jr., for defendants-appellants.

JACKSON, Judge.

Edgecombe County Home Health Care and Sedgwick Claims Management Services ("defendants") appeal the 5 February 2007 opinion and award of the Full Commission of the North Carolina Industrial Commission in favor of Karyn Winders ("plaintiff"). For the reasons stated below, we reverse.

Plaintiff was working as a home health care nurse on 29 June 1998 when she injured her back attempting to catch her three hundred pound patient who was falling off a bed. The following day, plaintiff was treated by her family physician, Dr. Michael Sunderman ("Dr. Sunderman"). He recommended physical therapy. Plaintiff called Dr. Sunderman on 15 July 1998 complaining of numbness and tingling in both legs, and stated that physical therapy was not helping. He referred her to Dr. John Gorecki ("Dr. Gorecki") of Duke University Medical Center.

On 14 August 1998, plaintiff saw Dr. Gorecki for severe back pain and numbness in her lower extremities. On 7 October 1998, she underwent surgery that resulted in a two-level fusion at L4-5 and L5-S1, with BAK cages and a bone graft. Plaintiff continued to experience severe pain, ultimately having a spinal column stimulator installed in October 2000. Several surgeries followed the implantation of the dorsal spinal column stimulator: (1) the pulse generator was replaced on 27 August 2001; (2) the pulse generator and extension wire were removed and a new radio frequency receiver with extension wires was implanted on 5 February 2004; and (3) the stimulator was removed on 28 November 2005 and replaced with a rechargeable one.

By 12 January 1999, plaintiff was taking OxyCodone for her pain. She reported better pain control due to the medication. At her visit on 18 March 1999, Dr. Gorecki recommended pool therapy as part of an overall physical therapy program and a gradual decrease of the previously prescribed OxyCodone dosage.

Plaintiff was referred to the YMCA for pool therapy at a 30 March 1999 outpatient physical therapy evaluation at Nash General Hospital. As of 2 August 1999, plaintiff was enrolled in an aquatic exercise class at the YMCA. She attended sessions three days each week for an hour per day. Dr. Gorecki originally prescribed pool therapy for three months. Defendants stopped paying for the pool therapy after three months, at which time plaintiff and her husband began paying for the classes.

On 7 October 1999, plaintiff again saw Dr. Gorecki and complained of modest, dull, aching back pain which worsened with activity. He imposed physical restrictions such as no lifting over ten pounds, and alternating between walking, sitting, and standing. At her 8 February 2000 follow-up visit, plaintiff asked Dr. Gorecki about con-

tinuing aquatic therapy. He told her that such therapy was appropriate and that it "would always be useful for her."

Plaintiff's father built an in-ground, heated, enclosed pool[1] at his home in October 2000—about the time plaintiff's spinal stimulator was installed. Thereafter, plaintiff traveled to her parents' home three to five times per week to use the pool for her therapy. She continued the same exercise regimen she learned at the YMCA.

In June 2003, plaintiff and her husband purchased her parents' home. Since then, plaintiff has tried to use the pool on a daily basis. During the time she is in the pool, she is relatively pain-free. Her relief continues for about fifteen minutes after she leaves the pool. Over the next few hours, the pain gradually increases to its normal level. She gets more significant benefits from the home pool as opposed to the YMCA aquatic therapy because the pool's temperature at the YMCA caused her to have back spasms. She maintains a warmer than normal temperature in the home pool because she gets better pain relief when exercising in warm water.

Throughout her treatment, plaintiff continued to see Dr. Sunderman for medication management. On 26 October 2004, she asked Dr. Sunderman to prescribe home pool therapy, including "cleaning, maintenance, and supplies." Dr. Sunderman prescribed the therapy as requested because he concurred with the request.

Plaintiff continued to experience back pain. On 12 August 2005, she was seen by a physician's assistant at Triangle Spine and Back Care Center. She stated that her pain had intensified over the previous years and had not been relieved with the multiple treatments she had tried. She did not want to try any non-surgical treatments. She was referred for a discogram to evaluate if surgery was an option.

A discogram was performed on 22 September 2005 and showed that the BAK cages were in place and the fusion was solid. There was no anatomic reason to explain the nature and extent of plaintiff's pain. Her muscle strength was normal. These results were explained to plaintiff at a 13 October 2005 follow-up visit with Dr. William F. Lestini ("Dr. Lestini") of Triangle Spine and Back Care Center.

Plaintiff filed a claim with the Industrial Commission on 27 October 2005, seeking reimbursement for heating her home pool, as well as authorization for further examinations to determine if surgery

1. The pool varies from three to five and one-half feet deep and is surrounded by several feet of concrete decking with several chairs placed around it.

was possible. A hearing was held on 3 January 2006 before a Deputy Commissioner. The opinion and award dated 17 May 2006 denied plaintiff's claim for pool maintenance and request for evaluation by one of two doctors. Plaintiff appealed to the Full Commission.

The case was reviewed by the Full Commission on 16 November 2006. On 5 February 2007, the Full Commission entered its opinion and award granting plaintiff pool therapy a minimum of five times per week, including transportation, if necessary. Defendants were ordered to reimburse plaintiff $6.85 for each day that plaintiff could not attend pool therapy away from home in order to maintain her home pool. Defendants appeal.

[1] Defendants first argue that the Full Commission erred in finding that plaintiff was entitled to pool therapy for a minimum of five days per week. We agree.

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (citing *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986)).

> Although it is well-established that the Industrial Commission is the sole judge of the credibility of the witnesses and the evidentiary weight to be given their testimony, findings of fact by the Commission may be set aside on appeal when there is a complete lack of competent evidence to support them.

Young v. Hickory Bus. Furn., 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000) (internal citations omitted). The Commission's conclusions of law are reviewed *de novo*. *Griggs v. Eastern Omni Constructors*, 158 N.C. App. 480, 483, 581 S.E.2d 138, 141 (2003).

Defendants contend that there was no competent evidence that pool therapy was warranted in that plaintiff's pain relief was too minimal to meet the statutory definition of "medical compensation." We disagree.

The North Carolina Workers' Compensation Act requires employers to provide medical compensation to workers "who suffer disability by accident arising out of and in the course of their employment." *Henry v. Leather Co.*, 234 N.C. 126, 127, 66 S.E.2d 693, 694 (1951); *see* N.C. Gen. Stat. § 97-25 (2005). "Medical compensation" is defined as

> medical, . . . and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to . . . give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability[.]

N.C. Gen. Stat. § 97-2(19) (2005).

The Industrial Commission found as fact that pool therapy is a medical treatment or service "which is reasonably required to either provide relief, effect a cure, and/or lessen Plaintiff's disability[.]" This finding of fact is supported by the deposition testimony of Drs. Sunderman and Lestini.

Dr. Sunderman testified that he sometimes prescribes such therapy when patients are significantly restricted in activity due to pain; it is a way to keep them moving. It keeps them flexible and toned. He testified that the therapy is intended to provide relief for plaintiff's back pain symptoms, that it gives her some relief, and that it maintains her tone and hopefully keeps her more physically capable. Dr. Sunderman prescribed pool therapy, albeit at plaintiff's request, because in her situation, it "ma[de] sense." He stated that part of her ongoing prescription was continued pool therapy.

Dr. Lestini testified that he sometimes recommended pool therapy for his patients as a way to get them mobilized. It is often used for people who are very deconditioned and probably would not tolerate a land-based exercise program. Although he had not reviewed plaintiff's pain management plan, he thought that if she was unable to tolerate physical therapy, pool therapy would be a reasonable backup.

Further, "relief from pain is a legitimate aspect of the 'relief' anticipated by future medical treatment under N.C. Gen. Stat. § 97-25[.]" *Simon v. Triangle Materials, Inc.*, 106 N.C. App. 39, 44, 415 S.E.2d 105, 108, *disc. rev. denied*, 332 N.C. 347, 421 S.E.2d 154 (1992). Plaintiff testified that she was relatively pain-free while in the pool and remained so for a short period after getting out of the pool. She continued that her pain gradually increased over a period of a few hours to its normal level. Dr. Sunderman testified that plaintiff experienced brief but significant pain relief with pool therapy—that it was one of the few things that provided a source of improvement and pain relief for her. Dr. Sunderman further testified that there were benefits to even brief periods of pain relief. He stated that for a patient who has chronic pain, even brief periods of pain relief were psychologically beneficial.

Based upon the expert testimony and relevant case law, we hold that there is competent evidence in the record to support the Industrial Commission's finding of fact that pool therapy is a compensable medical treatment or service. This finding of fact in turn supports the Full Commission's conclusion that plaintiff is entitled to pool therapy.

[2] Defendants next contend that there is no competent evidence from medical authorities supporting the award of "a minimum" of five days per week of pool therapy. We agree.

The Full Commission concluded that defendants are obligated to provide pool therapy for a minimum of five days per week. The following findings of fact relate to the number of plaintiff's pool therapy sessions, and state in pertinent part:

> 10. Over a three-month period, Plaintiff attended sessions at the YMCA three days a week for an hour per day.
>
> . . . .
>
> 14. [O]n February 8, 2000, . . . Dr. Gorecki's medical note indicates aquatic therapy is appropriate and "would always be useful for her."
>
> 15. [Plaintiff] testified she would travel to her parents' home between three and five times a week to use the pool.
>
> . . . .
>
> 20. In June 2003, Plaintiff and her husband bought her parents' home. Since that time she has tried to use the pool on a daily basis.

As to finding of fact number 14, there is no medical note dated 8 February 2000 in the record before this Court to support it. Finding of fact number 15 is a recitation of plaintiff's testimony. "[R]ecitations of the testimony of each witness *do not* constitute *findings* of fact by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented." *In re Green*, 67 N.C. App. 501, 505 n. 1, 313 S.E.2d 193, 195 (1984) (emphasis in original). Therefore, these two findings of fact are not supported by competent evidence in the record and are not binding upon this Court. This leaves only two relevant findings of fact. Both show the number of

pool therapy sessions it was plaintiff's habit to engage in, but not the number of sessions a doctor ordered as reasonably necessary to alleviate plaintiff's pain.

The Full Commission made no findings of fact that a doctor had prescribed a minimum of five pool therapy sessions per week. The record evidence does not support such a finding of fact. Dr. Sunderman agreed in his deposition that plaintiff continues to need pool therapy on a daily basis, but his prescription, written at plaintiff's request, did not specify a number of therapy sessions per week. Although the Full Commission's findings of fact indicate that Dr. Gorecki ordered pool therapy on 3 August 1999, the medical note for that date in the record before this Court does not address pool therapy. After Dr. Gorecki allegedly prescribed pool therapy in August 1999, plaintiff received such therapy only three times each week. As the Commission's findings of fact are not supported by competent evidence that plaintiff required pool therapy for a minimum of five days per week, they cannot support its conclusion of law mandating that result.

[3] Finally, defendants argue that the maintenance costs of a home pool on days that plaintiff has "valid reasons" for not going to outside pool therapy are not "medical compensation." We agree.

The Full Commission first concluded that plaintiff had failed to prove by the greater weight of the evidence that she is entitled to medical compensation for the gas, electricity, and supplies used to heat and maintain her home pool. Several findings of fact are relevant to this conclusion of law. Such findings include, in pertinent part:

> 9. As of August 2, 1999, Plaintiff was enrolled in an aquatic exercise class at the YMCA.
>
> . . . .
>
> 11. Plaintiff testified that after the first three months of aqua therapy at the YMCA, Defendant-carrier stopped paying for the classes. Plaintiff and her husband then began to pay for the aqua therapy classes.
>
> . . . .
>
> 13. Dr. Gorecki's notes do not indicate that Plaintiff should receive water therapy from a pool heated to a certain temperature.
>
> . . . .

17. [Plaintiff] performs in [her home] pool the same regimen she learned during aqua therapy at the YMCA.

. . . .

30. Although being able to perform pool therapy at home in a heated pool is beneficial to Plaintiff, there is insufficient evidence from which to find that pool or aqua therapy at the YMCA is not also beneficial.

Although there may be some evidence in the record to support contrary findings of fact, "it has long been settled that in a Work[ers'] Compensation case the findings of fact by the Industrial Commission . . . are conclusive on appeal when supported by competent evidence, even though there is evidence that would have supported findings to the contrary." *Hollman v. City of Raleigh*, 273 N.C. 240, 245, 159 S.E.2d 874, 877 (1968). Based upon the evidence before this Court, we hold that there is sufficient competent evidence to support these findings of fact.

Here, after concluding that plaintiff had failed to prove that she was entitled to medical compensation for pool maintenance and denying plaintiff medical compensation for pool maintenance, the Full Commission made an exception "for the limited purposes authorized herein." The specific exception was that "Defendants shall . . . reimburse Plaintiff at the rate of six dollars and eighty-five cents per day for any day within the authorized weekly period that Plaintiff is required to use her home pool for therapy for valid reasons given."

The Full Commission found as fact:

28. A twenty-five thousand BTU heater is hooked up to the [pool's] filtration system. Electricity to run the pump costs about thirty-five dollars a month. The pool also requires between nine hundred to a thousand gallons of gas a year. The average annual cost of gas for the pool is eighteen hundred twenty-five dollars. The maximum cost of chemicals is two hundred fifty dollars a year. So the total cost of heating and maintaining the pool is approximately two thousand five hundred dollars a year, which amounts to approximately six dollars and eighty-five cents per day.

Although this finding of fact is supported by competent evidence in the record, it supports only partially the conclusion of law that "Defendants shall reimburse Plaintiff at the rate of six dollars and

eighty-five cents per day for any day within the authorized weekly period that Plaintiff is required to use her at home pool for valid reasons given." This conclusion of law is inconsistent with the conclusion of law that plaintiff had failed to prove she is entitled to medical compensation for the maintenance of her personal pool. Further, the Full Commission failed to give any guidance as to what "valid reasons" would support plaintiff's use of her home pool instead of the YMCA or similar facility.

Because we hold that the Full Commission erred in awarding plaintiff a greater number of pool therapy sessions per week than that supported by the evidence, and in awarding maintenance costs on days plaintiff has "valid reasons" to use her home pool, we reverse.

Reversed.

Judges TYSON and STROUD concur.

STATE OF NORTH CAROLINA v. ALFRED ALDRIAN ADAMS

No. COA07-730

(Filed 18 December 2007)

1. Rape; Sexual Offenses— first-degree—motion to dismiss—sufficiency of evidence—hands alone are not dangerous or deadly weapon

The trial court erred by denying defendant's motions to dismiss and instructing the jury on the charges of first-degree rape and first-degree sexual offense, and the convictions on these charges are vacated and the case is remanded for resentencing on the lesser-included offenses of second-degree rape and second-degree sexual offense, because: (1) there was no evidence of defendant's employment or display of a dangerous or deadly weapon during commission of these crimes; and (2) the General Assembly intended to require the State to prove defendant used an external dangerous weapon and not just his hands.

2. Sentencing— discrepancy—resentencing for felonious breaking or entering instead of first-degree burglary

The Court of Appeals determined ex mero motu in a first-degree rape, first-degree kidnapping, felonious breaking or enter-

ing, first-degree sexual offense by digital penetration, first-degree sexual offense by cunnilingus, communicating threats, and assault on a female case that there was a discrepancy between the offenses the jury found defendant to be guilty of and the offenses the trial court listed in its judgment, and the case is remanded for the trial court to strike and correct the error upon resentencing, because: (1) the trial court's judgment stated defendant was found guilty of first-degree burglary under N.C.G.S. § 14-51 and sentenced defendant as a class D felon for that conviction; and (2) the record indicated the jury found defendant to be not guilty of first-degree burglary, but guilty of the lesser-included offense of felonious breaking or entering.

Appeal by defendant from judgments entered 18 January 2007 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 29 November 2007.

Attorney General Roy Cooper, by Assistant Attorney General David N. Kirkman, for the State.

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

TYSON, Judge.

Alfred Aldrian Adams ("defendant") appeals from judgment entered after a jury found him to be guilty of: (1) first-degree rape pursuant to N.C. Gen. Stat. § 14-27.2(a); (2) first-degree kidnapping pursuant to N.C. Gen. Stat. § 14-39; (3) felonious breaking or entering pursuant to N.C. Gen. Stat. § 14-54(a); (4) two counts of first-degree sexual offense pursuant to N.C. Gen. Stat. § 14-27.4(a); (5) communicating threats pursuant to N.C. Gen. Stat. § 14-277.1; and (6) assault on a female pursuant to N.C. Gen. Stat. § 14-33(c)(2). We find no error in part, reverse in part, and remand for resentencing and correction of error in judgment.

I. Background

On 23 August 2004, S.M. ("the victim") awoke to a "shadowy affect" [sic] coming from her living room. The victim initially thought she may have forgotten to turn off her television. The victim arose from her bed and walked into the hallway to see if her television had been left on. The victim saw defendant standing in her living room. Defendant's face was not hidden in any way.

The victim asked defendant to leave her apartment. Defendant backed the victim into her bedroom and pushed her onto her bed. The victim screamed. Defendant hit the victim on the face and yelled, "[s]hut up or I'll shoot you. Do what I say and I won't shoot you . . . ." The victim never saw a gun. The victim has been a grade school teacher for the past thirty years and is five foot three inches tall. Defendant is a muscular 22 year-old male, 4 to 5 inches taller than the victim, and weighs approximately 150 pounds.

Defendant removed the victim's panties and began licking and inserting his fingers into her vagina. Defendant then licked the victim's right breast. The victim told defendant his actions were very painful because she had recently undergone "cancer surgery and radiation . . . ." Defendant asked the victim for a condom. The victim told defendant she did not have a condom. Defendant asked the victim for "Saran Wrap." The victim told defendant the "Saran Wrap" was located in the kitchen.

Defendant pulled the victim from the bed and took her into the kitchen. The victim gave defendant the "Saran Wrap." Defendant led the victim into the living room and told her to bend over a chair. Defendant wrapped his penis in "Saran Wrap" and told the victim to insert his penis into her rectum. After pleading with defendant not to enter her rectum, defendant told the victim to lie on the floor and to remove her sweatshirt. Defendant again licked the victim's breast. Defendant tried to insert his penis into the victim's vagina. Defendant was able to "somewhat" penetrate the victim. After defendant ejaculated, the victim asked him if he was going to let her live. Defendant told the victim that she had seen him and that she "would tell the police." While defendant fumbled with the "Saran Wrap," the victim ran out the open patio door and dove over the railing.

The victim heard someone in a neighboring apartment yell that they were calling the police. The victim waited until she thought defendant had left and crawled back over the railing. The victim re-entered her apartment, grabbed a blanket, and went upstairs to her neighbor's door to wait for the police to arrive. Police officers arrived on the scene and searched the victim's apartment. Defendant was not located.

Officer Eric G. McClary met with the victim a few days after the incident and presented her with a photo line-up. The victim identified defendant as her attacker. Defendant was arrested and indicted for first-degree rape, first-degree kidnapping, first-degree burglary,

two counts of first-degree sexual offense, communicating threats, and assault on a female. Defendant did not testify at trial nor offer any evidence.

A jury found defendant to be guilty of first-degree rape, first-degree kidnapping, felonious breaking or entering, first-degree sexual offense by digital penetration, first-degree sexual offense by cunnilingus, communicating threats, and assault on a female. The trial court consolidated the first-degree rape, first-degree kidnapping, and felonious breaking or entering convictions and sentenced defendant to a minimum of 384 to a maximum of 470 months imprisonment. Upon entering this judgment, the trial court erroneously indicated that the jury found defendant to be guilty of first-degree burglary. The trial court also consolidated defendant's remaining convictions and sentenced him to an active consecutive term of a minimum of 384 to a maximum of 470 months imprisonment. Defendant appeals.

II. Issue

[1] Defendant argues the trial court erred by denying his motions to dismiss and instructing the jury on the charges of first-degree rape and first-degree sexual offense.

III. Motions to Dismiss

Defendant argues the trial court erred by denying his motions to dismiss and instructing the jury on the charges of first-degree rape and first-degree sexual offense "when, on the question of . . . defendant's employment or display of a dangerous or deadly weapon, the [trial] court had determined that 'there was no evidence of it whatsoever.' " We agree.

A. Standard of Review

> The standard for ruling on a motion to dismiss is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

State v. Wood, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005) (internal citations and quotations omitted).

B. Analysis

1. Hands as a Dangerous or Deadly Weapon

The State contended defendant committed first-degree rape and two first-degree sexual offenses, in which "he employed a dangerous weapon . . . ." To convict defendant of first-degree rape and first-degree sexual offense, the State is required to prove defendant engaged in vaginal intercourse and a sexual act, respectively, "[w]ith [the victim] by force and against the will of the [victim], and: a. [e]mploy[ed] or display[ed] a dangerous or deadly weapon or an article which the [victim] reasonably believe[d] to be a dangerous or deadly weapon . . . ." N.C. Gen. Stat. §§ 14-27.2(a)(2)a., -27.4(a)(2)a. (2005).

Second-degree rape and second-degree sexual offense require a person to engage in vaginal intercourse and a sexual act, respectively, "with another person: (1) [b]y force and against the will of the other person . . . ." N.C. Gen. Stat. §§ 14-27.3(a)(1), -27.5(a)(1) (2005).

Here, the victim testified that defendant yelled, "[s]hut up or I'll shoot you. Do what I say and I won't shoot you . . . ." The victim testified she never saw a gun and no evidence was presented tending to show defendant "[e]mploy[ed] or display[ed] a dangerous or deadly weapon . . . ." during commission of these crimes. N.C. Gen. Stat. §§ 14-27.2(a)(2)a., -27.4(a)(2)a.

During deliberations, the jury submitted a question to the trial court: "[c]an hands be considered a deadly or dangerous weapon?" In response to the jury's question, the trial court stated:

> A dangerous or deadly weapon is a weapon, which is likely to cause death or serious bodily injury.
>
> In determining whether a particular object is a dangerous or deadly weapon, you should consider its nature, the manner in which it was used, and the size and strength of the Defendant as compared to the victim.

In certain cases, this Court has held a defendant's fists may be considered a deadly weapon depending on the manner in which they are used and the relative size and condition of the parties. *See State*

v. Lawson, 173 N.C. App. 270, 279-80, 619 S.E.2d 410, 415-16 (2005) ("By statute, the essential elements of assault with a deadly weapon with intent to inflict serious injury are (1) an assault; (2) with a deadly weapon; (3) inflicting serious injury; (4) not resulting in death. . . . [M]ere observation by the jury of the victim and defendant's strength and size, alone, is not sufficient evidence to support the deadly weapon element for the charge of assault with a deadly weapon with intent to inflict serious injury."), *disc. review denied*, 360 N.C. 293, 629 S.E.2d 276 (2006); *see also State v. Brunson*, 180 N.C. App. 188, 193, 636 S.E.2d 202, 205 (2006) ("The jury was given the proper standard, as outlined in *Lawson*. In keeping with its role as finder of fact, the jury came to the conclusion that, in this case, Defendant's hands were deadly weapons."), *aff'd*, No. 623A06 (N.C. Dec. 7, 2007); *State v. Rogers*, 153 N.C. App. 203, 211, 569 S.E.2d 657, 663 (2002) ("[W]e hold that a single hand may be considered a deadly weapon, based on the manner in which it is used and the relative size and condition of the parties involved" for the charge of assault with a deadly weapon with intent to kill or inflict serious bodily injury), *disc. rev. denied*, 357 N.C. 168, 581 S.E.2d 442 (2003); *State v. Krider*, 138 N.C. App. 37, 46-47, 530 S.E.2d 569, 575 (2000) ("[A] defendant may be convicted of first degree murder despite the lack of premeditation or deliberation if she attempted to or committed a felony with the use of [her hands as] a deadly weapon, causing the victim's death."); *State v. Jacobs*, 61 N.C. App. 610, 611, 301 S.E.2d 429, 430 ("Since defendant's fists could have been a deadly weapon in the circumstances of this assault, the indictment was sufficient."), *disc. rev. denied*, 309 N.C. 463, 307 S.E.2d 368 (1983).

2. Hands are not a Dangerous or Deadly Weapon

Our Supreme Court has recently held in *State v. Hinton*, "that a defendant's hands, in and of themselves, cannot be dangerous weapons for purposes of robbery with a dangerous weapon under N.C.G.S. § 14-87." 361 N.C. 207, 212, 639 S.E.2d 437, 441 (2007). In reaching this holding, our Supreme Court stated:

> [c]onsidering the purpose of N.C.G.S. § 14-87 is to provide for more severe punishment when the robbery is committed with the use or threatened use of firearms or other dangerous weapons, we conclude the General Assembly intended to require the State to prove that a defendant used *an external dangerous weapon* before conviction under the statute is proper. To hold otherwise would remove the critical distinction be-

> tween common law robbery and N.C.G.S. § 14-87 and require us to resolve an ambiguous criminal statute by making a liberal reading in favor of the State.

Hinton, 361 N.C. at 211-12, 639 S.E.2d at 440 (emphasis supplied) (internal quotation omitted).

This Court has also stated:

> [c]ommon sense and the clear intent of N.C. Gen. Stat. § 14-87 lead us to conclude that an individual cannot possess, use, or threaten to use a dangerous weapon during a robbery where that individual is not possessing, using, or threatening to use *some external weapon or instrument* during the robbery. The critical difference between armed and common law robbery is that the former is accomplished by the *use or threatened use of a dangerous weapon* whereby the life of a person is endangered or threatened. Were an individual's bare hands, fists, and feet considered dangerous weapons for the purposes of N.C. Gen. Stat. § 14-87, that critical difference would be erased, and the crime of common law robbery would in effect merge with the crime of robbery with a dangerous weapon. We are not convinced that this result was contemplated by our legislature in enacting N.C. Gen. Stat. § 14-87. Therefore, in light of the foregoing, *we conclude that an individual's bare hands, fists, and feet are not considered dangerous weapons* for the purposes of N.C. Gen. Stat. § 14-87.

State v. Duff, 171 N.C. App. 662, 672, 615 S.E.2d 373, 381 (emphasis supplied) (internal quotation omitted), *disc. rev. denied*, 359 N.C. 854, 619 S.E.2d 853 (2005).

Our Supreme Court's reasoning in *Hinton* and this Court's reasoning in *Duff* are applicable to the first-degree and second-degree rape and first-degree and second-degree sexual offense statutes at issue here. 361 N.C. at 211-12, 639 S.E.2d at 440; 171 N.C. App. at 672, 615 S.E.2d at 381. To elevate the crimes from second-degree rape and second-degree sexual offense to first-degree rape and first-degree sexual offense, the State is required to prove defendant "[e]mploy[ed] or display[ed] a dangerous or deadly weapon . . . ." N.C. Gen. Stat. §§ 14-27.2(a)(2)a., -27.4(a)(2)a. We hold the General Assembly intended to require the State to prove defendant used "an external dangerous weapon" based on the additional language of "[e]mploys or displays a dangerous or deadly weapon . . . ." in N.C. Gen. Stat. §§ 14-27.2(a)(2)a., -27.4(a)(2)a., before defendant's first-

degree convictions would be proper. *Hinton*, 361 N.C. at 212, 639 S.E.2d at 440; *Duff*, 171 N.C. App. at 672, 615 S.E.2d at 381.

The trial court erred by denying defendant's motions to dismiss the charges of first-degree rape and first-degree sexual offenses when the State failed to offer any evidence tending to show defendant had "[e]mploy[ed] or display[ed] a dangerous or deadly weapon or an article which the [victim] reasonably believe[d] to be a dangerous or deadly weapon . . . ." N.C. Gen. Stat. §§ 14-27.2(a)(2)a., -27.4(a)(2)a. We reverse the trial court's denial of defendant's motions to dismiss the charges of first-degree rape and first-degree sexual offenses, vacate defendant's convictions on those charges, and remand for resentencing.

3. Second-Degree Rape and Sexual Offense

The jury's verdict of guilty of first-degree rape and two counts of first-degree sexual offense necessarily contains all the required elements of the lesser included offenses of second-degree rape and second-degree sexual offense: defendant engaged in vaginal intercourse and sexual acts, respectively, "[b]y force and against the will of the [victim] . . . ." N.C. Gen. Stat. §§ 14-27.3(a)(1), -27.5(a)(1). Defendant does not challenge the sufficiency of the evidence to support either of the lesser included second-degree offenses. We remand to the trial court for resentencing and imposition of judgment on the lesser included offenses of second-degree rape and second-degree sexual offense. *See State v. Miller*, 146 N.C. App. 494, 505, 553 S.E.2d 410, 417 (2001) (Which held the jury's verdict of the greater offense contained all the elements of the lesser included offense and remanded to the trial court for imposition of the lesser included offense).

IV. Resentencing

[2] After a thorough review of the record and transcripts, we, *ex mero moto*, hold a discrepancy exists between the offenses the jury found defendant to be guilty of and the offenses the trial court listed in its judgment. *See State v. Barber*, 9 N.C. App. 210, 212, 175 S.E.2d 611, 613 (1970) (Which noted, *ex mero moto*, that the judgments as entered contained an error and remanded for correction). The trial court's judgment stated defendant was found guilty of first-degree burglary pursuant to N.C. Gen. Stat. § 14-51 and sentenced defendant as a class D felon for that conviction. The record indicates the jury found defendant to be not guilty of first-degree burglary, but guilty of the lesser included offense of felonious breaking or entering.

N.C. Gen. Stat. § 14-54(a) (2005) states: "Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon." Because the trial court's judgment incorrectly stated defendant was found guilty of first-degree burglary, we also remand for the trial court to strike and correct this error upon resentencing.

V. Conclusion

The State failed to present any evidence tending to show defendant "[e]mploy[ed] or display[ed] a dangerous or deadly weapon . . . ." while engaging in vaginal intercourse and sexual acts with the victim. N.C. Gen. Stat. §§ 14-27.2(a)(2)a., -27.4(a)(2)a. The trial court erred by denying defendant's motions to dismiss and instructing the jury on the charges of first-degree rape and first-degree sexual offense. The jury's convictions necessarily include all elements of second-degree rape and second-degree sexual offense. We remand to the trial court for imposition of judgment on the lesser included offenses of second-degree rape and second-degree sexual offense. We hold no error occurred in the remainder of the jury's verdicts, and defendant's remaining convictions are undisturbed. Upon remand the trial court is to correct the judgment entered for first-degree burglary, when the jury's verdict shows defendant to be not guilty of first-degree burglary but guilty of felonious breaking or entering.

No Error in Part, Reversed in Part, and Remanded for Resentencing and Correction of Judgment.

Judges JACKSON and ARROWOOD concur.

GARY W. SPANGLER, EXECUTOR OF THE ESTATE OF JESSICA J. SPANGLER, PLAINTIFF v. STEVEN E. OLCHOWSKI, M.D.; CONRAD J. R. MIRANDA, IV, M.D; SINA SURGICAL ASSOCIATES, P.A.; AND ATLANTIC BARIATRIC CENTER, INCORPORATED, DEFENDANTS

No. COA07-158

(Filed 18 December 2007)

1. Appeal and Error— appealability—discovery order—statutory privilege affects substantial right

Although it is generally true that the appeal from discovery orders are an appeal from an interlocutory order, such orders are immediately appealable if delaying the appeal will irreparably

impair a substantial right of the party. When, as here, a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right and is immediately appealable.

2. Appeal and Error— mootness—current controversy still remaining

Defendants' motion to dismiss plaintiff's appeal as moot in a medical malpractice case is denied irrespective of whether plaintiff has agreed to produce all records through the date of 15 September 2005, because: (1) plaintiff did not appeal the 22 September 2005 order since plaintiff's reliance on an oral motion for the trial court to reconsider the 22 September 2005 order under N.C.G.S. § 1A-1, Rule 60(b) is misplaced, and plaintiff is bound by the 22 September 2005 order and must produce all medical records including the substance abuse treatment records up until 15 September 2005; and (2) a current controversy still remains concerning defendants' ability to depose decedent's substance abuse treatment providers and whether plaintiff must disclose records relating to substance abuse treatment between 15 September 2005 and 15 January 2006 since defendant Olchowski has not withdrawn his request to depose providers of substance abuse treatment and neither defendant Miranda nor defendant Atlantic Bariatric have withdrawn any discovery requests.

3. Appeal and Error— motion to strike portions of motion to dismiss—challenged information related to procedural context

Plaintiff's motion to strike portions of defendants' motion to dismiss in a medical malpractice case is summarily denied because the challenged information contained in defendants' motion to dismiss is related to the procedural context of the case.

4. Medical Malpractice— disclosure of substance abuse treatment records—providers available for deposition—waiver of patient-physician privilege by placing medical condition at issue—authorization by state and federal law

The trial court did not err in a medical malpractice case by ordering disclosure of decedent's substance abuse treatment records and by ordering plaintiff to make decedent's substance abuse treatment providers available for deposition, because: (1)

there are explicit statutory exceptions that authorize such disclosure as well as an implicit waiver by plaintiff of the protections generally afforded to confidential communications between a patient and the provider of substance abuse treatment; (2) a patient impliedly waives the patient-physician privilege by opening the door to medical history by bringing an action, counterclaim, or defense that places his medical condition at issue, and plaintiff impliedly waived the privilege under N.C.G.S. § 8-53 *et seq*. when he placed decedent's mental health and history of substance abuse at issue by bringing a claim for emotional distress; and (4) disclosure of the information under the trial court's order was also authorized by state and federal law under the exception codified in N.C.G.S. § 122C-54 and 42 C.F.R. § 2-63(a)(3); and (5) 42 C.F.R. § 2-63(a)(3) was satisfied since the records and communications related to decedent's substance abuse treatment are causally related and thus relevant to plaintiff's claim for damages, the information at issue could not be discovered other than by court order, and there was no potential injury to the patient or patient-physician relationship due to such disclosure when decedent had died.

5. Evidence— refusal to conduct in-camera review—substance abuse records

The trial court did not abuse its discretion in a medical malpractice case by refusing to conduct an in camera review of all of decedent's substance abuse treatment records because: (1) contrary to plaintiff's contention, N.C.G.S. § 8-53 was not relevant since plaintiff waived the patient-physician privilege related to decedent's substance abuse treatment by placing her mental and emotional health at issue; and (2) the trial court complied with 42 C.F.R. § 2.64(e)(1) since the records ordered to be disclosed were reasonably calculated to lead to the discovery of evidence relevant to the issues of emotional distress and damages and such record would only be disclosed under seal.

Appeal by plaintiff from orders entered 29 September 2006 and 13 October 2006 by Judge B. Craig Ellis in New Hanover County Superior Court. Heard in the Court of Appeals 12 September 2007.

Jennifer L. Umbaugh; and Melissa A. Pollock for plaintiff appellant.

Robert S. Shields, Jr., and Jonathan T. Mlinarcik, for Steven E. Olchowski, M.D., defendant appellee.

Crawford & Crawford, LLP, by Robert O. Crawford III, and Renee B. Crawford, for Sina Surgical Associates, P.A., defendant appellee.

McCULLOUGH, Judge.

On 13 November 2002, Jessica Spangler ("decedent") filed a medical malpractice action against Steven E. Olchowski, M.D. ("Olchowski"), Conrad J.R. Miranda, M.D. ("Miranda"), Sina Surgical Associates, P.A. ("Sina"), and Atlantic Bariatric Center, Inc. ("Atlantic Bariatric") (collectively "defendants"). On 15 January 2006, decedent died of unrelated causes. Her father, Gary W. Spangler, as executor of her estate, was substituted as the party-plaintiff ("plaintiff") on 10 February 2003.

The action concerns a gastric bypass surgery performed on 3 July 2001 by Olchowski, during which plaintiff alleges that Olchowski performed a modified Rutledge procedure with an afferent and efferent loop to a gastric pouch ("loop gastric bypass") instead of the laparoscopic Roux-en-y gastric bypass procedure ("RNY bypass") to which decedent had consented. The complaint alleges that after the surgery, Olchowski attempted to conceal the true nature of the procedure that he performed; that due to complications related to the 3 July 2001 surgery, decedent was forced to undergo a second procedure to revise the original surgery; and that as a result of the actions of Olchowski,

> [decedent] suffered unnecessary conscious physical pain and emotional distress; has been forced to undergo multiple painful and therapeutic and diagnostic tests and procedures and prolonged hospitalizations; was forced to undergo a major abdominal surgery; has incurred significant reasonable and necessary medical and other related expenses; had to withdraw from her college studies resulting in a delay in completing her education and financial loss; has suffered a loss of enjoyment of life[.]

During discovery, Sina filed motions to compel discovery of all medical records for the ten-year period preceding 3 July 2001, the date of decedent's surgery, and medical records up to the date of trial. During this period of time, decedent had been undergoing substance abuse treatment. On 22 September 2005, the trial judge granted Sina's motion and ordered plaintiff to produce to defendants, under seal, complete medical records from all known medical providers in their

entirety from 3 July 1991 through 15 September 2005. Plaintiff did not appeal this order.

Thereafter, on 8 May 2006, plaintiff filed a motion for a protective order, seeking: (1) to limit the time frame for production of medical records to 5 July 1991 until 15 September 2005; and (2) to protect from disclosure all medical records and health care provider testimony relating to decedent's substance abuse treatment.

A hearing on the motion was held on 25 August 2006. At this hearing, plaintiff made an oral motion, pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b) (2005), for the trial judge to reconsider the 22 September 2005 order. On 29 September 2006, the trial judge ordered plaintiff to (1) produce complete, updated medical records from 15 September 2005 until 6 January 2006, the date of decedent's death; and (2) make sixteen witnesses available for deposition, including decedent's substance abuse treatment providers. On 13 October 2006, the trial judge entered an order denying plaintiff's request for the court to conduct an *in camera* review of decedent's medical records, denying plaintiff's motion to reconsider the 22 September 2005 order, and denying plaintiff's motion for a protective order to limit the scope of discovery, finding that:

> A. Jessica Spangler's Estate is seeking damages for pain and suffering and emotional distress.
>
> B. Mental suffering often results in substance abuse and records relating to substance abuse treatment may be relevant to mental pain.
>
> C. In that the Plaintiff has put before the Court a claim for emotional distress, all medical records which the Plaintiff asserts are protected from disclosure under 42 CFR §2.1 [sic] *et seq.* and N.C.G.S. § 122C-52, *et seq.* are discoverable and shall be produced.

The 13 October 2006 order provides that all records tendered by plaintiff are to remain under seal pursuant to the 25 August 2006 order.

On appeal, plaintiff contends that the trial court erred by (1) ordering disclosure of decedent's substance abuse treatment records; (2) ordering plaintiff to make decedent's substance abuse treatment providers available for deposition; and (3) refusing to conduct an *in camera* review of all of decedent's substance abuse treatment

records. Defendants filed a motion to dismiss the appeal. Plaintiff filed a motion to strike portions of defendants' motion to dismiss.

I. Defendants' Motion to Dismiss Appeal

[1] Defendants contend that plaintiff's appeal should be dismissed on the following grounds: (1) the orders from which plaintiff appeals are interlocutory; and (2) plaintiff's appeal is moot.

First, while it is generally true that discovery orders are interlocutory and therefore not immediately appealable, *Romig v. Jefferson-Pilot Life Ins. Co.*, 132 N.C. App. 682, 685, 513 S.E.2d 598, 600 (1999), *aff'd*, 351 N.C. 349, 524 S.E.2d 804 (2000) (*per curiam*), such orders are immediately appealable if "delaying the appeal will irreparably impair a substantial right of the party." *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 344, 511 S.E.2d 309, 311 (1999). "[W]hen, as here, a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right[.]" *Sharpe v. Worland*, 351 N.C. 159, 166, 522 S.E.2d 577, 581 (1999). Accordingly, we conclude that the orders from which plaintiff appeals affect a substantial right and are immediately appealable.

[2] Next, we address defendants' argument that plaintiff's appeal should be dismissed as moot given that defendants have withdrawn their requests for production of medical records from the time period of 15 September 2005 until decedent's date of death and plaintiff has either consented to production of all medical records before 15 September 2005, or in the alternative, that plaintiff has failed to preserve her objection to the 22 September 2005 order, which requires plaintiff to produce all medical records up until 15 September 2005.

Irrespective of whether plaintiff has agreed to produce all records through the date of 15 September 2005, plaintiff did not appeal the 22 September 2005 order. We have consistently held that judgments involving misapplication of the law "may be corrected only by appeal and Rule 60(b) motions cannot be used as a substitute for appeal." *Burton v. Blanton*, 107 N.C. App. 615, 617, 421 S.E.2d 381, 383 (1992). Therefore, plaintiff's reliance on an oral motion for the trial judge to reconsider the 22 September 2005 order pursuant to Rule 60(b) is misplaced. Plaintiff is bound by the 22 September 2005 order and must produce all medical records, including the substance abuse treatment records, up until 15 September 2005.

Nonetheless, because Olchowski has not withdrawn his request to depose providers of substance abuse treatment and neither Miranda nor Atlantic Bariatric have withdrawn any discovery requests, we find that a current controversy still remains as to: (1) the ability of Olchowski, Miranda, and Atlantic Bariatric to depose decedent's substance abuse treatment providers; and (2) whether plaintiff must disclose to Miranda and Atlantic Bariatric records relating to substance abuse treatment of decedent between 15 September 2005 and 15 January 2006. Accordingly, defendants' motion to dismiss is denied.

II. Plaintiff's Motion to Strike

[3] Plaintiff's motion to strike portions of defendants' motion to dismiss is summarily denied, as we find that the challenged information contained in defendants' motion to dismiss is related to the procedural context of the case.

III. Plaintiff's Substantive Appeal

A. Disclosure of Information Relate to Substance Abuse Treatment

[4] First, plaintiff contends that because confidential information relating to decedent's substance abuse treatment is protected from disclosure under federal and state law, the trial court erred by denying plaintiff's motion for a protective order, and respectively, by ordering plaintiff to disclose such information. Because we find explicit statutory exceptions that authorize such disclosure as well as an implicit waiver by plaintiff of the protections generally afforded to confidential communications between a patient and the provider of substance abuse treatment, we disagree.

Since the analysis is the same with respect to all confidential information related to decedent's substance abuse treatment, we address together plaintiff's requests to prohibit depositions of decedent's substance abuse treatment providers and to exclude all records related to such treatment.

We begin the analysis with an overview of the statutory scheme. Confidential communications between a patient and provider of substance abuse treatment are generally protected from disclosure pursuant to three separate statutory and regulatory provisions: (1) the general patient-physician privilege conferred by N.C. Gen. Stat. § 8-53 (2005); (2) North Carolina's Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985, N.C. Gen. Stat. § 122C-52 (2005); and (3) federal regulations, codified in 42 C.F.R.

§ 2.1 *et seq.*, promulgated pursuant to Section 408 of the Drug Abuse Prevention, Treatment, and Rehabilitation Act, 42 U.S.C. 290ee-3. " 'Statutes *in pari materia* are to be construed together, and it is a general rule that the courts must harmonize such statutes, if possible, and give effect to each, that is, all applicable laws on the same subject matter should be construed together so as to produce a harmonious body of legislation, if possible.' " *Justice v. Scheidt*, 252 N.C. 361, 363, 113 S.E.2d 709, 711 (1960) (quoting *Blowing Rock v. Gregorie*, 243 N.C. 364, 371, 90 S.E.2d 898, 904 (1956)).

(1) North Carolina Law

North Carolina has created by statute a privilege for communications between a physician and patient. *See* N.C. Gen. Stat. § 8-53 (2005) (for doctors); *see also* N.C. Gen. Stat. § 8-53.3 (2005) (for psychologists); N.C. Gen. Stat. § 8-53.7 (2005) (for social workers); N.C. Gen. Stat. § 8-53.8 (2005) (for counselors). "It is the purpose of such statutes to induce the patient to make full disclosure that proper treatment may be given, to prevent public disclosure of socially stigmatized diseases, and in some instances to protect patients from self-incrimination." *Sims v. Insurance Co.*, 257 N.C. 32, 36, 125 S.E.2d 326, 329 (1962). The privilege "extends, not only to information orally communicated by the patient, but to knowledge obtained by the physician or surgeon through his own observation or examination while attending the patient in a professional capacity, and which was necessary to enable him to prescribe." *Smith v. Lumber Co.*, 147 N.C. 62, 64, 60 S.E. 717, 718 (1908).

This patient-physician privilege is not absolute, however, and may be waived, either by express waiver or by waiver implied from the patient's conduct. *Mims v. Wright*, 157 N.C. App. 339, 342, 578 S.E.2d 606, 609 (2003). We have recognized that a patient impliedly waives this privilege when she opens the door to her medical history by bringing an action, counterclaim, or defense that places her medical condition at issue. *Id.* at 342-43, 578 S.E.2d at 609. Here, by bringing a claim for emotional distress, which alleges that defendants' actions caused decedent to withdraw from her college studies and caused an overall loss in decedent's enjoyment of life, we find that plaintiff has placed decedent's mental health and history of substance abuse at issue. Thus, plaintiff has impliedly waived the patient-physician privilege conferred by § 8-53 *et seq.*

Our analysis must continue, as North Carolina's Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985 ("the

N.C. Act") also provides patients of substance abuse treatment with "the right that no confidential information acquired [by the treatment facility] be disclosed," except as provided by certain exceptions codified in N.C. Gen. Stat. § 122C-53 through -56 (2005). N.C. Gen. Stat. § 122C-52(c). One of the exceptions provided in N.C. Gen. Stat. § 122C-54(a) allows disclosure of such confidential information "if a court of competent jurisdiction issues an order compelling disclosure." However, the N.C. Act expressly provides that:

> No provision of . . . G.S. 122C-53 through G.S. 122C-56 permitting disclosure of confidential information may apply to the records of a client *when federal statutes or regulations applicable to that client prohibit the disclosure of this information.*

N.C. Gen. Stat. § 122C-52(d) (emphasis added).

As discussed above, because plaintiff waived the general privilege conferred by § 8-53 *et seq.*, allowing disclosure of such generally privileged information, we conclude that disclosure of that information pursuant to the trial judge's order is also authorized by the exception codified in § 122C-54 as long as disclosure of such information is not prohibited by the federal regulations.

(2) The Federal Regulations

Under 42 C.F.R. § 2.1 *et seq.*, the trial court may order disclosure of confidential communications related to substance abuse treatment if two conditions are met. *Fannon v. Johnston*, 88 F. Supp. 2d 753, 766, (E.D. Mich. 2000). First,

> [t]he disclosure is in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of the confidential communications.

42 C.F.R. § 2.63(a)(3) (2005). Second, there is "good cause" for disclosure, which requires a finding that: "(1) Other ways of obtaining the information are not available or would not be effective; and (2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services." 42 C.F.R. § 2.64(d).

Like other jurisdictions, we interpret the language of § 2.63(a)(3) to require simple relevance. "If a patient's testimony is relevant or relates to the content of the confidential communications, then the regulation's standard has been met." *Fannon*, 88 F. Supp. 2d at 765;

see also Aetna Casualty & Surety Co. v. Ridgeview Inst., Inc., 194 Ga. App. 805, 806, 392 S.E.2d 286, 287-88 (1990) (concluding that where a plaintiff claimed injuries he sustained in a car accident forced him to change practice areas, confidential records related to alcoholism treatment obtained during the same time period were placed at issue).

Here, as previously discussed, the records and communications related to decedent's substance abuse treatment are causally related and thus relevant to plaintiff's claim for damages. Accordingly, § 2.63(a)(3) is satisfied. Furthermore, we conclude that § 2.64(d) is satisfied, as (1) the information at issue cannot be discovered other than by court order; and (2) because decedent has died, there is no potential injury to the patient or patient-physician relationship due to such disclosure. Therefore, the federal regulations do not prohibit disclosure of the information at issue.

In sum, we conclude that neither federal nor state law prohibited the trial court from ordering disclosure of the information at issue. Accordingly, this assignment of error is overruled.

B. *In Camera* Review

[5] Next, plaintiff contends that the trial court's decision not to conduct an *in camera* review of all of decedent's substance abuse treatment records was improper under 42 C.F.R. § 2.1 *et seq.* and N.C. Gen. Stat. § 8-53. We disagree.

"Whether to conduct an *in camera* inspection of documents appears, as a general rule, to rest in the sound discretion of the trial court." *Midgett v. Crystal Dawn Corp.*, 58 N.C. App. 734, 736, 294 S.E.2d 386, 387 (1982). Under the rules of discovery, unless otherwise limited by order of the court, a party may obtain discovery concerning any unprivileged matter as long as it is relevant to the pending action and is reasonably calculated to lead to the discovery of admissible evidence. N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) (2005).

As discussed previously, by placing her mental and emotional health at issue, plaintiff has waived the patient-physician privilege conferred by N.C. Gen. Stat. § 8-53 as it relates to information concerning decedent's substance abuse treatment. Therefore, we conclude that § 8-53 is no longer relevant to our analysis.

However, 42 C.F.R. § 2.64(e)(1) provides, in pertinent part, "[a]n order authorizing a disclosure [of confidential communications relat-

ing to substance abuse treatment] must: (1) Limit disclosure to those parts of the patient's record which are essential to fulfill the objective of the order." 42 C.F.R. § 2.64(e)(1) (2005). Here, the clear purpose of the trial court's order is to enable defendants to have access to information useful in developing their defense. Given that the records ordered to be disclosed are reasonably calculated to lead to the discovery of evidence relevant to the issues of emotional distress and damages and such records will only be disclosed under seal, we find that the trial court complied with 42 C.F.R. § 2.64(e)(1). As such, this assignment of error is overruled.

Affirmed.

Judges CALABRIA and STEPHENS concur.

IN THE MATTER OF: T.M. AND M.M., JR., MINOR CHILDREN

No. COA07-911

(Filed 18 December 2007)

1. Evidence— introduction of medical records—reliance on expert testimony—no prejudice

There was no prejudice in a child neglect proceeding where medical records were admitted into evidence without a proper foundation, but it is clear from the court's findings and conclusions that it relied on significant and extensive medical testimony by experts in determining that the child suffered from shaken-baby syndrome.

2. Child Abuse and Neglect— untimely adjudicatory hearing—delay due to respondents—no prejudice

There was no error in a child neglect proceeding where the respondent-parents argued that the court had not complied with the statutory time period for the adjudicatory hearing, but most of the delay was attributed to respondents' search for an expert witness and request for a special trial setting. Furthermore, respondents did not articulate specific prejudice resulting from the delay.

3. Child Neglect and Abuse— reservation of right to make additional findings—none made—no prejudice

An assignment of error to the trial court's reservation of the right to make additional findings in a child neglect adjudication was overruled where respondent could not cite any such finding.

Appeal by respondents from an adjudication and disposition order entered 23 April 2007 by Judge Edward A. Pone in Cumberland County District Court. Heard in the Court of Appeals 26 November 2007.

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

Attorney Advocate Beth A. Hall for Guardian ad Litem.

Don Willey for respondent-father-appellant.

Judy N. Rudolph for respondent-mother-appellant.

BRYANT, Judge.

Respondent-mother (A.M.[1]) and respondent-father (M.M., Sr.) appeal from an adjudication and disposition order entered 23 April 2007. T.M. was adjudicated abused and neglected based on findings of fact that she suffered injuries consistent with Shaken Baby Syndrome, and that the injuries were non-accidental and caused by either one or both of the respondent-parents. M.M., Jr. was adjudicated neglected in that he lived in an environment injurious to his welfare because he lived in the home where T.M. was abused.

After T.M. experienced several days of vomiting and irritability, respondents took her to the Womack Army Medical Center Emergency Room because she was nonresponsive. Due to the severity of her injuries, she was transported by helicopter to UNC Hospital. On 12 November 2005, T.M. was diagnosed with a non-accidental head injury. On 13 November 2005, it was determined the injuries were a result of T.M. being shaken. Dr. Keith Kocis, a pediatrician and expert in the field of diagnosis and treatment of critically ill children, admitted T.M. to UNC. He testified she scored a 7 on the Glascow Coma Score, which was "a number consistent with severe neurologic dysfunction."

1. Initials are used throughout the opinion to protect the identity of the juveniles.

On 14 November 2005 a petition for abuse and neglect was filed by Cumberland County Department of Social Services (DSS) and a nonsecure custody order was issued for T.M. and M.M., Jr. On 30 November 2005, the trial court ordered respondents could have supervised visitation with T.M. and M.M., Jr. At that time, M.M., Jr. was placed in the paternal grandmother's home and a home study was ordered. Upon release from the hospital, T.M. was placed with the paternal grandmother in April 2006.

On 5 January 2006, respondent-father made an oral motion requesting that a medical expert review the records in the case, which was reduced to writing on 23 September 2006. On 21 November 2006, the trial court filed an order which included findings of fact that "[i]t has taken a significant amount of time to locate an expert in as much as despite counsel's diligent work to locate an expert witness, they have been turned down by numerous experts." The trial court also found "[t]hat it has been for good cause shown that the time for trial has lapsed" and "[t]hat it has been determined that a Special Session will be required to hear this matter in that it is anticipated that it will take three to five (3-5) days for trial." The trial court found "[t]hat the [trial] Court currently has special sessions scheduled through November and December; there is no available trial time until next year." Based on the time delay, the trial court made a "good cause" finding for the case to be continued to early 2007.

In March 2007, the trial court conducted a six-day hearing adjudicating T.M. abused and neglected and M.M., Jr. neglected. From the 23 April 2007 adjudication and disposition order, respondents appeal.

Respondent-mother raises four arguments on appeal. First, respondent-mother argues that the trial court erred by admitting medical records into evidence without proper foundation as required by N.C. Gen. Stat. §8C-1, Rule 803(6) (2005). Respondent-mother's second and third arguments are that the trial court's findings of fact and conclusions of law are not properly supported, based on the fact that the medical records were erroneously admitted. Fourth, respondent-mother argues that the trial court committed reversible error by failing to comply with the statutory time period for adjudicating the petition.

Respondent-father raises three arguments on appeal. First, respondent-father argues that the trial court erred by reserving the right to make additional findings of fact out of court and out of session. Second, respondent-father asserts that there was insufficient

evidence to support the adjudication of abuse. Third, respondent-father argues, as respondent-mother argues, that the trial court committed reversible error by failing to comply with the statutory time period for adjudicating the petition.

[1] Respondent-mother argues the trial court committed reversible error by admitting the medical records into evidence without a proper foundation. At the beginning of the hearing, DSS sought admission of all the medical records pursuant to "the local rules[.]" The local rule relied on by DSS, Rule 10.3 of the Twelfth Judicial District Juvenile Case Management Plan, states as follows:

> The GAL attorneys and volunteers regularly obtain copies of the medical records of the parents and children in cases alleging abuse and/or neglect pursuant to statutes or court orders allowing them access to said records.
>
> (a) GAL shall request the records and upon receipt notify the DSS and respondent attorneys that they are available for review.
>
> (b) Attorneys may review the records in the GAL office and may make copies of the records. GAL will number the pages of the records and prepare a sheet for each attorney to sign indicating their review of the records. Attorneys may provide copies of their client's records to that client.
>
> *(c) Attorneys must make objections to the admission of the records within ten (10) working days of the notice of availability of the records or the records may be admitted without objection.*
>
> (d) The GAL may apply to the Court at any time, with notice to all parties, to destroy non-relevant records.
>
> (e) Attorneys are authorized to destroy copies of the records sixty (60) days following a voluntary or involuntary dismissal of the action, a TPR judgment, an order awarding guardianship of the children, an order returning custody to the parents with no further reviews, or any other action that finally terminates the case and no appeal has been filed.

Rule 10.3, Twelfth Judicial District Juvenile Case Management Plan (emphasis added). Although no objection was made to the records within the ten days as provided by Rule 10.3, respondent-father objected at the hearing "to the tender of the medical records without the proper foundation." In response, DSS argued that the medical

records should be admitted pursuant to Rule 10.3. The trial court ruled that because respondent-father had failed to object within ten days as provided by Rule 10.3, the medical records were deemed admissible.[2]

North Carolina General Statutes, Section 7B-804 states "[w]here the juvenile is alleged to be abused, neglected, or dependent, the rules of evidence in civil cases shall apply." *In re E.P.*, 183 N.C. App. 301, 303, 645 S.E.2d 772, 773 (2007). Under the North Carolina Rules of Evidence, statements, other than those made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted are hearsay and are generally inadmissible. N.C. Gen. Stat. § 8C-1, Rules 801(c), 802 (2005). The "business records exception" to the hearsay rule is found in North Carolina General Statutes, section 8C-1, Rule 803(6), which provides in relevant part:

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

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2. "The General Assembly has authorized our Supreme Court to promulgate rules of practice and procedure for the superior and district courts." *In re J.S.*, 182 N.C. App. 79, 84, 641 S.E.2d 395, 397 (2007) (citing N.C. Gen. Stat. § 7A-34 (2005)). "Pursuant to this authority, our Supreme Court requires the Senior Resident Judge and Chief District Judge in each judicial district to 'take appropriate actions [such as the promulgation of local rules] to insure prompt disposition of any pending motions or other matters necessary to move the cases toward a conclusion.' " *Id.* at 84, 641 S.E.2d at 398 (quoting N.C. Gen. R. Prac. Super. and Dist. Ct. 2(d) (2007)). Rule 10.3 was promulgated pursuant to this authority. However, rules enacted pursuant to this authority are to be "supplementary to, and not inconsistent with, acts of the General Assembly." N.C. Gen. Stat. § 7A-34 (2005). "Wide discretion should be afforded in [the] application [of local rules] so long as a proper regard is given to their purpose." *Lomax v. Shaw*, 101 N.C. App. 560, 563, 400 S.E.2d 97, 98 (1991) (quoting *Forman & Zuckerman, P.A. v. Schupak*, 38 N.C. App. 17, 21, 247 S.E.2d 266, 269 (1978)). Rule 1.0 of the Twelfth Judicial District Juvenile Case Management Plan states that the purpose of the rules is to "provide for the orderly, prompt and just disposition of Juvenile Civil Matters." Further, the rules are to "be construed in such manner as to promote justice and avoid delay." On its face, Rule 10.3 was not intended to be an evidentiary rule. Instead, the local rules of court, including Rule 10.3, are designed to promote the efficient administration of justice and are to be applied toward such intended purpose.

N.C.G.S. § 8C-1, Rule 803(6) (2005). In addition, medical records are admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 703 which states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

N.C.G.S. § 8C-1, Rule 703 (2005). This Court has stated that:

> The mere admission by the trial court of incompetent evidence over proper objection does not require reversal on appeal. "Rather, the appellant must also show that the incompetent evidence caused some prejudice." In the context of a bench trial, an appellant "must show that the court relied on the incompetent evidence in making its findings." "Where there is competent evidence in the record supporting the court's findings, we presume that the court relied upon it and disregarded the incompetent evidence."

In re Huff, 140 N.C. App. 288, 301, 536 S.E.2d 838, 846 (2000) (internal citations omitted), *review denied*, *appeal dismissed*, 353 N.C. 374, 547 S.E.2d 9 (2001); *see also In re L.C.*, 181 N.C. App. 278, 284, 638 S.E.2d 638, 642 (2007) ("In a bench trial, 'it will be presumed that the judge disregarded any incompetent evidence that may have been admitted unless it affirmatively appears that he was influenced thereby.' ") (quoting *Stanback v. Stanback*, 31 N.C. App. 174, 180, 229 S.E.2d 693, 696 (1976), *disc. review denied*, 291 N.C. 712, 232 S.E.2d 205 (1977)). Further, "a physician, as an expert witness, may render his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied to him by others, including the patient, if the information is inherently reliable, even though such information is independently admissible into evidence; and if the expert's opinion is admissible, the expert may testify to the information he relied upon in forming it, for the purpose of showing the basis of the opinion." *State v. Spangler*, 314 N.C. 374, 385, 333 S.E.2d 722, 729 (1985) (citations omitted) (A doctor's testimony was admissible when he relied upon certain tests administered by hospital staff.).

The respondents have the burden of showing prejudice at the trial court's admission of the volumes of medical records. However, they

are unable to do so in the instant case. Over the course of the six-day hearing, petitioner presented the sworn testimony of eight witnesses, five of whom were trained medical personnel and three of whom were qualified and accepted by the trial court as expert witnesses. Detailed expert testimony regarding personal observations and opinions provided the court with clear, cogent and convincing evidence that T.M. was abused.

Dr. Keith Kocis, Director of Pediatric Intensive Care Unit at UNC, was tendered by the court as an expert in the treatment of critically ill children who have been victims of child abuse. As T.M.'s admitting physician at the UNC Hospital Intensive Care Unit, Dr. Kocis arranged for T.M.'s transport from Womack Army Medical Center. He testified it was clear T.M. was desperately ill and unable to breathe on her own with very minimal brain function. He further testified she scored a 7 on the Glascow Coma Score, which was "a number consistent with severe neurologic dysfunction" and that "it became very clear that [T.M.] had a life threatening brain injury and [that] the type of brain injury that she was showing [was] very consistent and very commonly found with non-accidental trauma." Dr. Kocis described the subdural hematomas of differing ages as, "a screaming red flag of shaken baby syndrome." Based on Dr. Kocis' observations, T.M. had multiple levels of brain injury and "it was a profound injury affecting almost all aspects of the brain." Dr. Kocis stated "[c]ertainly the constellation of what we saw is shaken baby syndrome."

Joyce Moore, Registered Nurse, was tendered as an expert in the field of forensic pediatric nurse consultation. Nurse Moore has thirty years experience on the UNC Beacon Team (combined child maltreatment assessment, child protection services, domestic violence and elder abuse) and the Child Medical Evaluation program at UNC. Nurse Moore testified she coordinated T.M.'s treatment, spoke directly with respondent-father and personally reviewed the medical records in forming her opinion. Nurse Moore testified in her expert opinion, T.M.'s injuries were inflicted by trauma.

Dr. Kenneth Lury, Neuroradiologist at UNC, was tendered as an expert in the field of diagnostic neuroradiology and was a part of the UNC team caring for T.M. He testified extensively as to the types of images used to diagnose T.M. and during his testimony showed the trial court images of T.M.'s brain. Dr. Lury testified that based on the presence of blood of varying ages in T.M.'s brain and other physical evidence he observed, it was his opinion T.M.'s injuries were due to a non-accidental trauma.

It is clear from the detailed findings of fact and conclusions of law that the trial court relied on the significant and extensive medical testimony of these experts. While petitioners did not lay a proper foundation for the admission of medical records, the extensive first-hand medical testimony by Drs. Kocis and Lury and Nurse Moore in treating T.M. provided more than sufficient evidence to support a finding and conclusion that T.M. was abused. Respondents have not met their burden of showing they were prejudiced by the admission of the medical records. We reject respondent's contention that without the medical records in evidence the trial court could not have found and concluded T.M. was abused. *See Huff*, 140 N.C. App. at 301, 536 S.E.2d at 846 (citation omitted) ("Where there is competent evidence in the record supporting the court's findings, we presume that the court relied upon it and disregarded the incompetent evidence."). Each of the challenged findings of fact were supported by clear, cogent and convincing evidence. These assignments of error are overruled.

[2] Next, respondents argue the trial court committed reversible error by failing to comply with the statutory time period for conducting the adjudicatory hearing. The juvenile petition was filed on 14 November 2005. The adjudicatory hearing was held in March 2007, sixteen months after the petition was filed. Pursuant to N.C. Gen. Stat. §7B-801(c) (2005), "[t]he adjudicatory hearing shall be held . . . no later than 60 days from the filing of the petition unless the judge pursuant to G.S. 7B-803 orders that it be held at a later time." N.C. Gen. Stat. § 7B-803 provides that:

> The court may, for good cause, continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile.

N.C. Gen. Stat. § 7B-803 (2005).

Here, continuances were entered due to a request for a special court setting based on the length of time needed for a trial, and because respondents sought funds to hire an expert witness. Additional delay resulted from respondents' inability to retain an expert who would agree to review the medical records. On 17

November 2006, the trial court entered an order stating counsel had "taken a significant amount of time to locate an expert in as much as despite counsel's diligent work to locate an expert witness, they have been turned down by numerous experts." Furthermore, noting the request for a special setting to hold the trial, the court indicated January 2007 was the first available time for a special setting. Thus, the court found "for good cause shown that the time for trial has lapsed." A pre-adjudication conference was held on 4 January 2007. The trial court again noted in its order that the time for trial had lapsed "for good cause shown" and continued the matter. The matter was finally calendared for trial for 19 March 2007. Therefore, most of the delay was attributed to respondents' search for an expert witness, and respondents' request for a special trial setting, and not as respondents have argued, due to the trial court. *See In re D.J.D.*, 171 N.C. App. 230, 243, 615 S.E.2d 26, 35 (2005) (since respondent moved for the continuance, he could demonstrate no prejudice from any delay in holding the termination hearing). Furthermore, respondents have not articulated any specific prejudice resulting from the delay. *See In re S.N.H. and L.J.H.*, 177 N.C. App. 82, 627 S.E.2d 510 (2006) (mere passage of time alone is not enough to show prejudice). This assignment of error is overruled.

[3] Lastly, respondent-father argues the trial court erred by reserving "the right to make additional findings out of Court and out of session consistent with the evidence and testimony presented." N.C. Gen. Stat. § 1A-1, Rule 61 states:

> No error in either the admission or exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action amounts to the denial of a substantial right.

N.C.G.S. § 1A-1, Rule 61 (2005). Respondent-father has failed to cite any finding made by the trial court "out of Court," and none appear on the face of the record. As respondent-father has not shown how he was prejudiced, this assignment of error is overruled.

Affirmed.

Chief Judge MARTIN and Judge McCULLOUGH concur.

CANDY STREZINSKI, EMPLOYEE, PLAINTIFF-APPELLANT, CROSS-APPELLEE v. CITY OF GREENSBORO, EMPLOYER, AND KEY RISK MANAGEMENT SERVICES, CARRIER, DEFENDANTS-APPELLEES, CROSS-APPELLANTS

No. COA07-563

(Filed 18 December 2007)

1. Workers' Compensation— hearing loss—causal link to occupation—not established

The Industrial Commission's conclusion in a workers' compensation case that a 911 dispatcher had not suffered an occupational hearing loss within the meaning of the statute was proper. Plaintiff did not establish a causal link between her hearing loss and her alleged workplace exposure.

2. Workers' Compensation— hearing loss—findings—supported by evidence

The findings of the Industrial Commission in a workers' compensation case involving hearing loss by a 911 dispatcher were supported by the evidence.

3. Workers' Compensation— deputy commissioner's findings—consideration by full Commission

The Industrial Commission did not err in a workers' compensation case in its consideration of the deputy commissioner's findings of fact. The full Commission may weigh the same evidence that was presented to the deputy commissioner and decide for itself the weight and credibility of the evidence. It may even strike the deputy commissioner's findings entirely.

4. Appeal and Error— notice of appeal—timeliness—direct appeal from agency—Rule 18

The Court of Appeals had no jurisdiction over defendant's appeal in a workers' compensation case where the notice of appeal was not timely under Rule 18 of the Rules of Appellate Procedure. This is a direct appeal from an administrative agency rather than a civil case, so that it is governed by Rule 18 rather than Rule 3.

Appeal by plaintiff and cross-appeal by defendant from an opinion and award of the Full Commission of the North Carolina Industrial Commission entered 30 January 2007 by Commissioner Dianne C. Sellers. Heard in the Court of Appeals 15 November 2007.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, for plaintiff-appellant/cross-appellee.

Smith Moore, LLP, by Caroline H. Lock, for defendants-appellees/cross-appellants.

JACKSON, Judge.

Candy Strezinski ("plaintiff") appeals the denial of her workers' compensation claim by the Full Commission of the North Carolina Industrial Commission in its Opinion and Award dated 30 January 2007. The City of Greensboro ("defendant") appeals the denial of costs and attorney fees in the same Opinion and Award. For the reasons stated below, we affirm in part and dismiss in part.

Plaintiff began her employment with defendant as a telecommunicator, or 911 dispatcher, on 1 July 1997. Prior to applying for a position with defendant, plaintiff had surgery to correct hearing loss which the doctor attributed to chronic ear infections. Upon her application for employment with defendant, plaintiff's hearing was tested and the results demonstrated no hearing loss.

At various times throughout her employment, plaintiff used three types of telephone headset. Each type was routed through an amplifier which was plugged into a computer console at her workstation. Plaintiff had the ability to control the volume of the amplifier.

In her position, plaintiff was exposed to 911 callers yelling over her telephone headset, as well as police and fire sirens both through the headset when she was speaking directly with emergency personnel and over her computer console when she was using the headset to speak to 911 callers.

During the course of her employment, plaintiff continued to suffer from ear infections and other ailments. She also suffered bilateral conductive hearing loss and mild sensorineural hearing loss in the left ear. She underwent surgery in 2003 to correct her conductive hearing loss. Although the surgery eliminated all or most of her conductive hearing loss in the left ear, her mild sensorineural hearing loss remained.

Plaintiff saw her doctor for hearing problems on 17 March 2003, the alleged date of "injury," and first notified her supervisor about her condition on 11 April 2003. A senior claims representative informed plaintiff on 22 April 2003 that her claim was denied. On 18 July 2003,

plaintiff, appearing *pro se*, filed a request that her claim be assigned for hearing with the Industrial Commission. Defendant responded 2 September 2003. Plaintiff's attorney filed a notice of the alleged accident and claim to her employer on 11 November 2003. An amended request for hearing was filed 14 November 2003.

In September 2004, plaintiff was promoted to a supervisory position. Although her telecommunicator duties lessened, she still was required to use a headset and perform telecommunicator duties on an occasional basis, such as when the call center was short-handed, extremely busy, or when she was relieving someone who was at lunch or on a break.

At a hearing before a deputy commissioner on 25 January 2005, both plaintiff and the assistant director of communication testified. It was not until after appearing before the Industrial Commission that plaintiff sought medical opinions about her hearing loss. On 28 January 2005, plaintiff saw Dr. John Mundy ("Dr. Mundy"), the doctor who had performed her 2003 surgeries. Dr. Mundy's impression was that plaintiff's audiogram was "not suggestive of primary noise-induced hearing loss." That same day, plaintiff saw Dr. James Crossley ("Dr. Crossley"), who had performed her 1997 surgery. Dr. Crossley gave no opinion at that time as to causation because he did not have the results of Dr. Mundy's audiogram. Dr. Mundy and Dr. Crossley were deposed 1 March and 7 March 2005, respectively. At Dr. Crossley's deposition, he agreed that given plaintiff's greater loss of hearing in lower frequencies, her hearing loss was not likely due to noise exposure.

The deputy commissioner filed an opinion and award on 1 May 2006, granting plaintiff's claim. Defendant appealed to the Full Commission. On 30 January 2007, the Full Commission denied plaintiff's claim and declined to award costs and attorney fees to defendant. Plaintiff filed her notice of appeal on 21 February 2007; defendant filed its notice of appeal on 5 March 2007.

[1] Plaintiff first argues that the Full Commission applied the wrong standard of proof to an occupational disease hearing loss claim. We disagree.

This Court's review of an award from the Full Commission is "generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360

N.C. 41, 43, 619 S.E.2d 491, 492 (2005). This Court may set aside the Industrial Commission's findings of fact on appeal only when there is a complete lack of competent evidence to support them, because the commissioners are the sole judges of the credibility of the witnesses and the evidentiary weight to be given to their testimony. *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000). Findings of fact that are not challenged on appeal are binding on this Court. *See Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118, *disc. rev. denied*, 357 N.C. 460, 595 S.E.2d 760 (2003). In addition, findings of fact to which error is assigned but which are not argued in the brief are deemed abandoned. *See Myers v. BBF Printing Solutions*, 184 N.C. App. 192, 194, 645 S.E.2d 873, 875-76 (2007) (citing N.C. R. App. P. 28(b)(6) (2007)). The Commission's conclusions of law, however, are reviewed *de novo*. *Griggs v. Eastern Omni Constructors*, 158 N.C. App. 480, 483, 581 S.E.2d 138, 141 (2003).

Hearing loss that is caused by harmful noise in the employment is a compensable occupational disease pursuant to North Carolina's Workers' Compensation Act. N.C. Gen. Stat. § 97-53(28) (2005). In order to recover for such hearing loss, plaintiff must establish facts to support a *prima facie* case. To do so, she must prove "(1) loss of hearing in both ears which was (2) *caused* by harmful noise in [her] work environment." *McCuiston v. Addressograph-Multigraph Corp.*, 308 N.C. 665, 667, 303 S.E.2d 795, 797 (1983) (emphasis added).

Plaintiff correctly cites *McCuiston* as establishing the elements for her claim, but states that in order to prevail, she must prove only that she has suffered hearing loss in both ears and that she was exposed to harmful noise in her workplace. She argues that, as *McCuiston* directs, once she has proven those elements, the burden shifts to the employer to prove that the sound was of less than ninety decibels. *See id.* However, as this Court recently stated, "[i]t is well settled that, in order to establish a compensable occupational disease, the employee must show a causal connection between the disease and the claimant's employment." *Kashino v. Carolina Veterinary Specialists Med. Servs.*, 186 N.C. App. 418, 421, 650 S.E.2d 839, 841 (2007) (internal quotations omitted) (citations omitted). In *McCuiston*, the plaintiff established such a *prima facie* case; therefore, the burden shifted to the defendant. In the case *sub judice*, if plaintiff failed to establish the element of causation, defendant would not be required to prove the level of sound in the workplace.

Plaintiff has assigned error to many of the Full Commission's findings of fact. Those not challenged or in support of which no argument is made in the brief are binding on appeal.

The Full Commission made the following findings of fact relating to the element of causation:

> 2. As a child, plaintiff suffered from recurrent ear infections requiring treatment by a physician. These problems continued into adulthood. Plaintiff also has a history of allergy to dust mites, and has experienced significant problems with upper respiratory infections. Plaintiff has been treated at the Karam Family Practice for ear infections, sinusitis, bronchitis, acute labyrnthitis, upper respiratory infections, allergic rhinitis, asthmatic bronchitis, pharyngitis, and bilateral Eustachian tube dysfunction.
>
> . . . .
>
> 11. Plaintiff uses a telephone headset to perform her job duties. . . . Each of [the three types of headsets plaintiff has used] is connected to an amplifier which plugs into the computer console or station at which plaintiff works. The amplifier has a volume control, which plaintiff is able to adjust throughout the day.
>
> . . . .
>
> 16. During the course of her employment with defendant, plaintiff has continued to suffer problems with recurrent ear infections, upper respiratory infections, sinusitis, bronchitis, labyrinthitis, and allergic rhynitis [sic].
>
> 17. Plaintiff has been treated for these complaints on numerous occasions . . . .
>
> . . . .
>
> 30. Plaintiff returned to Dr. Mundy on January 28, 2005 . . . .
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> 31. Dr. Mundy opined that plaintiff's audiogram was not suggestive of noise-induced hearing loss. Dr. Mundy further testified that it is unlikely that plaintiff's sensorineural hearing loss was caused by noise exposure, as noise induced hearing loss typically occurs to a greater extent in the higher frequencies, whereas plaintiff's hearing loss is greater in the lower frequencies. While Dr. Mundy testified that if plaintiff were exposed to greater than 90 decibels of noise over an eight hour work shift on a daily basis,

such exposure could have contributed to her sensorineural hearing loss, he also made it clear that it was possible but unlikely. Dr. Mundy's testimony remained that it is unlikely that plaintiff's sensorineural hearing loss is noise induced.

32. Plaintiff treated with Dr. Crossly [sic] on January 28, 2005. Upon physical examination, plaintiff's left tympanic membrane was intact but thinner and slightly retracted. The mobility of the ossicular chain was not as great as in the right ear. Dr. Crossly [sic] subsequently reviewed Dr. Mundy's records, including the audiogram. Dr. Crossley opined that plaintiff's sensorineural hearing loss is probably caused by chronic ear infections, based on the fact that plaintiff's sensorineural hearing loss was greater in the lower frequencies than in the higher frequencies. Dr. Crossley opined that plaintiff's sensorineural hearing loss is not likely due to noise exposure.

. . . .

34. Based upon the greater weight of the evidence, including the testimony of Dr. Mundy and Dr. Crossley, plaintiff has not suffered hearing loss from noise exposure.

These findings make clear that plaintiff has failed to establish a causal link between her hearing loss and the alleged workplace exposure. Accordingly, the Full Commission's conclusion that she had not suffered from occupational loss of hearing within the meaning of section 97-53(28) was proper. Therefore, this argument is without merit.

[2] Plaintiff next argues that the Full Commission's findings of fact and conclusions of law are not supported by competent evidence. We disagree.

Specifically, plaintiff challenges findings of fact numbers 7, 10, 11, 12, 13, 14, 16, 17, and 18. She contends they are incomplete, incorrectly stated, irrelevant, or otherwise not supported. "[I]t has long been settled that in a Work[ers'] Compensation case the findings of fact by the Industrial Commission . . . are conclusive on appeal when supported by competent evidence, even though there is evidence that would have supported findings to the contrary." *Hollman v. City of Raleigh*, 273 N.C. 240, 245, 159 S.E.2d 874, 877 (1968).

Moreover, "the Industrial Commission is not required to make specific findings of fact on every issue raised by the evidence[;] it is required to make findings only on crucial facts upon which the right

to compensation depends." *Watts v. Borg Warner Auto., Inc.*, 171 N.C. App. 1, 5, 613 S.E.2d 715, 719, *aff'd*, 360 N.C. 169, 622 S.E.2d 492 (2005) (per curiam) (citing *Gaines v. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977)). As noted *supra*, because plaintiff failed to establish causation, the burden of proof as to sound levels in her workplace did not shift to defendant. Therefore, to the extent that the challenged findings of fact do not address sound levels, such findings were not required. Further, the Full Commission is the sole judge of the credibility of the witnesses and the evidentiary weight to be given to their testimony. *Young*, 353 N.C. at 230, 538 S.E.2d at 914.

Having carefully reviewed the entire record in this case, we hold that the challenged findings of fact are supported by competent evidence. Therefore, this argument is overruled.

[3] In her final argument, plaintiff contends the Full Commission erred in making only partial findings of fact and ignoring many of the deputy commissioner's findings of fact. We disagree.

A deputy commissioner's opinion and award may be appealed to the Full Commission pursuant to North Carolina General Statutes, section 97-85, which states in pertinent part: "If [timely notice is given], the full Commission shall review the award, and . . . reconsider the evidence[.]" N.C. Gen. Stat. § 97-85 (2005). Although this Court is limited on appeal to determining whether the findings of fact are supported by competent evidence and whether those findings of fact in turn support the conclusions of law, the opinion and award of the deputy commissioner is fully reviewable upon appeal to the Full Commission. *Hobgood v. Anchor Motor Freight*, 68 N.C. App. 783, 785, 316 S.E.2d 86, 87 (1984). The Full Commission may weigh the same evidence that was presented to the deputy commissioner and decide for itself the weight and credibility of that evidence. *See id.* The Full Commission may even strike entirely the deputy commissioner's findings of fact even if no exception was taken to them. *Keel v. H & V, Inc.*, 107 N.C. App. 536, 542, 421 S.E.2d 362, 367 (1992).

Because the Full Commission was not bound by the deputy commissioner's findings of fact, this argument is without merit.

[4] Defendant separately appeals the Full Commission's denial of costs and attorney fees, arguing the Full Commission erred in not finding that plaintiff had prosecuted her claim without reasonable ground and abused its discretion. We disagree.

We note that plaintiff contends this Court is without jurisdiction to hear defendant's appeal because the notice of appeal was not timely filed pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure. Rule 3 governs how and when appeals are taken in civil cases. This is not a civil case; this is a direct appeal from an administrative agency. As such, it is governed by Rule 18 which states: "The times and methods for taking appeals from an agency shall be as provided in this Rule 18 unless the statutes governing the agency provide otherwise, in which case those statutes shall control." N.C. R. App. P. 18(b)(1) (2007). Chapter 97 of the North Carolina General Statutes governs the Workers' Compensation Act. North Carolina General Statutes, section 97-86 provides for the timing of appealing a decision of the Full Commission. Therefore, the timeliness of defendant's appeal is governed by section 97-86, not Appellate Rule 3. *See Winslow v. Carolina Conference Ass'n of Seventh Day Adventists*, 211 N.C. 571, 580, 191 S.E. 403, 408 (1937).

Section 97-86 states that the procedure for appealing from the Full Commission "shall be as provided by the rules of appellate procedure." N.C. Gen. Stat. § 97-86 (2005). The Opinion and Award at issue was filed 30 January 2007. "Defendant could, within thirty days from the date of the award, but not thereafter, appeal from the decision of the Commission to the Court of Appeals." *Fisher v. E. I. Du Pont de Nemours*, 54 N.C. App. 176, 177, 282 S.E.2d 543, 543 (1981) (citing N.C. Gen. Stat. § 97-86; N.C. R. App. P. Rule 18(b)). The thirty days expired on 1 March 2007. Defendant's notice of appeal is dated 5 March 2007. The notice of appeal was filed after the expiration of the thirty-day period. Although "[t]he statute . . . allows notice of appeal to be made within thirty days after receipt of notice by registered or certified mail of the award[, t]he record on appeal . . . is devoid of anything indicating that notice of the award was so mailed. We are bound by the record before us." *Fisher*, 54 N.C. App. at 177 n. 1, 282 S.E.2d at 543. Because defendant's notice of appeal was not timely filed, this Court did not obtain jurisdiction, therefore, defendant's assignment of error must be dismissed. *See*, *e.g.*, *Oliver v. Williams*, 266 N.C. 601, 605, 146 S.E.2d 648, 651 (1966); *Higdon v. Light Co.*, 207 N.C. 39, 40-41, 175 S.E. 710, 711 (1934); *Brooks v. Matthews*, 29 N.C. App. 614, 615, 225 S.E.2d 159, 159 (1976).

For the foregoing reasons, we affirm the Full Commission's denial of plaintiff's workers' compensation claim.

Affirmed in part and dismissed in part.

Judges TYSON and STROUD concur.

CHARLES BAKER, PLAINTIFF-APPELLEE v. LANIER MARINE LIQUIDATORS, INC., DEFENDANT-APPELLANT

No. COA07-152

(Filed 18 December 2007)

1. Jurisdiction— personal—findings of fact not requested—minimum contacts—long-arm statute—due process

The trial court did not err in a breach of express warranty, breach of implied warrant of merchantability, breach of warranty of fitness for a particular purpose, fraud or in the alternative negligent misrepresentation, and unfair and deceptive trade practices case arising out of the sale of a boat by denying defendant's motion to dismiss based on lack of personal jurisdiction, because: (1) although defendant contends the trial court failed to make any findings of fact, there was no indication in the record that either party requested findings by the trial court as required by N.C.G.S. § 1A-1, Rule 52(a)(2); (2) defendant was subject to jurisdiction under North Carolina's long-arm statute, N.C.G.S. § 1-75.4(5), since defendant personally coordinated the delivery of the boat to plaintiff located in North Carolina through an independent third-party, and the $9,812 wire transfer sent from plaintiff in North Carolina to defendant in Georgia for payment of the boat constituted a thing of value shipped from this state by plaintiff to defendant on defendant's order or direction; and (3) the exercise of personal jurisdiction comported with due process based on sufficient minimum contacts with the forum state including the relationship among the parties, the nature of their communications, the interest of the forum state, the convenience of the parties, and the cause of action such that defendant purposefully availed itself to do business in North Carolina.

2. Appeal and Error— appealability—denial of motion to dismiss—failure to state claim

Although defendant contends the trial court erred by denying his N.C.G.S. § 1A-1, Rule 12(b)(6) motion to dismiss even though defendant contends Georgia law and not North Carolina law

should apply to this case, this assignment of error is dismissed as an appeal from an interlocutory order, because the denial of a motion to dismiss for failure to state a claim upon which relief can be granted is not a final determination within the meaning of N.C.G.S. § 1-277(a), does not affect a substantial right, and is not appealable.

Judge STEELMAN concurring in the result.

Appeal by defendant from order entered 25 August 2006 by Judge John E. Nobles in Carteret County Superior Court. Heard in the Court of Appeals 12 September 2007.

Harvell & Collins, P.A., by Wesley A. Collins and Amy C. Shea, for plaintiff-appellee.

Wheatly, Wheatly, Weeks, Valentine & Lupton, P.A., by Stevenson L. Weeks, for defendant-appellant.

CALABRIA, Judge.

Lanier Marine Liquidators, Inc. ("defendant") appeals from an order of the Carteret County Superior Court. We affirm the trial court's denial of defendant's motion to dismiss for lack of personal jurisdiction, and we dismiss, as interlocutory, the trial court's denial of the motion to dismiss for failure to state a claim upon which relief can be granted.

Defendant is a Georgia merchant in the business of selling boats and marine vessels. In 2004, Charles Baker ("plaintiff") sought to purchase a boat and was referred to defendant by a North Carolina firm. In the summer of 2004, plaintiff contacted defendant and spoke with defendant's agent, Shane Vaughn, ("Vaughn") concerning the type of boat plaintiff wished to purchase. During the initial phone conversation, Vaughn told plaintiff he currently did not have a boat in his inventory that met with plaintiff's specifications. Vaughn said he would begin searching for one matching plaintiff's requirements. In the Fall of 2004, Vaughn contacted plaintiff in North Carolina and told plaintiff he had a "great boat" and that plaintiff could view the boat on defendant's website.

After plaintiff viewed the boat on defendant's website, he offered to purchase the boat at its listed price in the amount of $9,900, and defendant accepted his offer. On 9 December 2004, plaintiff used his debit card and placed a $100 deposit with defendant. On 14 January

2005, plaintiff wired $9,812, the remaining amount of the purchase price (including a $12 wire transfer fee), to defendant's bank in Georgia. After completing the financial arrangements, defendant arranged for an independent contractor, Richard Pursley, to ship the boat to plaintiff. When the boat was delivered in North Carolina, the boat's interior was in very poor condition. In addition, plaintiff was not presented with any sales documentation or the boat's title. On the same day the boat was delivered, plaintiff placed the boat in the water, and the boat sank. Plaintiff telephoned Vaughn, spoke with him briefly, and was promised a return phone call. Neither Vaughn nor any of defendant's other employees contacted plaintiff.

On 1 August 2005, plaintiff filed a complaint in Carteret County Superior Court against defendant seeking to recover damages for breach of an express warranty, breach of an implied warranty of merchantability, breach of warranty of fitness for a particular purpose, fraud, in the alternative to fraud negligent misrepresentation, and unfair and deceptive trade practices. Defendant filed motions to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted. The trial court denied all three motions. From the denial of these motions, defendant appeals.

[1] As a preliminary matter, we first address defendant's contention that the trial court made no findings of fact, but concluded as a matter of law that the court has personal jurisdiction over defendant. Rule 52(a)(2) of the North Carolina Rules of Civil Procedure provides that "[f]indings 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).

Here, there is no indication in the record that either party requested findings by the trial judge. Therefore, it was proper that the trial court made no findings of fact when issuing the order denying defendant's motion to dismiss.

Defendant next argues the trial court erred in denying its motion to dismiss for lack of personal jurisdiction. Specifically, defendant argues there are insufficient minimum contacts with North Carolina for our courts to exercise statutory jurisdiction, nor are there sufficient minimum contacts necessary to satisfy the due process of law requirements to subject defendant to the personal jurisdiction of North Carolina's courts. We disagree.

"The standard of review of an order determining jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Tejal Vyas, LLC v. Carriage Park Ltd. P'ship*, 166 N.C. App. 34, 37, 600 S.E.2d 881, 884 (2004) (internal quotation omitted). North Carolina courts utilize a two-prong analysis in determining whether personal jurisdiction against a non-resident is properly asserted. *Id.* Under the first prong of the analysis, we determine if statutory authority for jurisdiction exists under our long-arm statute. *Id.*, 166 N.C. App. at 37, 600 S.E.2d at 885; *See also* N.C. Gen. Stat. § 1-75.4 (2005). If statutory authority exists, we consider under the second prong whether exercise of our jurisdiction comports with standards of due process. *Tejal Vyas*, 166 N.C. App. at 37, 600 S.E.2d at 885.

A. North Carolina's statutory long-arm statute

Pursuant to North Carolina's long-arm statute, personal jurisdiction is proper here under two provisions:

> (5) Local Services, Goods or Contracts.-In any action which:
>
> . . . .
>
> (c) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value; or
>
> (d) Relates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction[.]

N.C. Gen. Stat. § 1-75.4(5) (2005).

Defendant personally coordinated the delivery of the boat to plaintiff, located in North Carolina, through an independent third party. Moreover, the $9,812 wire transfer sent from plaintiff in North Carolina to defendant, in Georgia, for payment of the boat constitutes a "thing[] of value" shipped from this State by plaintiff to defendant on defendant's order or direction pursuant to N.C. Gen. Stat. § 1-75.4(5)(d). *See Tejal Vyas*, 166 N.C. App. at 38, 600 S.E.2d at 885. Therefore, the defendant is subject to jurisdiction under North Carolina's long-arm statute.

B. Due Process

"Since at least one requirement under North Carolina's long-arm statute allows plaintiffs to assert jurisdiction over defendants, the inquiry becomes whether plaintiffs' assertion of jurisdiction over defendants complies with due process." *Id.* "In determining whether the exercise of personal jurisdiction comports with due process, the crucial inquiry is whether the defendant has 'certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *Id.* (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945) (internal quotation marks omitted) (citation omitted)). In order to have minimum contacts:

> the defendant must have purposefully availed itself of the privilege of conducting activities within the forum state and invoked the benefits and protections of the laws of North Carolina. The relationship between the defendant and the forum state must be such that the defendant should reasonably anticipate being haled into a North Carolina court.

Id., 166 N.C. App. at 38-39, 600 S.E.2d at 885-86 (citations omitted) (quotation marks omitted).

This Court in *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 284, 350 S.E.2d 111, 114 (1986), discussed five factors to be considered to determine whether the defendant has had sufficient minimum contacts with the forum state. The factors are: "(1) quantity of the contacts between the defendant and the forum state, (2) quality and nature of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience of the parties." *Id.*

> Although a contractual relationship between a North Carolina resident and an out-of-state party alone does not automatically establish the necessary minimum contacts with this State, nevertheless, a single contract may be a sufficient basis for the exercise of *in personam* jurisdiction if it has a substantial connection with this State.

Tom Togs, Inc. v. Ben Elias Industries Corp., 318 N.C. 361, 367, 348 S.E.2d 782, 786 (1986) (emphasis in original).

We now apply the five factors to the instant case and determine whether defendant has sufficient minimum contacts with North

Carolina such that this State's exercise of jurisdiction over defendant complies with due process. Plaintiff initiated contact with defendant about purchasing a boat. Defendant told plaintiff that currently defendant did not have a boat meeting plaintiff's specifications. However, a few months after that initial conversation, defendant specifically called plaintiff in North Carolina to inform plaintiff a boat was available that plaintiff might wish to purchase. Defendant accepted plaintiff's wire transfer of funds in the amount of $9,812 that plaintiff wired to defendant from a North Carolina bank. Furthermore, when defendant telephoned plaintiff, defendant told plaintiff he could look at the boat on defendant's website. Defendant also made shipping arrangements with a third party to ship the boat to North Carolina.

Plaintiff is an individual consumer who sought to purchase the boat for his own use as a primary residence on the water. Defendant's employees did not return plaintiff's phone calls after plaintiff's boat sank. As a result of plaintiff's unreturned phone calls, plaintiff brought suit against defendant for breach of warranty, fraud, and unfair and deceptive trade practices. "It is generally conceded that a state has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Id.*, 318 N.C. at 367, 348 S.E.2d at 787 (citation omitted) (quotation marks omitted). Thus, North Carolina has a "manifest interest" in providing the plaintiff "a convenient forum for redressing injuries inflicted by" defendant, an out-of-state merchant. As to the fifth factor, the convenience of the parties, we note that Georgia is located in the same region as North Carolina; therefore, defendant would not have suffered a great burden in traveling from Georgia to North Carolina to appear in the lawsuit. Moreover, there is no evidence in the record to suggest that it is more convenient for the parties to try this matter in Georgia than in North Carolina. *See Cherry Bekaert & Holland v. Brown*, 99 N.C. App. 626, 635, 394 S.E.2d 651, 657 (1990) ("Litigation on interstate business transactions inevitably involves inconvenience to one of the parties. When [t]he inconvenience to defendant of litigating in North Carolina is no greater than would be the inconvenience of plaintiff of litigating in [defendant's state] . . . no convenience factors . . . are determinative[.]" (citations and quotation marks omitted); *Hankins v. Somers*, 39 N.C. App. 617, 251 S.E.2d 640 (1979) (holding defendants, Georgia residents, satisfied all the requirements of due process and were subject to personal jurisdiction in North Carolina).

Defendant contests personal jurisdiction in North Carolina because there is no evidence its business activities are conducted in North Carolina. However, our Supreme Court has held, "[l]ack of action by defendant *in* a jurisdiction is not now fatal to the exercise of long-arm jurisdiction." *Tom Togs, Inc.*, 318 N.C. at 368, 348 S.E.2d at 787 (citations omitted).

Therefore, after examining the relationship among the parties, the nature of their communications, the interest of the forum state, the convenience of the parties, and the cause of action, we conclude defendant has "purposely availed" itself to do business in North Carolina and "should reasonably anticipate being haled into a North Carolina court." Thus, we find sufficient minimum contacts to justify the exercise of personal jurisdiction over defendant without violating the due process clause.

[2] Defendant next argues that the trial court erred in denying its 12(b)(6) motion because Georgia law and not North Carolina law should apply to this case. We disagree.

"As a general rule, a party may properly appeal only from a final order, which disposes of all the issues as to all parties, or an interlocutory order affecting a substantial right of the appellant." *Buffington v. Buffington*, 69 N.C. App. 483, 485, 317 S.E.2d 97, 98 (1984) (citation omitted). "Denial of a motion to dismiss is interlocutory because it simply allows an action to proceed and will not seriously impair any right of defendants that cannot be corrected upon appeal from final judgment." *Howard v. Ocean Trail Convalescent Center*, 68 N.C. App. 494, 495, 315 S.E.2d 97, 99 (1984). "Denial of a motion to dismiss for failure to state a claim upon which relief can be granted is not a final determination within the meaning of G.S. 1-277(a), does not affect a substantial right, and is not appealable." *Hankins v. Somers*, 39 N.C. App. at 618, 251 S.E.2d at 641 (citation omitted).

In the case *sub judice*, because defendant assigns as error the court's denial of its motion to dismiss pursuant to Rule 12(b)(6), this assignment of error is premature, and therefore not appealable. Since defendant has not argued its remaining assignments of error, they are deemed abandoned pursuant to N.C.R. App. P. 28(b)(6) (2005).

Affirmed in part; dismissed in part.

Judge STEPHENS concurs.

Judge STEELMAN concurs with a separate opinion.

STEELMAN, Judge concurring in the result.

I fully concur in the result reached by the majority in this case, and particularly with the holding that under N.C.R. Civ. P. 52(a)(2) the court was not required to make findings of fact in the absence of a request by the parties. In such a case, "it will be presumed that the judge, upon proper evidence, found facts sufficient to support the judgment." *J.M. Thompson Co. v. Doral Mfg. Co.*, 72 N.C. App. 419, 424, 324 S.E.2d 909, 912 (1985) (citation omitted). Our analysis is limited to whether the presumed findings of fact are supported by competent evidence, and if so, they are conclusive on appeal despite evidence to the contrary. *Id.* at 424, 324 S.E.2d at 913; *see also* 2 G. Gray Wilson, *North Carolina Civil Procedure* § 52-4, at 200-201 (2d ed. 1995). In the instant case, there is evidence in the record to support the presumed findings of fact by the court, and its denial of defendant's motion to dismiss for lack of personal jurisdiction should be affirmed.

STATE OF NORTH CAROLINA v. AMOS PATRICK KELSO

No. COA06-1489

(Filed 18 December 2007)

1. Sexual Offenses— first-degree rape indictment—sexual battery conviction—indictment not sufficient

An indictment for first degree rape that did not include the purpose element of the sexual battery statute was insufficient to confer subject matter jurisdiction for a sexual battery conviction. The trial court lacked jurisdiction and judgment was arrested.

2. Appeal and Error— defect in indictment—objection not required for appeal

Defendant was not required to object to a defect in an indictment to preserve the issue for appeal. A motion for arrest of judgment based upon the insufficiency of an indictment may be made for the first time on appeal.

3. Appeal and Error— insufficient indictment—invited error not applicable

Due to another Court of Appeals decision on similar facts, a defendant was entitled to relief despite the invited error doctrine where he encouraged the court to submit sexual battery as a lesser included offense and appeals on the insufficiency of the indictment for first-degree rape to support a conviction for sexual battery.

Appeal by defendant from judgment entered 17 February 2006 by Judge Jerry Cash Martin in Watauga County Superior Court. Heard in the Court of Appeals 10 September 2007.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Russell J. Hollers III, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Amos Patrick Kelso ("defendant") was charged in a bill of indictment with first degree rape of C.S., first degree sexual offense and attempted first degree sexual offense against C.S., and assault upon C.S. by strangulation. He entered pleas of not guilty. As to the charge of first degree rape, the jury found him guilty of sexual battery; he was acquitted of all of the other charges.

At trial, the State offered evidence tending to show that both defendant and C.S. were students at Appalachian State University and lived in the same dormitory. C.S. testified that she found defendant attractive, and she told friends that she was romantically interested in him. On the evening of 10 December 2004, C.S. testified that she watched television with defendant and his roommate in their room on the second floor of the dormitory. Around midnight, C.S. went upstairs to her room on the sixth floor, and decided to go with friends to a party at another friend's apartment. Defendant encountered one of C.S.'s friends and learned of their plans; he also went to the party.

C.S. walked home from the party with some friends around 1:30 or 2:00 a.m., and went to bed at approximately 2:15-2:45 a.m. About 5:15 a.m., defendant knocked on C.S.'s door and asked her to come downstairs to "hang out." She went with defendant to the second floor, where defendant pulled her into the lobby and began kissing her. C.S. did not resist because she had romantic feelings for defend-

ant, but then he led her into the nearby bathroom, where she testified that he forcibly had vaginal sex with her and forced her to perform fellatio upon him, notwithstanding her resisting him and pleading with him to stop. He then grabbed her by the neck until she thought she was going to pass out. She also testified that defendant bit her on both sides of her neck.

C.S. was taken by her friends to the emergency room at Watauga Medical Center where she was examined by Dr. Frederick Miner, who observed bruises and signs of trauma on her neck, lacerations and abrasions on her genital area, and bruises on her knees.

Defendant's roommate testified that he had been friends with C.S. and that she had expressed an interest in defendant, and had exposed her breasts to defendant on several occasions when she was visiting in their room. He testified that C.S. had told him on a previous occasion that she wanted defendant to have sex with her and that she wanted to fellate him.

Defendant testified that he had been drinking heavily on the night in question, and that when he returned to his room he asked his roommate which room C.S. lived in. Upon getting the room number, he went upstairs and asked her to come with him. They went to a dormitory lounge and began "making out", but went into a bathroom when they heard a door slam. He testified that he exposed his penis and put C.S.'s hand on it, and then she began to perform oral sex on him. He testified that he did not force her. He then helped her up and she unbuttoned her pants and turned around and they had sexual intercourse. She did not resist. At one point, he attempted to penetrate her anally and she quietly told him that it hurt and he stopped. He again attempted to penetrate her vaginally, but lost his erection. He was embarrassed, so he just left. According to defendant, all of the sexual activity with C.S. was consensual.

During the jury instruction conference, the trial court indicated that, as to the rape charge, it would instruct upon, and submit to the jury, the possible verdicts of Guilty of First Degree Rape, Guilty of Second Degree Rape, Guilty of Sexual Battery, Guilty of Assault on a Female, Guilty of Simple Assault, or Not Guilty. The State objected to the court's proposed instructions as to the offenses of sexual battery, assault on a female, and simple assault, contending these offenses were not lesser offenses of first degree rape. While defendant's trial counsel requested for the record that the jury be instructed only as to the verdicts of Guilty of First Degree Rape or Not Guilty, she argued

to the trial court that an instruction on the offenses of sexual battery and assault on a female would be appropriate and asserted specifically that "all the elements of sexual battery are contained in the elements of first degree rape" and that the offense was therefore a lesser included offense of first degree rape.

The trial court overruled the State's objection and instructed the jury in accordance with its original statement of intention. The jury found defendant guilty of sexual battery and the court entered a judgment upon the verdict sentencing defendant to a term of 75 days in the custody of the Sheriff of Watauga County.

[1] Defendant's sole argument on appeal is that the trial court had no jurisdiction to enter judgment against him on the offense of sexual battery. Defendant contends that sexual battery is not a lesser included offense of first degree rape and, therefore, the bill of indictment charging him with first degree rape was insufficient to confer subject matter jurisdiction on the trial court to enter judgment as to the offense of sexual battery.

As the State concedes, North Carolina has a well-established definitional test for determining whether one offense is a lesser included offense of another crime:

> [T]he definitions accorded the crimes determine whether one crime is a lesser included offense of another crime. In other words, all of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense.

State v. Weaver, 306 N.C. 629, 635, 295 S.E.2d 375, 378-79 (1982) (citation omitted) (emphasis omitted), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993); *accord State v. Hedgepeth*, 165 N.C. App. 321, 324, 598 S.E.2d 202, 205, *disc. rev. denied*, 359 N.C. 193, 607 S.E.2d 656 (2004) (holding that a "lesser" crime cannot be a lesser included offense of a "greater" crime if the lesser crime contains an essential element not included in the greater crime).

Defendant was indicted for first degree rape. The pertinent essential elements of first degree rape are: (1) vaginal intercourse; (2) with another person; (3) by force and against the will of the other person; (4) while inflicting serious personal injury upon the victim or another

person. N.C. Gen. Stat. § 14-27.2(a) (2005). The essential elements of sexual battery are: (1) sexual contact with another person; (2) by force and against the will of the other person; and (3) for the purpose of sexual arousal, gratification or abuse. N.C. Gen. Stat. § 14-27.5A (2005). Sexual battery requires that the act be for the purpose of sexual arousal, gratification or abuse, while first degree rape does not. Thus, as the State also concedes, sexual battery is not a lesser included offense of first degree rape.

"North Carolina law has long provided that '[t]here can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court a[c]quires no jurisdiction [whatsoever], and if it assumes jurisdiction a trial and conviction are a nullity.' " *State v. Neville*, 108 N.C. App. 330, 332, 423 S.E.2d 496, 497 (1992) (quoting *McClure v. State*, 267 N.C. 212, 215, 148 S.E.2d 15, 17-18 (1966)). In other words, an indictment must allege every element of an offense in order to confer subject matter jurisdiction on the court.

While the State concedes the correctness of the foregoing principles of North Carolina law, it argues that the rule that a failure to allege each and every element of an offense is a jurisdictional defect is "antiquated" and followed by only a small minority of states. The State urges that we should reject the earlier rulings. We are, however, not free to do so, as this Court has no authority to overrule or otherwise disturb established precedent. *Kinlaw v. Long Mfg.*, 40 N.C. App. 641, 643, 253 S.E.2d 629, 630, *rev'd on other grounds*, 298 N.C. 494, 259 S.E.2d 552 (1979) (holding that "it is not our prerogative to overrule or ignore clearly written decisions of our Supreme Court"). Since the indictment for first degree rape did not include the purpose element included in the sexual battery statute, we must hold it was insufficient to confer subject matter jurisdiction over, and the trial court lacked jurisdiction to enter a judgment of defendant's guilt of, that offense.

An arrest of judgment is proper when the indictment "wholly fails to charge some offense cognizable at law or fails to state some essential and necessary element of the offense of which the defendant is found guilty." *State v. Gregory*, 223 N.C. 415, 418, 27 S.E.2d 140, 142 (1943). Further, "[w]hen an indictment has failed to allege the essential elements of the crime charged, it has failed to give the trial court subject matter jurisdiction over the matter, and the reviewing court must arrest judgment." *State v. Bullock*, 154 N.C. App. 234, 244, 574 S.E.2d 17, 23 (2002), *disc. review denied*, 357 N.C. 64, 579 S.E.2d 396,

cert. denied, 540 U.S. 928, 124 S. Ct. 338, 157 L. Ed. 2d 231 (2003). Therefore, we must arrest the judgment of the trial court.

[2] We note that defendant was not required to object to the indictment defect at trial in order to preserve the issue. A motion for arrest of judgment based upon the insufficiency of an indictment may be made for the first time on appeal. *State v. Wallace*, 25 N.C. App. 360, 363, 213 S.E.2d 420, 422 (1975). Further, under N.C.G.S. § 15A-1446(d)(1), a trial court's lack of jurisdiction over the offense of which the defendant was convicted "may be the subject of appellate review even though no objection, exception or motion has been made in the trial division." N.C. Gen. Stat. § 15A-1446(d)(1) (2005).

[3] The State also argues that, because defendant's counsel encouraged the trial court to submit the offense of sexual battery to the jury as a lesser included offense of first degree rape, it would be unfair to allow defendant to now take advantage of the error which he encouraged the trial court to make. Our Supreme Court has adopted the doctrine of invited error, holding that an appellant may not assign error "to the granting of [his] own requests" at trial. *State v. Wilkinson*, 344 N.C. 198, 213, 474 S.E.2d 375, 383 (1996). North Carolina courts have "consistently denied appellate review" to defendants who do so. *Id.*; *see also State v. Patterson*, 332 N.C. 409, 415, 420 S.E.2d 98, 101 (1992) (holding that invited error "does not entitle the defendant to any relief and of which he will not be heard to complain on appeal"). Further, our Supreme Court has held that "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); *see also State v. Basden*, 339 N.C. 288, 302, 451 S.E.2d 238, 246 (1994) (holding that the defendant could not appeal a jury instruction where he "did not object to the challenged instruction, but in fact, requested it and stated he was satisfied with it"), *cert. denied*, 515 U.S. 1152, 115 S. Ct. 2599, 132 L. Ed. 2d 845 (1995).

None of the foregoing cases, however, dealt with a failure of subject matter jurisdiction. If this were a case of first impression with us, we might be inclined to agree with the State that the defendant should not be allowed to obtain relief from a judgment entered upon an improper offense which his own counsel requested. It seems to us that affording a defendant relief under such circumstances might encourage the bad faith trial tactic of urging the submission of improper lesser offenses at trial in the hopes of obtaining appellate relief predicated on invited error. *See Shepherd v. State*, 459 S.E.2d

608, 609 (Ga. Ct. App. 1995) (holding that the defendant could be convicted of sexual battery, a lesser crime not included in the offense for which he was indicted, where the defendant requested that sexual battery be submitted to the jury); *Kemp v. State*, 647 N.E.2d 1143, 1145-46 (Ind. Ct. App. 1995) (holding that the defendant, who was indicted for first degree rape and convicted of sexual battery, had no remedy on appeal when he requested that the erroneous lesser non-included charge be submitted to the jury).

However, this Court reached a contrary result in a case decided upon facts similar to those in the present case. In *State v. Wilson*, 128 N.C. App. 688, 497 S.E.2d 416, *disc. review improvidently allowed*, 349 N.C. 289, 507 S.E.2d 38 (1998), the defendant was convicted of felonious restraint, which he requested to be submitted to the jury as a lesser included offense under his indictment for kidnapping. *Id.* at 689-90, 497 S.E.2d at 418. Felonious restraint contained an essential element, proof that the victim was transported in a motor vehicle or other conveyance, which was not alleged in the kidnapping indictment. *Id.* at 690, 497 S.E.2d at 418. On appeal, defendant contended, as does defendant in the present case, that his conviction was subject to an arrest of judgment because the indictment was not sufficient to confer jurisdiction for the offense of felonious restraint. *Id.* at 691, 497 S.E.2d at 419. This Court held that defendant was entitled to relief, notwithstanding the invited error doctrine. *Id.* at 690, 497 S.E.2d at 418-19. We are unable to meaningfully distinguish the present case from *Wilson* and are bound to follow it. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989).

Judgment Arrested.

Judges STROUD and ARROWOOD concur.

F. BARRY DIGH, PLAINTIFF v. NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, DEFENDANT

No. COA07-153

(Filed 18 December 2007)

Insurance— boat insurer—delayed notice of claim—not reasonable

An insurer had no duty to cover a loss from damage to a boat where the policy language about notice was ambiguous and the notice given was purposefully delayed through bad faith (a desire to keep premiums from increasing).

Appeal by Plaintiff from judgment entered 31 October 2006 by Judge Richard Doughton in Catawba County Superior Court. Heard in the Court of Appeals 12 September 2007.

Homesley Goodman & Wingo, PLLC, by Andrew J. Wingo, for Plaintiff-Appellant.

Robinson Elliott & Smith, by William C. Robinson, for Defendant-Appellee.

STEPHENS, Judge.

On 31 May 2002, Defendant Nationwide Mutual Fire Insurance Company ("Nationwide") issued an insurance policy to Plaintiff F. Barry Digh ("Digh") to cover Digh's 1998 Eliminator 25-foot powerboat. The front page of the policy assured Digh that he "now [had] a different kind of insurance policy. One that's readable, understandable, straight-forward." Nevertheless, after Digh's boat was damaged in an accident on Lake Norman in July 2002, Nationwide and Digh find themselves engaged in a dispute over the meaning of the notice provision in the policy's "Physical Damage Coverage" section:

SECTION I—CONDITIONS

. . . .

2. **Your Duties after Loss**. In case of a loss, **you must**:

a) give notice to us or our agent, and in case of theft also to the police as soon as possible.

Nationwide contends this provision obligated Digh to notify Nationwide of the damage to the boat "as soon as possible" after

the accident. Digh, on the other hand, argues he was only obligated to give notice "as soon as possible" *to the police* in case of theft, and that the provision is silent as to when he was required to give notice to Nationwide in case of a loss. From the trial court's grant of summary judgment in favor of Nationwide, Digh appeals.

BACKGROUND

On 28 July 2002, Digh was operating his boat on Lake Norman when, according to Digh, a four or five-foot "rogue wave" hit the boat, launching the boat "probably four to six feet out of the water" and ejecting Digh into the lake. Upon getting back on board the boat, Digh saw that the boat had suffered "stress cracks" in the fiberglass of the cockpit area and that the engine "was not quite what it was" before the encounter with the wave, in that he had to turn the key in the ignition "several times to get it to start." Digh drove the boat back to his boathouse, covered it, and raised it out of the water on his boat lift in his boathouse. At that point, Digh knew some work would have to be done on the boat to fix the stress cracks and engine damage, but Digh thought the cost of repairs would be about "fifteen hundred dollars plus the engine." Digh did not file a claim with Nationwide because he wanted "to keep [his] insurance from going up." The boat remained undisturbed on the boat lift for the next five months.

Around December 2002, Digh brought the boat to Admiral Marine Service ("Admiral") to have it winterized. Digh kept the boat at Admiral until November 2004 because he "was trying to save enough money to fix it [himself]." In November 2004, he brought the boat to Performance Engines ("Performance") to have the engine repaired. Performance removed and fixed the engine at a cost of approximately eighty-three hundred dollars. About three weeks after bringing the boat to Performance, Digh brought the boat back to Admiral. At Admiral, Digh discovered a softball-sized hole in the boat's hull. The cost to repair the stress cracks and the hole was estimated to be between fifteen and twenty-four thousand dollars.

In March 2005, Digh filed a claim with Nationwide for damage to the boat from the July 2002 accident. The parties did not settle Digh's claim, and, on 11 July 2005, Digh filed a complaint against Nationwide in which he asserted five causes of action: (1) breach of contract, (2) breach of contract duty to settle covered claim, (3) breach of fiduciary relationship, (4) bad faith refusal to settle, and (5) unfair and deceptive trade practices. On 10 October 2006, Nationwide filed a motion for summary judgment. On 31 October 2006, the trial court

granted summary judgment in favor of Nationwide on all of Digh's causes of action.

STANDARD OF REVIEW

As a preliminary matter, Digh, in his brief, does not specifically argue that the trial court erred in granting summary judgment on any one particular claim which he advanced before the trial court. It is evident, however, that the extent of Digh's argument to this Court is that the trial court erred in entering summary judgment on his first cause of action: breach of contract. Accordingly, we affirm summary judgment in favor of Nationwide on Digh's other four claims and limit our review to the trial court's entry of summary judgment on Digh's breach of contract claim. *See* N.C. R. App. P. 28(a) ("The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs.").

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [a] party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). "On appeal of a trial court's allowance of a motion for summary judgment, we consider whether, on the basis of materials supplied to the trial court, there was a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). "Evidence presented by the parties is viewed in the light most favorable to the non-movant." *Id.* (citing *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)).

BREACH OF CONTRACT

We begin by noting that insurance policies are considered contracts between two parties. *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 152 S.E.2d 436 (1967). "[I]t is the duty of the court to construe an insurance policy as it is written, not to rewrite it and thus make a new contract for the parties." *Id.* at 346, 152 S.E.2d at 440 (citations omitted). "Insurance contracts are construed according to the intent of the parties, and in the absence of ambiguity, we construe them by the plain, ordinary and accepted meaning of the language used." *Integon Gen. Ins. Corp. v. Universal Under-*

writers Ins. Co., 100 N.C. App. 64, 68, 394 S.E.2d 209, 211 (1990) (citing *Williams v. Nationwide Mut. Ins. Co.*, 269 N.C. 235, 238, 152 S.E.2d 102, 105-06 (1967)).

"An ambiguity exists where, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions asserted by the parties." *Maddox v. Colonial Life & Accident Ins. Co.*, 303 N.C. 648, 650, 280 S.E.2d 907, 908 (1981) (citing *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 172 S.E.2d 518 (1970)). "The fact that a dispute has arisen as to the parties' interpretation of the contract is some indication that the language of the contract is, at best, ambiguous." *St. Paul Fire & Marine Ins. Co. v. Freeman-White Assocs., Inc.*, 322 N.C. 77, 83, 366 S.E.2d 480, 484 (1988) (citing *Mazza v. Med. Mut. Ins. Co.*, 311 N.C. 621, 630, 319 S.E.2d 217, 223 (1984)). "The words used in the policy having been selected by the insurance company, any ambiguity or uncertainty as to their meaning must be resolved in favor of the policyholder, or the beneficiary, and against the company." *Wachovia Bank & Trust Co.*, 276 N.C. at 354, 172 S.E.2d at 522 (citations omitted).

Generally, " '[i]f no time for the performance of an obligation is agreed upon by the parties, then the law prescribes that the act must be performed within a reasonable time.' " *Int'l Minerals & Metals Corp. v. Weinstein*, 236 N.C. 558, 561, 73 S.E.2d 472, 474 (1952) (quoting *Rocky Mt. Sav. & Trust Co. v. Aetna Life Ins. Co.*, 199 N.C. 465, 469, 154 S.E. 743, 745 (1930) (citations omitted)).

In the opinion of this Court, the language of the notice provision at issue is fairly and reasonably susceptible to either of the constructions advanced by the parties and, thus, this language is ambiguous:

> 2. **Your Duties after Loss**. In case of a loss, **you must**:
>
> a) give notice to us or our agent, and in case of theft also to the police as soon as possible.

To clearly and unambiguously achieve the result espoused by Nationwide, the provision could be phrased as is the notice provision in the policy's "Liability Coverages" section:[1]

1. Digh's claim against Nationwide did not arise under the "Liability Coverages" section of the policy. This section only applies to claims made or suits brought *against Digh* because of an occurrence or property damage caused by the use of the boat.

> 4. **Duties after Loss**. In case of an accident or **occurrence**, the **insured** will perform the following duties that apply. You will cooperate with us in seeing that these duties are performed:
>
> a) Give notice to us or our agent as soon as practicable[.]

As written, however, the notice provision in the policy's "Physical Damage Coverage" section is ambiguous and uncertain.[2] As "any ambiguity or uncertainty . . . must be resolved in favor of the policyholder," *Wachovia Bank & Trust Co.*, 276 N.C. at 354, 172 S.E.2d at 522, the interpretation advanced by Digh must prevail. That is, Digh was not obligated to give notice to Nationwide "as soon as possible," and the contract does not specify a time for the performance of Digh's obligation. There being no time specified, however, Digh was required to give notice to Nationwide of the loss within a reasonable time. *Int'l Minerals & Metals Corp.*, *supra*.

DELAYED NOTICE

Both parties contend that the proper resolution of this case depends on our application of the test announced by our Supreme Court in *Great Am. Ins. Co. v. C. G. Tate Constr. Co.*, 303 N.C. 387, 279 S.E.2d 769 (1981) ("*Great American I*"). In that case, a controversy arose after an automobile accident which an injured third-party asserted was caused by the fault of the insured. The insurer sought declaratory relief that it had no obligation to defend or indemnify the insured in any suit arising out of the accident because the insured failed to give notice to the insurer "as soon as practicable," as the insurance contract unambiguously required. *Id.* at 390, 279 S.E.2d at 771. Overruling a long line of cases,[3] the Supreme Court held that the insured's failure to give notice, by itself, did not relieve the insurer of its obligations under the policy. Instead, the Court

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2. Alternatively, the provision might include a well-placed comma, as such:

> 2. **Your Duties after Loss**. In case of a loss, **you must**:
>
> a) give notice to us or our agent, and in case of theft also to the police, as soon as possible.

Or, the provision might be re-phrased as follows:

> 2. **Your Duties after Loss**. In case of a loss, **you must**, as soon as possible:
>
> a) give notice to us or our agent, and in case of theft also to the police.

3. *Fleming v. Nationwide Mut. Ins. Co.*, 261 N.C. 303, 134 S.E.2d 614 (1964); *Muncie v. Travelers Ins. Co.*, 253 N.C. 74, 116 S.E.2d 474 (1960); *Peeler v. U.S. Cas. Co.*, 197 N.C. 286, 148 S.E. 261 (1929).

> create[d] a three-step test for determining whether the insurer is obliged to defend. 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 American I, 303 N.C. at 399, 279 S.E.2d at 776. In *Great Am. Ins. Co. v. C. G. Tate Constr. Co.*, 315 N.C. 714, 340 S.E.2d 743 (1986) ("*Great American II*"), the Court emphasized that an insurer only has the burden of showing prejudice if the insured has shown that he acted in good faith.

> Th[e] 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?

Great American II, 315 N.C. at 720, 340 S.E.2d at 747. Nationwide argues that Digh delayed giving notice of the loss and that the delay was in bad faith. Digh, on the other hand, argues that the delay was in good faith and that Nationwide suffered no resulting prejudice.

Before applying the *Great American* test to the facts of this case, we note that the language of the test suggests that it is to be applied in cases involving third-party claims against an insured. *See Great American I*, 303 N.C. at 399, 279 S.E.2d at 776 (stating that the trier of fact must decide whether the insured had "actual knowledge that a claim might be filed *against him*[,]" and that, if so, the burden then shifts to the insurer to show that "its ability to investigate and *defend* was materially prejudiced" by the delay) (emphasis added); *Great American II*, 315 N.C. at 720, 340 S.E.2d at 747 ("Was the insured aware of his possible *fault* . . . ?") (emphasis added). However, the Supreme Court has also applied the test in a case involving a first-party claim brought by the insured against the insurer. *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 573 S.E.2d 118 (2002). In *Pennington*, the insured sought to recover from the insurer under the insurance policy's underinsured motorist provisions after the insured was injured in an automobile accident. The insurer sought declara-

tory relief that it was not required to provide coverage because the insured did not comply with the policy's notice provision which required the insured to "[p]romptly send [the insurer] copies of the legal papers if a suit is brought." *Id.* at 578, 573 S.E.2d at 123. In applying the *Great American* test, the Court clearly stated that the test is to be used in "determining whether late notice to an insurer bars recovery[.]" *Id.* at 580, 573 S.E.2d at 124.

The Court's decisions in *Great American I* and *II* and *Pennington* guide and instruct our resolution of the case at bar. Accordingly, "the first step in the *Great American* test simply requires the trial court to determine whether there has been any delay in notifying the insurer." *Great American II*, 315 N.C. at 719, 340 S.E.2d at 747 (footnote omitted). The loss in the case *sub judice* occurred on 28 July 2002. Digh did not give notice of the loss to Nationwide until March 2005. It is beyond dispute that there was a delay in notifying the insurer. Thus, we must determine if Digh acted in good faith.

While Digh was not aware of the full extent of the damage until December 2004, Digh acknowledges that he was aware of the loss on the day it occurred. Digh further admits that the only reason he delayed notice was to prevent his insurance premiums from increasing. In other words, Digh was aware of the loss and he purposefully and knowingly delayed giving notice to Nationwide. Thus, Digh's delay was not in good faith, and Nationwide, therefore, had no duty to cover the loss to Digh's boat. The trial court properly entered summary judgment in favor of Nationwide on Digh's breach of contract claim.

AFFIRMED.

Judges McCULLOUGH and CALABRIA concur.

GEORGE G. CUNNINGHAM EXECUTOR OF THE ESTATE OF CHRISTINE B. CUNNINGHAM, DECEASED, PLAINTIFF v. CHARLES A. CANNON, JR. MEMORIAL HOSPITAL, INCORPORATED, DIAMOND HEALTHCARE CORPORATION, AND DAVID CLEO COOK, M.D., DEFENDANTS

No. COA06-1532

(Filed 18 December 2007)

1. Appeal and Error— appealability—interlocutory order—discovery order—privilege—substantial right

Although defendant doctor appeals from an interlocutory discovery order of the trial court denying in part his motion for a protective order and granting in part plaintiff executor's motion to compel, defendant has a right to an immediate appeal because: (1) appeals from discovery orders have been held to affect a substantial right when a privilege under N.C.G.S. § 90-21.22 has been asserted; and (2) defendant asserted that the matters to be disclosed were privileged under N.C.G.S. § 90-21.22.

2. Discovery; Medical Malpractice— Physicians Health Program—substance abuse—motion for protective order—voluntary consent order—public record—disciplinary action

The trial court did not abuse its discretion in a medical negligence case by denying in part defendant doctor's motion for a protective order with respect to the Georgia Board of Medical Examiners (GBME) order regarding defendant's alleged substance abuse even though defendant argued it contained information pertaining to a Physicians Health Program and was privileged under N.C.G.S. § 90-21.22, because: (1) although N.C.G.S. § 90-21.22 provides that any confidential patient information and other nonpublic information acquired, created, or used in good faith by the Academy or a society under this section shall remain confidential and shall not be subject to discovery or subpoena in a civil case, the GBME order provided that the consent order, once approved, shall constitute a public record which may be disseminated as a disciplinary action of the Board; and (2) defendant voluntarily entered into the consent order with the full understanding that it would become public record, and the GBME order was not privileged under N.C.G.S. § 90-21.22 and was discoverable since it was a public record.

3. Discovery; Medical Malpractice— motion for protective order—application for hospital privileges—limitations on ability to practice medicine

The trial court did not abuse its discretion in a medical negligence case by denying in part defendant doctor's motion for a protective order with respect to his application for hospital privileges showing defendant's limitations on his ability to practice medicine, because: (1) the privilege referenced in N.C.G.S. § 131E-95 does not extend to information available from original sources other than the medical review committee merely based on it being presented during medical review committee proceedings, and the statute's purpose is not violated by allowing materials otherwise available to be discovered and used in evidence even though they were considered by a medical review committee; and (2) the information sought by plaintiff was generated by defendant, not the Cannon Credentialing Committee, and thus the information was discoverable.

4. Discovery; Medical Malpractice— motion to compel—doctor's substance abuse and limitations on ability to practice medicine

The trial court did not abuse its discretion in a medical negligence case by granting in part plaintiff executor's motion to compel discovery regarding defendant doctor's substance abuse and limitations on his ability to practice medicine, because: (1) N.C.G.S. § 1A-1, Rule 26 provides that parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party; and (2) the Court of Appeals determined that both items sought by plaintiff were not privileged, and the information contained in a Georgia order and the application for hospital privileges provided information related to defendant's history of drug and alcohol abuse.

Judge JACKSON concurring in a separate opinion.

Appeal by defendant David Cleo Cook, M.D. from order entered 24 May 2006 by Judge Anderson D. Cromer in Wilkes County Superior Court. Heard in the Court of Appeals 6 June 2007.

Pulley, Watson, King & Lischer, by Richard N. Watson, for plaintiff-appellee.

Carruthers & Roth, P.A., by Richard L. Vanore, Norman F. Klick, Jr. and Robert N. Young, for defendant-appellant.

CALABRIA, Judge.

Defendant David Cleo Cook, M.D. ("Dr. Cook") appeals from an order of the trial court denying in part his motion for a protective order and granting in part George G. Cunningham, Executor of the Estate of Christine B. Cunningham's ("plaintiff") motion to compel. We affirm.

On 31 May 2004, Christine B. Cunningham ("Mrs. Cunningham"), plaintiff's wife and decedent, attempted suicide. Mrs. Cunningham was involuntarily committed to the Watauga Medical Center on 1 June 2004 where she received treatment. Mrs. Cunningham was transferred to the Charles A. Cannon, Jr. Memorial Hospital, Incorporated ("Cannon Memorial") on 1 June 2004. That same day, Mrs. Cunningham was placed on one-on-one constant observation and was placed under suicide precautions. On 3 June 2004, at 12:18 p.m., Dr. Cook changed Mrs. Cunningham's observation status from one-on-one to "close." At 3:30 p.m., a nurse found Mrs. Cunningham in the bathroom hanging by her neck and reported that Mrs. Cunningham was unresponsive. On 4 June 2004, the following day, Mrs. Cunningham died as a result of the injuries sustained from the previous day's incident.

On 3 October 2005, plaintiff filed an action against Dr. Cook, Cannon Memorial and Diamond Healthcare Corporation ("Diamond") alleging medical negligence of each party. On 1 February 2006, Dr. Cook filed a Motion for Protective Order to prohibit plaintiff from seeking discovery of privileged and confidential information. On 24 May 2006, Wilkes County Superior Court Judge Anderson D. Cromer ("Judge Cromer") entered an order granting Dr. Cook's motion as to certain interrogatories regarding information otherwise produced during the course of peer review activities or while participating in any agreements made pursuant to N.C. Gen. Stat. § 90-21.22 (2005). Judge Cromer denied Dr. Cook's motion for a protective order in part and granted plaintiff's motion to compel as to Dr. Cook's alleged substance abuse and limitations on his ability to practice medicine. Judge Cromer further ordered that a prior order entered by the Georgia Board of Medical Examiners ("GBME order") was dis-

coverable and portions of Dr. Cook's application for privileges with Cannon Memorial that were submitted to the North Carolina Department of Health and Human Services ("DHHS") were discoverable. Dr. Cook appeals.

[1] Initially we note that although Dr. Cook's appeal is interlocutory, appeals from discovery orders have been held to affect a substantial right when a privilege under N.C. Gen. Stat. § 90-21.22 has been asserted. *See Armstrong v. Barnes*, 171 N.C. App. 287, 614 S.E.2d 371, *review denied*, 360 N.C. 60, 621 S.E.2d 173 (2005) (allowing interlocutory appeal of discovery order based on privileges asserted under N.C. Gen. Stat. § 90-21.22); *Sharpe v. Worland*, 351 N.C. 159, 522 S.E.2d 577 (1999) (holding interlocutory discovery orders affect a substantial right when a statutory privilege directly related to the matter to be disclosed is asserted). Because Dr. Cook asserts that the matters to be disclosed are privileged under N.C. Gen. Stat. § 90-21.22, a substantial right is affected.

I. The Georgia Order

[2] Dr. Cook argues the trial court erred in denying his motion for a protective order with respect to the GBME order because the information pertained to a Physicians Health Program and is privileged under N.C. Gen. Stat. § 90-21.22. We disagree.

Pursuant to N.C. Gen. Stat. § 90-21.22 (2005), "[a]ny confidential patient information and other *nonpublic information* acquired, created, or used in good faith by the Academy or a society pursuant to this section *shall remain confidential and shall not be subject to discovery or subpoena in a civil case*." *Id.* (emphasis added). Nonpublic information is information that is not accessible to or shared by all members of the community. *Sharpe*, 137 N.C. App. at 88, 527 S.E.2d at 79. The GBME order provides "this Consent Order, once approved, shall contitute [sic] a public record which may be disseminated as a disciplinary action of the Board." Therefore, Dr. Cook voluntarily entered into the consent order with the full understanding that it would become public record and the GBME Order is not privileged pursuant to N.C. Gen. Stat. § 90-21.22 and is discoverable because it is a public record.

II. The Application for Privileges

[3] Defendant next argues the trial court erred by denying his motion for protective order with respect to his application for hospital privileges. We disagree.

North Carolina General Statutes § 131E-95 provides:

> The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132-1 " 'Public records' defined", and shall not be subject to discovery or introduction into evidence in any civil action against a hospital, an ambulatory surgical facility licensed under Chapter 131E of the General Statutes, or a provider of professional health services which results from matters which are the subject of evaluation and review by the committee.

N.C. Gen. Stat. § 131E-95(b) (2005). Under N.C. Gen. Stat. § 131E-76(5) (2005), a "medical review committee" is defined to include a committee responsible for "medical staff credentialing."

In *Shelton v. Morehead Memorial Hosp.*, 318 N.C. 76, 87, 347 S.E.2d 824, 831 (1986), our Supreme Court determined the purpose of N.C. Gen. Stat. § 131E-95(b) is to promote medical staff candor and medical review committee objectivity. *Shelton*, 318 N.C. at 83, 347 S.E.2d at 829; *See also Whisenhunt v. Zammit*, 86 N.C. App. 425, 427, 358 S.E.2d 114, 116 (1987). The statute accomplishes this purpose by providing a broad privilege that protects "a medical review committee's (1) proceedings; (2) records and materials it produces; and (3) materials it considers." *Shelton*, 318 N.C. at 83, 347 S.E.2d at 829. The statute also accomplishes a balance between this broad privilege and the interest of allowing reasonable discovery by permitting "access to information not generated by the committee itself but merely presented to it . . . ." *Id.* Therefore, the privilege referenced in the statute does not extend to "information . . . available[] from original sources other than the medical review committee . . . merely because it was presented during medical review committee proceedings[,]" and the statute's purpose is not violated by allowing materials otherwise available to "be discovered and used in evidence even though they were considered by [a] medical review committee." *Id.*, 318 N.C. at 83-84, 347 S.E.2d at 829.

In *Shelton*, the plaintiffs sought discovery from the defendant hospital's medical review committee records and information regarding the review proceedings with respect to the defendant doctor. *Id.*, 318 N.C. at 81, 347 S.E.2d at 828. Similarly, the plaintiffs in *Whisenhunt* sought discovery from a hospital of its "credentialing records" concerning the defendant doctor. *Whisenhunt*, 86 N.C. App. at 426, 358 S.E.2d at 115. Each decision held that the information

sought was not discoverable because the plain language of N.C. Gen. Stat. § 131E-95(b) extends a statutory privilege to the records produced by a medical review committee and the information concerning its proceedings. *Shelton*, 318 N.C. at 82-83, 347 S.E.2d at 829; *Whisenhunt*, 86 N.C. App. at 428, 358 S.E.2d at 116.

Defendant argues N.C. Gen. Stat. § 131E-95 applies to his application for privileges because it was "generated at the instance of the Cannon Credentialing Committee" and, therefore, is privileged. More specifically, defendant contends our Supreme Court's statement in *Shelton*, 318 N.C. at 87, 347 S.E.2d at 831, that "[s]ection [131E-] 95 offers no protection to the records and documents furnished by the individual physicians in their applications for hospital privileges" is inapplicable because the Supreme Court was "referring to documents presented to a medical review committee as part of the application process and not the application itself." However, § 131E-95 applies to the *information* generated by a medical review committee. Here, the information that defendant contends is privileged was not information generated, but information that defendant provided to Cannon Memorial in his application for hospital privileges. We believe the Legislature's purpose in enacting § 131E-95 was to protect "information produced pursuant to peer review statutes like [§ 131E-95]." *Sharpe*, 137 N.C. App. at 88, 527 S.E.2d at 79. Regardless of its form, the *information* sought by plaintiff was generated by defendant, not the Cannon Credentialing Committee. Therefore, the information is discoverable and the trial court did not abuse its discretion in denying defendant's motion for a protective order.

III. Discovery

[4] Defendant's final argument is that the information sought within the GBME Order and the Application for Privileges is not discoverable because it is privileged. "Whether or not to grant a party's motion to compel discovery is in the sound discretion of the trial court and will not be disturbed absent an abuse of discretion." *Belcher v. Averette*, 152 N.C. App. 452, 455, 568 S.E.2d 630, 633 (2002). Pursuant to Rule 26 of the North Carolina Rules of Civil Procedure, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party[.]" We have determined that both items sought by plaintiff are not privileged. Furthermore, the information contained in the Georgia Order and the Application for Privileges provides information related to defendant's history of drug

and alcohol abuse. The trial court's decision to grant plaintiff's motion to compel discovery was not an abuse of discretion.

For the foregoing reasons, the order of the trial court is affirmed.

Affirmed.

Judge GEER concurs.

Judge JACKSON concurs in a separate opinion.

JACKSON, Judge, concurring.

Although I concur with the majority opinion, I write separately to express my opinion that on the issue of Dr. Cook's credentialing application, we need go no further than Chapter 131E to reach our conclusion.

Although North Carolina General Statutes, section 131E-95(b) prohibits discovery of medical review committee meetings, the records and materials it produces, and the materials it considers,

> information, documents, or records *otherwise available* are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee. Documents *otherwise available* as public records within the meaning of G.S. 132-1 do not lose their status as public records merely because they were presented or considered during proceedings of the committee.

N.C. Gen. Stat. § 131E-95(b) (2005) (emphasis added).

Here, plaintiff sought information pertaining to whether Dr. Cook had ever (1) had his license to practice medicine revoked, suspended, limited, or denied, either voluntarily or involuntarily; (2) had his hospital privileges revoked, suspended, or in any way limited; (3) had his privileges to prescribe medications, including narcotics, revoked, suspended, or limited, either voluntarily or involuntarily; or (4) been subject to an investigation or disciplinary action. This information was *otherwise available* from several sources other than his application for privileges at Cannon Memorial Hospital.

As the trial court noted, the information was known to Dr. Cook, himself. In addition, pursuant to the consent order entered into between Dr. Cook and the Georgia Board of Medical Examiners, it

was a matter of public record that Dr. Cook was the subject of a disciplinary action limiting his ability to practice medicine and prescribe medications in Georgia. Further, separate and apart from his application was a letter in the public files of D.H.H.S. in which Dr. Cook indicated that he had been the subject of disciplinary proceedings, had his ability to prescribe medications limited, and had his license to practice limited.

Because the information sought was *otherwise available*, it was discoverable, rather than the fact that, as the majority suggests, it was generated by defendant.

IN THE MATTER OF: APPEAL OF ROLLIE AND MARY W. TILLMAN FROM THE DECISION OF DURHAM COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF CERTAIN REAL PROPERTY FOR TAX YEAR 2005

No. COA07-555

(Filed 18 December 2007)

Taxes— ad valorem—valuation—membership in continuing care community

The value of a membership fee was properly included in the assessed ad valorem tax value of a condominium in a residential continuing care community. Membership in the community's club was an express requirement of owning real property there, and the property could not be purchased or sold without including the membership fee in the price of the property.

Appeal by taxpayers Rollie and Mary W. Tillman from final decision entered 26 January 2007 by Chairman Terry L. Wheeler for the North Carolina Property Tax Commission. Heard in the Court of Appeals 15 November 2007.

Kennon, Craver, Belo, Craig & McKee, PLLC, by Joel M. Craig, for taxpayers-appellants.

Durham County Attorney S.C. Kitchen and Assistant County Attorney Curtis Massey, for appellee Durham County Board of Equalization and Review.

TYSON, Judge.

Rollie and Mary Tillman ("the Tillmans") appeal from a final decision of the North Carolina Property Tax Commission ("Commission"), which affirmed Durham County's assessed value of their residence for *ad valorem* taxes for the 2005 tax year. We affirm.

I. Background

The Tillmans' residence is located at 421 Cedar Berry Lane in Chapel Hill, North Carolina. The subject property is a condominium unit located in The Cedars of Chapel Hill ("the Cedars"), an adult residential continuing care retirement community. Residents of the Cedars are afforded a wide range of amenities such as "a full-service clubhouse and [an] on-site Health Care Center offering skilled nursing care and assisted living." The Tillmans chose to reside in this community because the Cedars is a licensed health facility and because of the availability of a membership in The Cedars of Chapel Hill Club, Inc. ("the Cedars Club"). The Cedars Club provides residents with a full complement of services including dining, recreation, laundry, housekeeping, security, and transportation.

On 11 October 2002, the Tillmans signed the Reservation Agreement to purchase the subject property for a total purchase price of $456,000.00. The purchase price included a non-refundable membership fee of $45,600.00, an amount equal to ten percent of the purchase price. The Reservation Agreement stated, "[m]embership in the [Cedars] Club [is an] integral part of purchase." The Reservation Agreement further stated, "[e]ach such Owner or the approved designee *must acquire* Membership simultaneously with the purchase of a Unit and each Member *shall* execute the Cedars Membership Agreement." (Emphasis supplied). Both the Reservation Agreement and the Membership Agreement were signed by the Tillmans and contained provisions clearly stating that membership in the Cedars Club is a requirement of ownership and residency in the Cedars retirement community. Additionally, the deed sets forth a provision requiring the Tillmans "to collect upon resale of the said Unit a membership fee payable to said Club in the amount of [] ten percent (10%) of the gross sales price."

The Durham County Tax Assessor assessed the Tillmans' residence at a total value of $447,994.00 for the 2005 tax year, approximately $8,000.00 less than the contract purchase price. The Tillmans challenged Durham County's assessment by filing an appeal with the Durham County Board of Equalization and Review ("the County

Board"). On 16 June 2005, the County Board issued its decision and affirmed the $447,994.00 assessment of the Tillmans' residence.

The Tillmans appealed the Board's decision to the Commission and argued "the County Board employed an arbitrary and illegal method of appraisal in reaching the assessed value assigned to the subject property" and "the inclusion of the value of the [m]embership fee resulted in assignment of a value to the subject property which substantially exceeded its true value."

On 26 January 2007, following a two day hearing, the Commission entered its final decision and affirmed the decision of the County Board. The Commission made the following findings of fact, *inter alia*:

> 8. [T]hat the purchase of the subject residence requires that it be coupled with the rights, privileges and responsibilities of membership in the Cedars Club . . . and that by accepting the deed to the property, the [Tillmans][] agree to comply with the bylaws of The Cedars Club and pay assessments that include a membership fee in the amount of ten percent (10%) of the purchase price.
>
> 9. The membership fee is calculated on the sale price or market value (as determined by an appraisal) and the "Required Membership" as designated in the Membership Agreement [] is a benefit and right of ownership of the property that the [Tillmans] acquired when they purchased the subject property. . . .

The Commission concluded that the Tillmans had failed to show by competent, material, and substantial evidence that: (1) the subject property was not properly appraised; (2) Durham County employed an arbitrary or illegal method of appraisal; or (3) the County Board assigned a value that substantially exceeded the true value in money of the subject property. The Tillmans appeal.

II. Issues

The Tillmans argue the Commission erred by concluding the cost of a membership in a continuing care retirement community may be included in the assessed value of real property and is subject to *ad valorem* taxation.

III. Standard of Review

> This Court reviews the Commission's decision under the whole record test. The whole record test is not a tool of judicial intru-

> sion and this Court only considers whether the Commission's decision has a rational basis in the evidence. We may not substitute our judgment for that of the Commission even when reasonably conflicting views of the evidence exist.

In re Appeal of Weaver Inv. Co., 165 N.C. App. 198, 201, 598 S.E.2d 591, 593 (internal citations and quotations omitted), *disc. rev. denied*, 359 N.C. 188, 606 S.E.2d 695 (2004).

"[*A*]*d valorem* tax assessments are presumed to be correct . . . . As a result of this presumption, when such assessments are attacked or challenged, the burden of proof is on the taxpayer to show that the assessment was erroneous." *In re Appeal of AMP, Inc.*, 287 N.C. 547, 562, 215 S.E.2d 752, 761-62 (1975) (internal citations and quotations omitted). To overcome this presumption, the taxpayer must "produce competent, material and substantial evidence that tends to show that: (1) [e]ither the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of valuation; and (3) the assessment *substantially* exceeded the true value in money of the property." *Id.* at 563, 215 S.E.2d at 762 (emphasis in original) (citation omitted). "If a taxpayer fails to present evidence sufficient to meet its burden as to either prong, the appeal fails." *In re Appeal of The Greens of Pine Glen Ltd. Part.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003).

IV. *Ad Valorem* Taxation

The Tillmans argue the Durham County Tax Assessor used an illegal appraisal method when the assessed value included the non-refundable membership fee. The Tillmans also argue this assessment valued the property substantially in excess of its "true value." We disagree.

All property, real and personal is subject to taxation unless it is excluded or exempt by statute. N.C. Gen. Stat. § 105-274 (2005). As a threshold issue, we must determine whether the non-refundable membership fee required to be paid at the purchase and sale of real property is subject to *ad valorem* taxation pursuant to N.C. Gen. Stat. § 105-274. The Tillmans argue the membership fee is intangible personal property which is generally excluded from *ad valorem* taxation pursuant to N.C. Gen. Stat. § 105-275(31) (2005). We disagree.

"The North Carolina General Assembly has adopted market value or true value in money as the uniform appraisal standard for valua-

tion of property for tax purposes." *Electric Membership Corp. v. Alexander*, 282 N.C. 402, 408-09, 192 S.E.2d 811, 816 (1972) (internal citations and quotations omitted). N.C. Gen. Stat. § 105-283 (2005) states, in relevant part:

> All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the words 'true value' shall be interpreted as meaning market value, that is, *the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller*, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

(Emphasis supplied). N.C. Gen. Stat. § 105-317(a)(2) (2005) provides the factors the tax assessor must consider during appraisal:

> (a) Whenever any real property is appraised it shall be the duty of the persons making appraisals:
>
> . . . .
>
> (2) In determining the true value of a building or other improvement, to consider at least its location; type of construction; age; *replacement cost*; *cost*; adaptability for residence, commercial, industrial, or other uses; past income; probable future income; and *any other factors that may affect its value.*

(Emphasis supplied).

Real property is statutorily defined as "buildings, structures, improvements, and permanent fixtures on the land, and *all rights and privileges belonging or in any way appertaining to the property*." N.C. Gen. Stat. § 105-273(13) (2005) (emphasis supplied). After thorough review of the record, we hold the non-refundable membership fee is a right and privilege "belonging" or "appertaining to" the Tillmans' property and was properly included in its tax appraisal value. *Id.*

V. Analysis

The Tillmans received delivery of a general warranty deed recorded on 5 August 2004. The deed states, in relevant part:

> Grantee, by accepting this Deed, hereby assumes and agrees to be bound by and comply with all the terms of the Declaration of

> Condominium, the Bylaws of The Cedars of Chapel Hill Condominium Association, any Rules and Regulations made thereunder, including, but not limited to, the obligation to pay assessments which may be levied against said Unit for the maintenance and operation of the condominium, and *the terms of the Membership Agreement for The Cedars of Chapel Hill Club, Inc.*, including, but not limited to, the obligation to collect upon resale of said Unit a membership fee payable to said Club in the amount of percent [sic] ten percent (10%) of the gross sales price as more particularly described in said Membership Agreement.

(Emphasis supplied). The deed expressly binds the Tillmans to the terms contained in the Membership Agreement. The Membership Agreement "outlines the membership *rights*, *obligations*, *and services* derived from the membership." (Emphasis supplied). The Membership Agreement requires all owners and residents to purchase a nontransferable membership for their use or for use by an approved designee simultaneously with the purchase of their real property. "As outlined in the Membership Agreement, the membership *entitles* the purchaser to the use of the clubhouse facilities, specific services, and to be provided with health care in the health center when the purchaser is no longer capable of independent living." (Emphasis supplied).

Upon resale of the residence, the purchase price *must* include the subsequent purchaser's membership fee. The Reservation Agreement also expressly requires purchasers to enter into and sign the Membership Agreement as a condition of purchasing real property located at the Cedars. Based on the language contained in the Reservation Agreement, Membership Agreement, and deed, the membership in the Cedars Club belongs and appertains to the Tillman's condominium unit and is a "factor[] that may affect its value." N.C. Gen. Stat. § 105-273(13); N.C. Gen. Stat. § 105-317(a)(2).

Further, the "true value" of the Tillmans' property is "the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller . . . ." N.C. Gen. Stat. § 105-283. The Tillmans were required to pay ten percent of the purchase price of the real property as a membership fee. Upon resale of the property, the Tillmans are obligated to include the subsequent purchaser's membership fee in the purchase price and the purchaser must become a member of the Cedars Club. The estimated amount of money, which will change hands between the

Tillmans and a subsequent purchaser, is directly tied to the purchase price of the unit and includes the value of the non-refundable membership fee.

The non-refundable membership fee is a right and privilege "belonging" or "appertaining to" the Tillman's property and is a "factor[] that may affect its value." N.C. Gen. Stat. § 105-273(13); N.C. Gen. Stat. § 105-317(a)(2). The tax appraised value was properly assessed. The Tillmans failed to produce competent, material, and substantial evidence that Durham County used an arbitrary or illegal method of valuation and that "the assessment *substantially* exceeded the true value in money of the property." *AMP*, 287 N.C. at 563, 215 S.E.2d at 762 (emphasis in original). "If a taxpayer fails to present evidence sufficient to meet its burden as to either prong, the appeal fails." *Greens of Pine Glen*, 356 N.C. at 647, 576 S.E.2d at 319. This assignment of error is overruled.

VI. Conclusion

Membership in the Cedars Club is an express requirement of owning real property situated in the Cedars. The real property at issue cannot be purchased or sold apart from the inclusion of the non-refundable membership fee. The value of the membership fee was properly included in the real property's assessed value. The Commission properly concluded that the Tillmans failed to produce competent, material, and substantial evidence that Durham County used an arbitrary or illegal method of valuation and the assessment substantially exceeded the true value in money of the property. *AMP*, 287 N.C. at 563, 215 S.E.2d at 762. The Commission's final decision is affirmed.

Affirmed.

Judges JACKSON and STROUD concur.

THOMAS G. POTTLE AND WIFE, MARY E. POTTLE; AND SNUG HARBOR SOUTH, LLC, PLAINTIFFS v. CHARLES DAVID LINK AND GENE WILLETS, DEFENDANTS

No. COA07-359

(Filed 18 December 2007)

Easements— statute of limitations—injury to incorporeal hereditament

A dispute which alleged obstructions on easements providing access to lots involved an injury to an incorporeal hereditament rather than a continuous trespass or a prescriptive easement to property held in fee, and the six-year statute of limitations of N.C.G.S. § 1-50(a)(3) is applicable. Two of the alleged encroachments did not violate the limitations period but involved an issue of fact as to whether actual encroachment occurred. Those issues were preserved for the jury; the remainder were remanded for entry of summary judgment for defendants.

Appeal by Defendants from order entered 21 August 2006 by Judge Benjamin G. Alford in New Hanover County Superior Court. Heard in the Court of Appeals 17 October 2007.

Ward and Smith, P.A., by Ryal W. Tayloe, for Plaintiffs-Appellees.

Smith Moore LLP, by Sidney S. Eagles, Jr. and Elizabeth Brooks Scherer; and Law Offices of G. Grady Richardson, Jr., P.C., by G. Grady Richardson, Jr., for Defendants-Appellants.

ARROWOOD, Judge.

Thomas G. Pottle and his wife, Mary E. Pottle, own Tract 6 of Cedar Island, in New Hanover County, North Carolina, and Snug Harbor South, LLC, a North Carolina limited liability company, owns Tract 4 of Cedar Island (together, Plaintiffs). Plaintiffs' Tract 6 and Tract 4 are adjoining properties on Cedar Island, and both are the owners of two easements, allegedly thirty feet in width, which allow ingress to and egress from the public road to Tracts 6 and 4 and other lots comprising Cedar Island. Charles D. Link (Defendant Link) owns Tract 3 on Cedar Island, and Gene Willets (Defendant Willets) owns Tract 5, which are properties adjacent to Plaintiffs' properties and are the servient lots over which the aforementioned thirty-foot easements run.

In the summer of 1994, approximately eleven years before the commencement of Plaintiffs' action, Defendant Link planted several oak, cypress, holly, and cedar trees on Tract 3. In autumn of 1996, Defendant Link planted two additional oak trees, replacing two trees that had been destroyed by hurricanes. Thereafter, Defendant Link maintained the trees by installing an irrigation drip line and planting other vegetation on Tract 3. In the summer of 2004, Defendant Willets installed a post and rope fence on Tract 5, and in 2005, Defendant Link also constructed a fence on Tract 3. Plaintiffs alleged that all of the aforementioned landscaping encroached onto their thirty-foot easement.

Plaintiffs initially filed a complaint on 8 February 2005, and Defendant Link filed motions and an answer on 13 April 2005. Plaintiffs then filed an amended complaint on 8 September 2005, adding Defendant Willets, and alleging that "[t]rees, shrubs, and other vegetation have grown up on [Defendant Link's] property . . . within and over the thirty foot easement area[,]" which "impede vehicular traffic, especially large vehicles such as delivery trucks, moving vans, and emergency vehicles." Plaintiffs further alleged that Defendant Willets "placed a post and rope fence on the property . . . lying within and over the thirty foot easement area[.]" The amended complaint states that the encroachments interfered with Plaintiffs' right to the full use and enjoyment of the easement, and Plaintiffs prayed that the court order a preliminary and permanent injunction prohibiting Defendants from obstructing or interfering with Plaintiffs' right to the thirty-foot easement.

Defendant Link filed motions and an answer to Plaintiffs' amended complaint on 29 November 2005. Defendant Willets filed motions and an answer on 27 March 2006.

On 24 July 2006, Plaintiffs filed a Rule 56 motion for summary judgment, arguing that "there are no genuine issues of material fact . . . and that Plaintiffs are entitled to judgment as a matter of law on all claims." Plaintiffs provided the affidavits of Joseph M. James, M.D. (James), Plaintiff Thomas Pottle, and Stuart Y. Benson to support their motion. James, a resident of Cedar Island, stated in his affidavit that the Snug Harbor South, LLC, deed conveyed the property with a right of ingress and egress over two thirty-foot roadway easements, "[t]he purpose [being] . . . to provide [access] from the public road to the property owners within Cedar Island." James stated, "[t]here is no other overland route by which I can access my house[,] . . . absent the [e]asements." When James began construction

of his house, "[he] discussed with . . . Defendant [Link], the need to clear trees, shrubs and other vegetation from the [e]asements." James stated that he made attempts to remove the trees and encroachments by hiring contractors at his own expense, but Defendant Link consistently refused and "physically interposed himself and interfered with all attempts . . . to clear the [e]asements[.]" James further stated that "Defendant [Willets] . . . maintains and continues to erect post and rope fencing around his property and within the [e]asements[,]" and that James made similar attempts to remove the post and rope fencing, which Defendant Willets consistently refused. James said the encroachments make the right-of-way narrow and "create a low overhanging obstruction so as to prevent access to [his] house by any large vehicles[.]"

Defendants moved for summary judgment on 26 July 2006, and at the 10 August 2006 hearing, Defendants argued that the applicable statute of limitations for injuries to incorporeal hereditaments, N.C. Gen. Stat. § 1-50(3), had expired, and secondarily that Plaintiffs' actions constituted an abandonment of the easement. Defendants also supported their motion with the affidavits of Defendant Willet, Defendant Link and R.K. Goodyear. In addition, Defendants filed a motion to dismiss on 26 July 2006, arguing that Plaintiffs "fail[ed] to join all necessary and proper parties."

On 21 August 2006, the court entered an order granting Plaintiffs' motion for summary judgment and denying Defendants' motions for summary judgment and dismissal. From this order, Defendants appeal.

Summary Judgment

A motion for summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). Therefore, "[a]ppellate review of the grant of summary judgment is limited to two questions, including: (1) whether there is a genuine question of material fact, and (2) whether the moving party is entitled to judgment as a matter of law." *Wooten v. Town of Topsail Beach*, 127 N.C. App. 739, 740, 493 S.E.2d 285, 286-87 (1997) (citation omitted). "Evidence is viewed in the light most favorable to the non-moving party with all reasonable inferences drawn in favor of the non-movant." *Id.* at 741, 493 S.E.2d at 287.

On appeal, Defendants argue that the trial court committed reversible error by granting Plaintiffs' motion for summary judgment because Plaintiffs' claims are time-barred by application of the statute of limitations "[f]or injury to any incorporeal hereditament" under N.C. Gen. Stat. § 1-50(a)(3) (2005). Plaintiffs argue that their claims are governed by the twenty-year adverse possession statute of limitations, N.C. Gen. Stat. § 1-40 (2005).

"Ordinarily, the question of whether a cause of action is barred by the statute of limitations is a mixed question of law and fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). "However, when the bar is properly pleaded and the facts are admitted or are not in conflict, the question of whether the action is barred becomes one of law, and summary judgment is appropriate." *Id.* (citations omitted). Here, the relevant facts are not disputed. The parties agree that all encroachments, except the fences installed in 2004 and 2005, were planted or installed approximately nine to eleven years before the commencement of Plaintiffs' action. The only question is which statute of limitations applies, and that is a question of law.

"Easements are classified as affirmative or negative." *Davis v. Robinson*, 189 N.C. 589, 598, 127 S.E. 697, 701 (1925) (internal quotation marks omitted). An affirmative easement "is a right to make some use of land owned by another without taking a part thereof." *Builders Supplies Co. v. Gainey*, 282 N.C. 261, 266, 192 S.E.2d 449, 453 (1972) (citations omitted). A negative easement prohibits "the owner of a servient estate . . . from doing something otherwise lawful upon his estate, because it will affect the dominant estate." *Davis*, 189 N.C. at 598, 127 S.E. at 701 (internal quotation marks omitted). "A restrictive covenant is a servitude, commonly referred to as a negative easement[.]" *Hawthorne v. Realty Syndicate, Inc.*, 43 N.C. App. 436, 440, 259 S.E.2d 591, 593 (1979) (citations omitted). Both a restrictive covenant and an easement are incorporeal hereditaments. *Id.* at 440, 259 S.E.2d at 593.

This Court has adopted the following definition of the term "incorporeal hereditament," which "derives from English law":

> Anything, the subject of property, which is inheritable and not tangible or visible. A right issuing out of a thing corporate (whether real or personal) or concerning or annexed to or exercisable within the same. A right growing out of, or concern-

> ing, or annexed to, a corporeal thing, but not the substance of the thing itself.

Karner v. Roy White Flowers, Inc., 134 N.C. App. 645, 649, 518 S.E.2d 563, 567 (1999), *rev'd on other grounds*, 351 N.C. 433, 527 S.E.2d 40 (2000), (citing Black's Law Dictionary 726 (6th ed. 1990)). The 8th edition of Black's Law Dictionary defines "incorporeal hereditament" as "[a]n intangible right in land, such as an easement." Black's Law Dictionary 743 (8th ed. 2004).

N.C. Gen. Stat. § 1-50(3) (2005) requires that an action for injury to any incorporeal hereditament be brought within six years. *See also Boyden v. Achenbach*, 79 N.C. 539, 543 (1878) (stating that "[i]f the right of way is claimed as an incorporeal hereditament . . . then six years is the statute [of limitations]").

Plaintiffs rely on *Karner*, 134 N.C. App. 645, 518 S.E.2d 563, and *Bishop v. Reinhold*, 66 N.C. App. 379, 311 S.E.2d 298 (1984), for their argument that even though easements are incorporeal hereditaments, the six-year statute of limitations under G.S. § 1-50(3) does not apply in this case. Plaintiffs contend that the injury here is similar to an adverse possession, having a limitation period of twenty years under G.S. § 1-40, and that their "claim for relief [is] . . . not barred 'until defendants [have] been in continuous use [of the easement] for a period of twenty years so as to acquire the right by prescription.' " *Karner*, 134 N.C. App. at 650, 518 S.E.2d at 567 (quoting *Bishop*, 66 N.C. App. At 384, 311 S.E.2d at 301).

In *Bishop*, notwithstanding the three-year statute of limitations for a continuing trespass, *see* N.C. Gen. Stat. § 1-52(3) (2005), this Court held that any action to remove the defendants' structure, which partially encroached onto Bishops' property, "would not be barred until defendants had been in continuous use thereof for a period of twenty years[.]" *Bishop*, 66 N.C. App. at 384, 311 S.E.2d at 301. The Court in *Bishop* explained:

> To deny plaintiffs a right of action . . . would be to allow the defendants a right of eminent domain as private persons (and without the payment of just compensation) or grant defendants a permanent prescriptive easement to use the plaintiffs' land. This the law will not do, as the defendants have not been in possession for 20 years from 1973, the date the house was constructed.

Id. at 384, 311 S.E.2d at 301-02.

Similarly, in *Williams v. South & South Rentals*, 82 N.C. App. 378, 382, 346 S.E.2d 665, 667 (1986), an apartment building encroached approximately one square foot onto the plaintiff's property. The Court in *Williams* said, "[w]hile the action sounds in trespass because there is no dispute over title or location of the boundary line, plaintiff seeks a permanent remedy and is subject to the twenty-year statute of limitations for adverse possession."

We conclude that *Bishop* and *Williams*, are distinguishable from the instant case. In both *Bishop* and *Williams*, the defendants' continuous trespass encroached onto plaintiffs' property held in fee, not plaintiffs' incorporeal hereditament.

Furthermore, in *Karner*, this Court rejected a similar argument and ruled that G.S. § 1-50(a)(3), the statute of limitations for injury to an incorporeal hereditament, was applicable to restrictive covenants. In *Karner*, the defendants intended to construct a commercial building in a neighborhood developed as a residential subdivision, and the plaintiffs, lot owners in the neighborhood, filed a complaint to enjoin defendants from erecting the structure. Defendants answered with the defense that the statute of limitations for injury to an incorporeal hereditament, G.S. § 1-50(a)(3), had expired. Plaintiffs then argued that the "correct statute of limitation . . . [was] the 'prescriptive period' of twenty years." *Karner*, 134 N.C. App. at 649, 518 S.E.2d at 567. The Court distinguished *Bishop*, stating that "a residential restrictive covenant is at issue rather than [a] . . . prescriptive easement [to property held in fee]." *Id.* at 650, 518 S.E.2d at 567. Therefore, G.S. § 1-50(a)(3) was the applicable statute of limitations.

Here, we find the logic of *Karner* persuasive. Because an injury to an incorporeal hereditament is at issue, rather than a continuous trespass or a prescriptive easement to property held in fee, as in *Bishop* and *Williams*, we conclude that G.S. § 1-50(a)(3) is the applicable statute of limitations, and Plaintiffs' case is barred if the six year statute of limitations is satisfied.

The parties agree that all but two encroachments onto Plaintiffs' easement began approximately nine to eleven years before the commencement of Plaintiffs' action. Defendants were therefore entitled to partial summary judgment as a matter of law, and the trial court erred in granting summary judgment to Plaintiffs.

Defendants admit, however, that "Defendant Link's fence and Defendant Willets' fence have not been in place for more than six

years[,]" and the parties contest whether "these fences [actually encroach] into . . . Plaintiffs' easement." Defendants contend that the fences do not encroach, but Plaintiffs disagree and submitted as evidence the affidavit of Stuart Y. Benson, a professional land surveyor, which stated that "[t]he Survey shows a post and rope fence within the Easements around the perimeter of the Willets Lot." Furthermore, the affidavit stated, "[an] additional post and rope fenc[e] [was] erected within the Easements on the Link Lot." The record therefore reveals a genuine issue of material fact, such that summary judgment should be denied and the issue preserved for the jury as to whether Defendants' fences encroached onto Plaintiffs' easement.

The trial court erred by granting summary judgment in Plaintiffs' favor. We therefore reverse and remand for entry of summary judgment for Defendants on all issues for which the statute of limitations has expired, noting that this does not include the 2004 and 2005 installation of fences.

Reversed and Remanded.

Judges CALABRIA and STEPHENS concur.

MACON COUNTY, ET AL., PLAINTIFFS v. THE TOWN OF HIGHLANDS, DEFENDANT

No. COA06-1634

(Filed 18 December 2007)

1. Counties— challenge to town's extraterritorial jurisdiction—real parties in interest

The trial court correctly held that Macon County and its Commissioners were not real parties in interest to an action in which Macon County and others challenged defendant town's exercise of extraterritorial jurisdiction. The town did not take the property by eminent domain, and the County did not lose its ability to assess ad valorem taxes.

2. Cities and Towns— extraterritorial jurisdiction—proportional representation

The trial court did not err by granting defendant's motion for summary judgment in an action challenging defendant town's

exercise of its extraterritorial jurisdiction. Although N.C.G.S. § 160A-362 does not define the means to be used to provide proportional representation, matters of local concern are left largely to the judgment and discretion of a town government unless its acts are manifestly unreasonable and oppressive.

3. Cities and Towns— extraterritorial jurisdiction— appointments

There was no merit in an argument that the amended ordinances of a town exercising its extraterritorial jurisdiction did not comply with the requirements of N.C.G.S. § 160A-362 concerning appointments.

Appeal by plaintiffs from order entered 13 September 2006 and judgment entered 3 November 2006, both by Judge Dennis J. Winner in Macon County Superior Court. Heard in the Court of Appeals 23 August 2007.

Rickey L. Moorefield, for plaintiff-appellants.

Coward, Hicks & Siler, P.A., by William H. Coward, for defendant-appellee.

ELMORE, Judge.

Macon County (the County); Daniel A. Bryson, Charles D. Leatherman, Robert L. Simpson, Jay Dee Shepherd, and James W. Davis, in their official capacities as Commissioners of the County; and Daniel A. Bryson (plaintiff Bryson), in his individual capacity (collectively, plaintiffs) appeal a 13 September 2006 order and a 3 November 2006 judgment.

On 16 November 2005, the Town of Highlands (defendant) exercised its powers of extraterritorial jurisdiction by enacting an ordinance establishing its extraterritorial jurisdiction to include certain property within one mile of its city limits pursuant to N.C. Gen. Stat. § 160A-360. Defendant adopted a resolution on 7 December 2005 that specified that two regular members of the Highlands Planning Board will reside within the Macon County portion of the extraterritorial jurisdiction of the Town of Highlands.

Plaintiffs sued defendant and prayed for the following relevant relief:

1. The Court declare the rights and obligations of the parties with respect to the number of members each shall be entitled to

appoint to Defendant's Planning Board and Zoning Board of Adjustment pursuant to N.C.G.S. § 160A-362.

2. The Court enjoin Defendant from adopting any ordinance that purports to apply within Defendant's extraterritorial jurisdiction until such time as the Court has declared the rights and obligations of the parties with respect to the matters about which complaint is made.

On 13 September 2006, the trial court dismissed the claims of all plaintiffs except plaintiff Bryson (collectively, the County plaintiffs) because it found that the other plaintiffs were not real parties in interest and therefore had failed to state a claim upon which relief could be granted. On 3 November 2006, the trial court granted defendant's motion for summary judgment against plaintiff Bryson. Plaintiffs now appeal.

The 13 September 2006 Order

[1] The County plaintiffs argue that the trial court erred by granting defendant's pre-trial 12(b)(6) motion and dismissing their claims. We disagree.

"We review *de novo* the grant of a motion to dismiss. . . . Accordingly, when entertaining a motion to dismiss, the trial court must take the complaint's allegations as true and determine whether they are sufficient to state a claim upon which relief may be granted under some legal theory." *Lea v. Grier*, 156 N.C. App. 503, 507, 577 S.E.2d 411, 414-15 (2003) (citations and quotations omitted).

> [O]ur Supreme Court has stated that for purposes of reviewing a 12(b)(6) motion made on the grounds that the plaintiff lacked standing, '[a] real party in interest is a party who is benefitted or injured by the judgment in the case. An interest which warrants making a person a party is not an interest in the action involved merely, but some interest in the subject-matter of the litigation.'

Woolard v. Davenport, 166 N.C. App. 129, 135, 601 S.E.2d 319, 323 (2004) (quoting *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000)) (additional citation omitted).

The statute at issue here is N.C. Gen. Stat. § 160A-362, which proscribes how a city that exercises its extraterritorial jurisdiction "shall . . . provide a means of proportional representation based on popula-

tion for residents of the extraterritorial area to be regulated." N.C. Gen. Stat. § 160A-362 (2005). The statute provides, in relevant part:

> Representation shall be provided by appointing at least one resident of the entire extraterritorial zoning and subdivision regulation area to the planning board and the board of adjustment that makes recommendations or grants relief in these matters. For purposes of this section, an additional member must be appointed to the planning board or board of adjustment to achieve proportional representation only when the population of the entire extraterritorial zoning and subdivision area constitutes a full fraction of the municipality's population divided by the total membership of the planning board or board of adjustment. Membership of joint municipal county planning agencies or boards of adjustment may be appointed as agreed by counties and municipalities. . . . The representatives on the planning board and the board of adjustment shall be appointed by the board of county commissioners with jurisdiction over the area. When selecting a new representative to the planning board or to the board of adjustment as a result of an extension of the extraterritorial jurisdiction, the board of county commissioners shall hold a public hearing on the selection. . . . The board of county commissioners shall select appointees only from those who apply at or before the public hearing. The county shall make the appointments within 45 days following the public hearing. Once a city provides proportional representation, no power available to a city under G.S. 160A-360 shall be ineffective in its extraterritorial area solely because county appointments have not yet been made. If there is an insufficient number of qualified residents of the area to meet membership requirements, the board of county commissioners may appoint as many other residents of the county as necessary to make up the requisite number. . . . If a board of county commissioners fails to make these appointments within 90 days after receiving a resolution from the city council requesting that they be made, the city council may make them.

N.C. Gen. Stat. § 160A-362 (2005).

The County argues that it is a real party in interest because "the legislature has statutorily granted Macon County the substantive right to provide input, through its ETJ appointees, into the character and application of the zoning established in the Town's extraterritorial jurisdiction." They reason that because section 160A-362 "grants the

right to make the appointments as a legal right to Macon County through its Board of Commissioners, and not to property owners or residents within the county," defendant's actions harmed the County's interest of using its statutorily granted appointment power.

The County relies on *County of Johnston v. City of Wilson*, 136 N.C. App. 775, 525 S.E.2d 826 (2000), and *Orange County v. Dept. of Transportation*, 46 N.C. App. 350, 265 S.E.2d 890 (1980), to support its position. In *County of Johnston*, this Court held that Johnston County was a real party in interest to a suit against the City of Wilson to enjoin the city from continuing condemnation proceedings against thirty-four Johnston County landowners. *County of Johnston*, 136 N.C. App. at 779, 525 S.E.2d at 829. The city planned to take the land, which abutted Buckhorn Reservoir, by eminent domain, and then flood the land by raising the reservoir's water level. *Id.* at 777, 525 S.E.2d at 827-28. We held that Johnston County, "through its Board of Commissioners, was statutorily granted the substantive right to protect its citizens from unlawful takings by contiguous local governments," and "the County itself was potentially aggrieved by the affect on its *ad valorem* tax base." *Id.* at 779, 525 S.E.2d at 829 (citations omitted). As such, Johnston County was a real party in interest to the action. *Id.*

We distinguish *Johnston County* from the case at hand because defendant is not taking property from Macon County landowners by eminent domain. Defendant is instead exercising its extraterritorial powers under N.C. Gen. Stat. § 160A-360. The statute provides several safeguards to prevent a city from encroaching upon the regulatory power of a county, none of which are at issue in this action. *See*, *e.g.*, N.C. Gen. Stat. § 160A-360(e) (2005) ("No city may hereafter extend its extraterritorial powers . . . into any area for which the county at that time has adopted and is enforcing a zoning ordinance and subdivision regulations and within which it is enforcing the State Building Code."). The County has not alleged that it has a statutorily granted substantive right to protect its citizens from extraterritorial zoning.

In *Orange County*, this Court held that Orange County had standing to pursue "temporary and permanent injunctive relief to restrain [the Department of Transportation *et alia*] from exceeding their constitutional and statutory authority in connection with the approval process for Interstate Route 40, from Interstate Route 85 west of Durham to Interstate Route 40 southeast of Durham in Durham and Orange Counties." *Orange County*, 46 N.C. App. at 354, 265 S.E.2d at

895. We held that Orange County was an aggrieved party because "its tax base and planning jurisdiction would . . . be affected by the proposed highway." *Id.* at 361, 265 S.E.2d at 899.

The County here claims that its tax base and planning jurisdiction would be similarly affected, but states no legal or factual basis for that claim. In the cases discussed above, Johnston County and Orange County stood to literally lose significant portions of their taxable land. The City of Wilson planned to submerge 400 acres of Johnston County, and Orange County lost the land now covered by I-40 and its attendant buffers. A county does not lose its ability to assess *ad valorem* taxes merely through the exercise of a city's extraterritorial jurisdiction. *See*, *e.g.*, *In re Appeal of Parsons*, 123 N.C. App. 32, 33-34, 472 S.E.2d 182, 184 (1996) (stating that Wake County assessed and collected *ad valorem* taxes on land located in Raleigh's extraterritorial area). Furthermore, extraterritorial jurisdiction was not at issue in either *Orange County* or *Johnston County*. Accordingly, we affirm the order of the trial court holding that Macon County is not a real party in interest to the action.

We turn now to the Macon County Commissioners' claim that they are real parties in interest. They state in their brief that they "acknowledge that present law does not support the argument that they are real parties in interest," but "they urge the Court to recognize that the injury of which they complain is real and substantial, thereby affording them that status." We decline to do so, and instead affirm the trial court's order holding that the Macon County Commissioners, with the exception of plaintiff Bryson, are not real parties in interest.

The 3 November 2006 Judgment

[2] Plaintiff Bryson argues that the trial court erred by granting defendant's motion for summary judgment because there are genuine controversies as to (1) the meaning of the word "population" in N.C. Gen. Stat. § 160A-362, and (2) whether defendant complied with N.C. Gen. Stat. § 160A-362 when it adopted amendments to its extraterritorial jurisdiction ordinance. We disagree and affirm the judgment of the trial court that there is no genuine issue of material fact.

"The standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Papadopoulos v. State Capital Ins. Co.*, 183 N.C. App. 258, 262, 644 S.E.2d 256, 259 (2007) (quotations and citation omitted).

The statute in question, N.C. Gen. Stat. § 160A-362, states that "a city . . . shall . . . provide a means of proportional representation based on population for residents of the extraterritorial area to be regulated." N.C. Gen. Stat. § 160A-362 (2005). The statute does not define what means should be used. However, our Supreme Court has stated, "It is often said that matters of local concern are and should be left largely to the judgment and discretion of a town government and that the courts will not interfere with their acts unless they are *manifestly unreasonable and oppressive*." *Clark's Greenville, Inc. v. West*, 268 N.C. 527, 531, 151 S.E.2d 5, 8 (1966) (citations and quotations omitted) (emphasis added). Plaintiff Bryson has not demonstrated that defendant's method was unreasonable, nor has he demonstrated that a city cannot provide its own means of proportional representation. The statute plainly states that a city shall provide its own means of proportional representation, and we, like the trial court, decline to read the statute otherwise.

[3] Plaintiff Bryson also contends that defendant's amended ordinances did not comply with the requirements of N.C. Gen. Stat. § 160A-362. He argues that defendant's "Amended Ordinances establish that the Board of Commissioners, meaning the Board of Town Commissioners, makes all the appointments." Plaintiff Bryson fails to present adequate support for this argument, and as such we find it lacks merit.

Accordingly, we affirm the order and the judgment of the trial court.

Affirmed.

Judges STEELMAN and STROUD concur.

JUDY PERRY, EMPLOYEE-PLAINTIFF v. CKE RESTAURANTS, INC., EMPLOYER-DEFENDANT, AND TRAVELERS INSURANCE COMPANY, CARRIER-DEFENDANT

No. COA07-190

(Filed 18 December 2007)

Workers' Compensation— additional medical compensation— preauthorization—failure to admit liability

The full Industrial Commission did not err in a workers' compensation case by awarding additional medical compensation to plaintiff even though plaintiff failed to seek preauthorization for her medical treatment, and defendants were not excused from liability for such treatment under N.C.G.S. § 97-25.3, because: (1) although N.C.G.S. § 97-25.3(a) allows an insurer to impose preauthorization requirements, the statute itself does not impose such requirements; (2) in order to claim the protections afforded under N.C.G.S. § 97-25.3(a), defendants must have presented evidence that they actually required preauthorization for the treatment plaintiff received, and the record was devoid of such evidence; (3) even if defendants had in fact imposed preauthorization requirements on plaintiff, N.C.G.S. § 97-25.3(b) specifically states that an insurer may not impose preauthorization requirements for services for which the insurer does not admit liability, and the findings of fact adequately support the conclusion of law that defendants could not impose a preauthorization requirement on plaintiff since defendants denied liability for plaintiff's treatment on grounds that there was no causal connection between the compensable injury and the medical treatment at issue; (4) had the Legislature intended to waive preauthorization requirements only when a defendant was aware of a plaintiff's injury, change of condition, or medical treatment, it could have explicitly drafted the statute to reflect this intent; and (5) although defendants contend they should be allowed to raise the defense of lack of liability for plaintiff's injury and failure to seek preauthorization in the alternative, the plain language of the statute prohibits such defenses from being raised in the alternative in these circumstances.

Appeal by Defendants from Opinion and Award entered 17 November 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 September 2007.

Doran, Shelby, Pethel and Hudson, P.A., by David A. Shelby, for Plaintiff-Appellee.

Morris York Williams Surles & Barringer, LLP, by Stephen Kushner and Angela M. Easley, for Defendants-Appellants.

STEPHENS, Judge.

I. FACTS AND PROCEDURE

Judy Perry ("Plaintiff") slipped and fell at work on 6 October 1999, injuring her head and back. Plaintiff contended that as a result of the accident, she was entitled to payment of compensation for missed work, payment of medical expenses and treatment, payment for permanent partial disability, and payment for permanent total disability. Plaintiff's employer, CKE Restaurants, Inc., commonly known as Hardee's, and Travelers Insurance Company (collectively "Defendants"), accepted compensability for the claim as a "medicals only claim."

The case was heard before Deputy Commissioner Amy L. Pfeiffer on 28 November 2001. Deputy Commissioner Pfeiffer filed an Opinion and Award on 7 August 2002, in which she found that Plaintiff had sustained an injury which resulted in a concussion and materially exacerbated Plaintiff's preexisting back condition. Furthermore, Deputy Commissioner Pfeiffer determined that Plaintiff was temporarily totally disabled and entitled to temporary total disability benefits from 29 March 2000 through 17 July 2001; Plaintiff reached maximum medical improvement on 17 July 2001; Plaintiff was entitled to permanent partial disability benefits for a fifteen percent permanent partial impairment to her back; and Defendants were responsible for all related medical treatment received by Plaintiff due to her back condition. Neither party appealed the decision.

After that Opinion and Award was filed, Plaintiff sought and received a significant amount of additional medical treatment, including three back surgeries, without advising Defendants or seeking preauthorization for such treatment from Defendants. On 5 August 2004, Plaintiff filed a "Request that Claim be Assigned for Hearing," asserting that she had sustained a change of condition within the meaning of N.C. Gen. Stat. § 97-47 and was entitled to further benefits and medical treatment. Defendants filed a response, contending Plaintiff had not sustained a change of condition within the meaning of N.C. Gen. Stat. § 97-47; Plaintiff had not contested Deputy Commissioner Pfeiffer's prior determination that Plaintiff had reached

maximum medical improvement in July 2001; Plaintiff had not sought any authorization for medical treatment from Defendants for several years; any medical treatment Plaintiff had received since 7 August 2002 had not been authorized by Defendants; and all benefits owed to Plaintiff pursuant to Deputy Commissioner Pfeiffer's Opinion and Award had been paid by Defendants.

The case was heard before Deputy Commissioner John B. Deluca on 28 June 2005. In an Opinion and Award filed 30 March 2006, Deputy Commissioner Deluca determined that Plaintiff's back condition was causally related to her compensable injury of 6 October 1999; Plaintiff had sustained a change of condition on 8 November 2002 and had not yet reached maximum medical improvement; Plaintiff was entitled to total disability benefits from 8 November 2002 until further order of the Industrial Commission; and Plaintiff was entitled to payment of medical and related expenses incurred or to be incurred as a result of Plaintiff's compensable injury.

From this Opinion and Award, Defendants appealed to the Full Industrial Commission. The Full Commission affirmed Deputy Commissioner Deluca's decision with minor modifications. Defendants appealed the decision of the Full Commission to this Court. The sole issue on appeal is whether the Full Commission erred in awarding additional medical compensation to Plaintiff where Plaintiff failed to seek preauthorization for her medical treatment, thus excusing Defendants from liability for such treatment pursuant to N.C. Gen. Stat. § 97-25.3.

II. DISCUSSION

Appellate review of an Opinion and Award of the Full Commission is limited to a determination of whether the Full Commission's findings of fact are supported by any competent evidence, and whether those findings support the Full Commission's legal conclusions. *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). The Full Commission's conclusions of law are reviewable *de novo*. *Whitfield v. Lab. Corp. of Am.*, 158 N.C. App. 341, 581 S.E.2d 778 (2003).

First, Defendants claim the Full Commission erred in awarding Plaintiff additional medical compensation because Defendants were entitled to impose preauthorization requirements on Plaintiff's receipt of additional medical treatment. N.C. Gen. Stat. § 97-25.3(a) states in relevant part that "[a]n insurer *may* require preauthorization

for inpatient admission to a hospital, inpatient admission to a treatment center, and inpatient or outpatient surgery." N.C. Gen. Stat. § 97-25.3(a) (2005) (emphasis added). While this section allows an insurer to impose preauthorization requirements, the statute itself does not impose such requirements. Thus, in order to claim the protections afforded by N.C. Gen. Stat. § 97-25.3(a), Defendants must have presented evidence that they actually required preauthorization for the treatment Plaintiff received. As the record herein is devoid of such evidence, Defendants did not prove they were entitled to protection under N.C. Gen. Stat. § 97-25.3(a).

Second, Defendants claim the Full Commission erred in awarding Plaintiff additional medical compensation because Plaintiff sought medical treatment without obtaining preauthorization from Defendants. N.C. Gen. Stat. § 97-25.3(b) states in relevant part:

> (b) An insurer may not impose a preauthorization requirement for the following:
>
> (1) Emergency services;
>
> (2) Services rendered in the diagnosis or treatment of an injury or illness for which the insurer has not admitted liability or authorized payment for treatment pursuant to this Article; and
>
> (3) Services rendered in the diagnosis and treatment of a specific medical condition for which the insurer has not admitted liability or authorized payment for treatment although the insurer admits the employee has suffered a compensable injury or illness.

N.C. Gen. Stat. § 97-25.3(b) (2005).

It is undisputed that Plaintiff did not seek any preauthorization with respect to the medical treatment she received following the 7 August 2002 Opinion and Award. It is also undisputed that Defendants asserted that the condition for which Plaintiff sought treatment was not causally related to Plaintiff's compensable injury of 6 October 1999. Consequently, even if Defendants had in fact imposed preauthorization requirements on Plaintiff, since the statute specifically states that an insurer may not impose preauthorization requirements for services for which the insurer does not admit liability, Plaintiff was not required to seek preauthorization from Defendants for such services.

Defendants argue further, however, that the Full Commission did not make specific findings of fact to support its conclusion that Defendants are responsible for payment of Plaintiff's medical expenses despite a lack of preauthorization. "While the [Full] [C]ommission is not required to make findings as to each fact presented by the evidence, it is required to make specific findings with respect to crucial facts upon which the question of plaintiff's right to compensation depends." *Gaines v. L. D. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977). If the Full Commission's findings of fact are insufficient to allow this Court to determine the parties' rights upon the matters in controversy, the proceeding must be remanded to the Full Commission for proper findings of fact. *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E.2d 797 (1948).

The Full Commission made the following relevant findings of fact:

> 2. On October 6, 1999, Plaintiff slipped and fell on the floor at work. . . . Defendants admitted this injury as a medicals-only claim.
>
> . . . .
>
> 17. From August 7, 2002, through the date of the hearing before Deputy Commissioner Deluca, Plaintiff did not contact Defendants regarding additional treatment for her back.
>
> . . . .
>
> 34. . . . Defendants have denied that Plaintiff's current medical treatment is related to her compensable injury.

These findings of fact adequately support the conclusion of law that, pursuant to N.C. Gen. Stat. § 97-25.3(b), Defendants could not impose a preauthorization requirement on Plaintiff because, even though Defendants admitted Plaintiff suffered a compensable injury on 6 October 1999, Defendants denied liability for Plaintiff's treatment on grounds that there was no causal connection between that compensable injury and the medical treatment at issue. Thus, Defendants' argument that the Full Commission failed to make adequate findings of fact lacks merit.

Additionally, Defendants contend that N.C. Gen. Stat. § 97-25.3 is intended to waive preauthorization requirements only when a defendant is aware of a plaintiff's injury, change of condition, or medical treatment, but does not admit liability. However, where "the language

of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *Hyler v. GTE Prods. Co.*, 333 N.C. 258, 262, 425 S.E.2d 698, 701 (1993). "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." *Campbell v. First Baptist Church*, 298 N.C. 476, 482, 259 S.E.2d 558, 563 (1979). Here, the language of the statute makes it clear that preauthorization requirements cannot be imposed where an insurer denies liability for the treatment. Had the legislature intended to waive preauthorization requirements only when a defendant was aware of a plaintiff's injury, change of condition, or medical treatment, the legislature could have explicitly drafted the statute to reflect this intent.

Finally, Defendants contend they should be allowed to raise the defenses of lack of liability for Plaintiff's injury and failure to seek preauthorization in the alternative. As explained above, a statute must be implemented "according to the plain meaning of its terms." *Hyler*, 333 N.C. at 262, 425 S.E.2d at 701. As the plain language of the statute prohibits such defenses from being raised in the alternative in these circumstances, Defendants' argument is overruled.

Accordingly, the Full Commission did not err in awarding additional medical compensation to Plaintiff as Defendants were not excused from liability for such treatment pursuant to N.C. Gen. Stat. § 97-25.3. Thus, the Opinion and Award of the Full Commission is

AFFIRMED.

Judges McCULLOUGH and CALABRIA concur.

HABITAT FOR HUMANITY OF MOORE COUNTY, INC. v. BOARD OF COMMISSIONERS OF THE TOWN OF PINEBLUFF

No. COA07-406

(Filed 18 December 2007)

1. Zoning— conditional use permit—standing to contest

Habitat had a substantial interest affected by the Board of Commissioner's decision in a conditional use permit case where there was testimony that Habitat had a contract to purchase the

property and the Commission found the application for the permit to be complete.

2. Zoning— conditional use permit—requirements of unified development ordinance—prima facie harmony with area

The trial court did not err by reversing the Board of Commissioner's denial of a conditional use permit where the Commissioners found that Habitat's plans met the requirements of the unified development ordinance, which established a prima facie case of harmony with the area. The fact that the proposed development has not already taken place is not sufficient to rebut a prima facie showing of harmony.

3. Judges— orders—printed on law firm stationery

Lawyers are discouraged from submitting and judges from signing orders printed on attorneys' ruled stationery bearing the name of the law firm, as this could call the impartiality of the court into question.

Appeal by respondents from judgment entered 4 January 2007 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 30 October 2007.

Gill & Tobias, LLP, by Douglas R. Gill, for petitioner-appellee.

The Brough Law Firm, by William C. Morgan, Jr., for respondent-appellant.

STEELMAN, Judge.

Habitat of Moore County, Inc. (Habitat)'s conditional use permit application was determined by the Board of Commissioners of the Town of Pinebluff (Commissioners) to be complete, and it had standing to appeal Commissioners' denial of the permit. Habitat's proposed subdivision was in compliance with the zoning requirements of Commissioners' Unified Development Ordinance, and there was insufficient evidence to rebut the presumption of harmony with the area. Thus, the trial court did not err in reversing Commissioners' decision.

I. Factual Background

On 26 June 2006, petitioner Habitat submitted an application for a conditional use permit ("CUP") to develop a 75-lot subdivision. The Planning Board for the Town of Pinebluff met on 27 July 2006 and rec-

ommended approval of the permit. A public hearing was held on 17 August 2006 before respondents Commissioners. At this hearing, Habitat's executive director Elizabeth Cox (Cox) testified and was subjected to cross-examination. Numerous adjacent and neighboring property owners also testified. At its 21 September 2006 meeting, Commissioners found Habitat's application to be complete. Commissioners further found that the proposed development would meet the requirements of the R-30 zoning under the Pinebluff Unified Development Ordinance (the "Pinebluff UDO"). Commissioners then voted to deny the permit.

Habitat filed a petition for writ of certiorari in Moore County Superior Court on 16 October 2006. On that date, the trial court entered an order granting the petition and directing that the record of the proceedings be brought before the court. On 4 January 2007 Judge Webb entered an order reversing the decision of Commissioners and remanding the matter back to Commissioners for issuance of the CUP. Commissioners appeal.

II. Standing

[1] In their first argument, Commissioners contend that the trial court erred by concluding that it had jurisdiction over the parties and subject matter involved in this case. We disagree.

"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 (2002) (citation omitted). As the party invoking jurisdiction, plaintiffs have the burden of establishing standing. *Neuse River Found. v. Smithfield Foods*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002) (citation omitted). This Court in *Street v. Smart Corp.* defined standing as follows:

> Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter. . . . The gist of standing is whether there is a justiciable controversy being litigated among adverse parties with substantial interest affected so as to bring forth a clear articulation of the issues before the court.

Street v. Smart Corp., 157 N.C. App. 303, 305-06, 578 S.E.2d 695, 698 (2003) (internal citations and quotations omitted).

Section 48 of Pinebluff's UDO governs who may submit zoning permit applications, and states that:

> Applications for zoning, special-use, conditional-use, or sign permits or minor subdivision plat approval will be accepted only from persons having the legal authority to take action in accordance with the permit or the minor subdivision plat approval. By way of illustration, in general this means that applications should be made by the owners or lessees of the property, or their agents, or persons who have contracted to purchase property contingent upon their ability to acquire the necessary permits under this ordinance, or the agents of such persons . . .

The section further states:

> The administrator *may* require an applicant to submit evidence of his authority to submit the application in accordance with the Subsection (a) whenever there appears to be a reasonable basis for questioning this authority.

(emphasis added).

Commissioners argue that, since Habitat was not the owner of the property, and since it did not present a contract showing a purchase agreement contingent upon the approval of the CUP, Habitat had no stake in the matter and therefore did not have standing. This is not correct. Section 48 clearly indicates that a party need not be the owner of the property in order to submit an application. Moreover, an affirmative showing of a contract to purchase the land is unnecessary unless required by the administrator.

Cox testified at the 17 August 2006 public hearing that Habitat had a contract to purchase the property. The Commissioners did not request additional evidence of Habitat's authority to submit the application, and instead found the application to be complete. The application indicated that the purpose for applying for the CUP was "[t]o develop . . . 75 R-30 Habitat for Humanity homes."

Although Commissioners correctly note that the property owner did not sign the application, this is irrelevant in light of their finding that Habitat's application was complete. Further, the record contains evidence that Habitat had an option to purchase the property at the time it submitted the application.

Habitat had a "substantial interest affected" by Commissioners' decision and it complied with the provisions of the UDO in applying for a CUP. We hold that Habitat had standing in this matter, and that the trial court correctly concluded that it had jurisdiction over the parties and the subject matter. This argument is without merit.

III. Trial Court's Conclusions of Law

[2] In their second argument, Commissioners contend that the trial court erred in reversing their denial of the CUP. Commissioners argue that their decision was supported by competent, substantial, and material evidence, and was not arbitrary and capricious. We disagree.

Article IV of Pinebluff's UDO governs "Permits and Final Plat Approvals." Section 54 of this article states that the permit shall be issued unless (1) the requested permit is not within [the town board's] jurisdiction according to the table of permissible uses, (2) the application is incomplete, or (3) the proposed development will not comply with one or more requirements of [the UDO]. Further, subsection (d) states that:

> Even if the permit-issuing board finds that the application complies with all other provisions of this chapter, it may still deny the permit if it concludes . . . that if completed as proposed, the development, more probably than not:
>
> (1) Will materially endanger the public health or safety, or
>
> (2) Will substantially injure the value of adjoining or abutting property, or
>
> (3) Will not be in harmony with the area in which it is to be located, or
>
> (4) Will not be in general conformity with the land-use plan, thoroughfare plan, or other plan officially adopted by the Board of Commissioners.

Under North Carolina case law, where a use is included as a conditional use in a particular zoning district, a *prima facie* case of harmony with the area is established. *Vulcan Materials Co. v. Guilford County Bd. of County Comm'rs*, 115 N.C. App. 319, 324, 444 S.E.2d 639, 643 (1994). Once this *prima facie* case is established, Commissioners may still find that the use will not be in harmony with the area only if there is competent, material, and substantial evidence to support such a finding. *Id.*

At the 21 September 2006 meeting, Commissioners found that Habitat's plans for its proposed development met the requirements of the R-30 zoning in the UDO. Nevertheless, a motion was made and passed by a 3-2 vote to deny the CUP on the grounds that:

> [I]t will endanger the public health for the following reasons. There has not been enough of a traffic study. We do not know—there's a question on whether or not the safety of the citizens can be protected down there . . . I also think that it will not be in harmony with the area.

On appeal, Commissioners do not contend that Habitat's proposed development would endanger public health or safety. Instead, Commissioners only argue that there was competent, material, and substantial evidence in the record to support their finding that the subdivision would not be in harmony with the area.

In support of their contention, Commissioners reference four pieces of testimony from the 17 August 2006 public hearing which they claim "show[] clearly that the project would not be in harmony with the area[.]"

The first was from a woman expressing apprehension that her property "will be destroyed by trash dumping and riding four-wheelers and things like that." The second was a speaker who stated his concern about children in the proposed Habitat development spooking his horses. The third was a speaker who stated that "we do not want a subdivision built in there." Finally, the last piece of testimony cited by Commissioners is from a neighboring landowner, whose land does not abut the proposed Habitat development, stating "[I]t would be a lot nicer obviously if it went into five, ten-acre tracts or something like that."

After Habitat made its *prima facie* showing of harmony by demonstrating the proposed development's conformity with the R-30 zoning requirements of the Pinebluff UDO, the burden was on the opponents of the permit to show that the proposed development was not in harmony with the area. The gist of the opponents' objection is that they did not want the rural nature of their property to be compromised by a subdivision. However, under North Carolina jurisprudence, the fact that the proposed development in a CUP application has not already taken place on land is insufficient to rebut a *prima facie* showing of harmony. *See Vulcan*, 115 N.C. App. 319, 444 S.E.2d 639. Thus, to the extent that the objections to the proposed development centered on the fact that the land had not already been developed, these objections were insufficient to rebut Habitat's *prima facie* showing of harmony. No objections on any other basis were made, and we agree with the trial court's conclusion of law that there was insufficient evidence of a competent, material and substantial nature to rebut Habitat's showing of harmony with the area.

Because we affirm the trial court's order on the basis that the Commissioners' decision was not supported by competent, material, and substantial evidence, we need not address whether the decision was arbitrary and capricious.

III. Order

[3] We note that Judge Webb's order was printed, signed and filed on the ruled stationery of Habitat's trial attorney. Without deciding whether this practice violates either the Code of Judicial Conduct or the Revised Rules of Professional Conduct, we strongly discourage lawyers from submitting or judges from signing orders printed on attorneys' ruled stationery bearing the name of the law firm. Such orders could call into question the impartiality of the trial court. *In re T.M.H.*, 186 N.C. App. 451, —— S.E.2d —— (2007).

AFFIRMED.

Judges WYNN and GEER concur.

21ST MORTGAGE CORPORATION, PLAINTIFF v. DOUGLAS HOME CENTER, INC., A NORTH CAROLINA CORPORATION, AND JUDY C. DOUGLAS, DEFENDANTS

No. COA07-179

(Filed 18 December 2007)

Pleadings— unverified pleading—affirmative defense—motion for summary judgment improper

The trial court erred in an action to recover monies owed after defendants' default of a loan by granting summary judgment in favor of defendants, and the case is reversed and remanded to the trial court to hear the case on the merits, because: (1) a trial court may not consider an unverified pleading when ruling on a motion for summary judgment; (2) defendants' motion to amend their answer included an unverified amended answer asserting an additional affirmative defense; and (3) defense counsel argued this affirmative defense at the hearing on the parties' motions for summary judgment, and thus the trial court improperly granted defendants' motion for summary judgment based on the unverified pleading.

Appeal by plaintiff from order entered 24 July 2006 by Judge Timothy Kincaid in Catawba County Superior Court. Heard in the Court of Appeals 10 October 2007.

Fletcher & Rhoton, P.A., by John W. Fletcher, III and Bryan W. Stone, for plaintiff-appellant.

No brief filed for defendants-appellees.

CALABRIA, Judge.

21st Mortgage Corporation ("plaintiff") appeals from order granting summary judgment in favor of Douglas Home Center, Inc. ("defendant DHC") and Judy C. Douglas ("President Douglas") (collectively, "defendants"). We reverse and remand.

On or about 23 April 2001, defendant DHC, through President Douglas, entered into an Inventory Security Agreement and Power of Attorney ("the Agreement") with Vanderbilt Mortgage and Finance, Inc. ("Vanderbilt") which, *inter alia*, provided for the financing of defendant's purchase of multiple modular homes to serve as its operational inventory. Pursuant to the terms of the Agreement, defendant DHC agreed to finance the purchase of new and pre-owned inventory, and as a condition of the financing, granted Vanderbilt a security interest in the inventory, equipment, fixtures, proceeds, and rights against suppliers. President Douglas also personally guaranteed all payments due under the Agreement. On 1 February 2004, Vanderbilt assigned all of its rights, title and interest in the Agreement to the plaintiff.

Defendant DHC defaulted under the Agreement by failing to make monthly payments. Plaintiff proposed a "work out" plan to allow defendants to cure the default. Defendants failed to cure the default and plaintiff sent President Douglas a formal notice of default and demand for payment in the amount of $414,688.12, which represented the deficiency on the resale of any repossessed merchandise, any repossession cost, interest charges, and any other cost or expenses including attorneys' fees. On 11 July 2005, President Douglas, on behalf of defendant DHC, gave plaintiff written notice that as of 15 July 2005, the lot was closing and asked plaintiff to pick up "your homes" by the end of the month.

On 27 July 2005, plaintiff responded to President Douglas' letter, and warned President Douglas that "with the age of the units" there would be a deficiency after the sale of the homes.

Plaintiff sold the homes which had secured the loan in order to recover the amount defendant DHC owed, but alleged that defendant DHC still owed plaintiff a deficiency in the amount of $137,085.00, not including attorneys' fees and costs. As a result of the deficiency remaining on the defendants' account, plaintiff filed a complaint on 14 October 2005 against both defendant DHC and the personal guarantor, President Douglas, seeking to collect the monies owed by both defendants.

On 31 May 2006, defendants filed a motion for summary judgment but did not state the grounds for the motion. In addition, defendants filed a motion for judgment on the pleadings. Subsequently, President Douglas signed an affidavit stating that plaintiff issued an IRS form 1099-C, "Cancellation of Debt," ("1099-C form") and as a result of issuing this form, defendant DHC's debt was cancelled. Defendants had not previously pled the affirmative defense of waiver or forgiveness of a debt in their answer or counterclaim. On 5 July 2006, Karla Whitfield, assistant controller for plaintiff, signed an affidavit stating the issuance of the 1099-C form was a clerical error, and that plaintiff subsequently delivered to President Douglas a voided 1099-C form via Federal Express.

On 5 July 2006, plaintiff responded to defendants' motion for summary judgment with a memorandum in support of its motion for summary judgment. In the memorandum, plaintiff argued that its issuance of the 1099-C form did not cancel plaintiff's right to collect the debt. On 6 July 2006, defendants filed a motion to amend the answer, seeking the trial court's permission to plead, as an affirmative defense, plaintiff had cancelled defendants' debt. Accompanying defendants' motion to amend the answer was an affidavit signed by Linda Young, a staff accountant, who was not affiliated with either plaintiff or defendants, and who had prepared defendant DHC's 2005 state and federal income tax returns. In her affidavit, Linda Young stated defendant DHC had included an entry of $100,169.44 in its 2005 state and federal tax returns. In addition, Linda Young noted the plaintiff, a creditor of defendant DHC, sent the 1099-C form to defendant.

On 10 July 2006, at the hearing on the parties' joint motions for summary judgment, plaintiff objected to the court's consideration of defendants' seventh affirmative defense alleging it had not been properly pled. The court did not rule on defendants' motion to amend, and granted defendants' motion for summary judgment, finding "this debt has been discharged." Plaintiff appeals.

On appeal, plaintiff argues the trial court erred by (1) failing to rule on defendants' motion to amend before granting defendants' motion for summary judgment; (2) granting defendants' motion for summary judgment and judgment on the pleadings when defendants' motion was premised on an affirmative defense that was not timely pled; (3) granting defendants' motion for summary judgment when genuine issues of material fact existed; and (4) granting defendants' motion for summary judgment when defendants failed to present evidence of actual detriment and plaintiff demonstrated that it never intended to forgive defendants' indebtedness.

We first address plaintiff's contention that the trial court erred by granting defendants' motion for summary judgment. On appeal, this Court reviews an order granting summary judgment *de novo*. *McCutchen v. McCutchen*, 360 N.C. 280, 285, 624 S.E.2d 620, 625 (2006).

> Where a summary judgment motion has been granted the two critical questions of law on appeal are whether, on the basis of the materials presented to the trial court, (1) there is a genuine issue of material fact and, (2) whether the movant is entitled to judgment as a matter of law.

North River Ins. Co. v. Young, 117 N.C. App. 663, 667, 453 S.E.2d 205, 208 (1995) (citation omitted). "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." *Ellis v. Williams*, 319 N.C. 413, 415, 355 S.E.2d 479, 481 (1987).

In the case *sub judice*, the pertinent procedural actions leading up to the trial court's ruling on the parties' motions for summary judgment are as follows: plaintiff filed its complaint against defendants. Defendants then filed their verified answer alleging six affirmative defenses. Defendants subsequently filed their motion for summary judgment and judgment on the pleadings. Plaintiff then filed a motion for summary judgment.

On 5 July 2006, plaintiff submitted to defendants the grounds for plaintiff's motion for summary judgment. On 6 July 2006, defendants filed a motion to amend the answer, seeking the court's permission to plead their seventh affirmative defense: that plaintiff had cancelled defendants' indebtedness by sending to defendants the 1099-C form. Accompanying defendants' motion to amend was Linda Young's affidavit, who had prepared defendant DHC's 2005 state and federal income tax returns. On 7 July 2006, defendants filed a memorandum

stating the grounds upon which they relied in their motion for summary judgment.

At a 10 July 2006 hearing on the joint motions for summary judgment, defendants sought to argue the seventh affirmative defense. Defense counsel argued to the trial court that after plaintiff filed its complaint, defendant DHC received the 1099-C form which purportedly cancelled the debt in the amount of $100,169.44. Defense counsel also argued to the trial court, "[s]o our summary judgment motion basically says you can't have it two ways. You can't sue someone for a debt and then turn around and file a 1099 and cancel it and take the tax benefits that obviously will come to [plaintiff]."

Plaintiff, through counsel, first objected to defendants' motion for summary judgment based on the 1099-C form. Plaintiff's counsel objected on the ground that defendants based their motion on a defense that was never made part of their answer. Plaintiff's counsel further asserted that defendants argued this seventh defense without giving the court an opportunity to hear defendants' motion to amend the answer regarding the 1099-C form. After counsels' arguments, the trial court granted defendants' motion for summary judgment. In granting defendants' motion, the trial court based its ruling on defendants' seventh affirmative defense and found, "this debt has been discharged."

This Court addressed a similar issue in *Tew v. Brown*, 135 N.C. App. 763, 522 S.E.2d 127 (1999). In *Tew*, the defendant filed a verified answer to plaintiff's complaint. *Id.*, 135 N.C. App. at 764, 522 S.E.2d at 128. Subsequently, defendant filed a motion to amend his answer for the purpose of asserting an affirmative defense. However, the amended answer was unverified. *Id.* Plaintiff then filed a motion for summary judgment. *Id.* At the hearing for both motions, the trial court did not rule on defendant's motion to amend his answer but granted plaintiff's motion for summary judgment. *Id.*, 135 N.C. App. at 765, 522 S.E.2d at 128. This Court held "the trial court may not consider an unverified pleading when ruling on a motion for summary judgment." *Id.*, 135 N.C. App. at 767, 522 S.E.2d at 130 (citation omitted).

Here, the defendants' motion to amend their answer included an unverified amended answer asserting an additional affirmative defense. At the hearing on the parties' motions for summary judgment, defense counsel argued this affirmative defense, and the trial court granted defendants' motion for summary judgment based on

this affirmative defense. Thus, the trial court granted defendants' motion for summary judgment based on the unverified pleading, which the trial court may not do. Therefore, summary judgment was not proper. We reverse the decision of the trial court granting defendants' motion for summary judgment, and remand to the trial court to hear the case on the merits.

As a result of our decision, we need not reach plaintiff's remaining assignments of error.

Reversed and remanded for further proceedings.

Judges McCULLOUGH and STEPHENS concur.

STATE OF NORTH CAROLINA v. TRAVIS LEE SCOTT

No. COA07-216

(Filed 18 December 2007)

Constitutional Law— right to counsel—denial of request to withdraw waiver of court-appointed attorney—probation revocation hearing

The trial court erred in a probation revocation hearing by denying defendant's request to withdraw his waiver of a court-appointed attorney, and the case is remanded for a new hearing, because: (1) defendant withdrew his prior waiver by explicitly asking the trial court to appoint counsel to represent him; (2) defendant indicated he sought to hire an attorney, but that he did not know it would cost so much; (3) the State's contention that defendant made no inquiry into the cost of retaining counsel was not supported by the transcript; (4) defendant did not forfeit his right to an attorney when his request for appointed counsel was not a tactic to delay and frustrate the orderly processes of the trial court based on the fact that he attempted to withdraw his waiver at his second appearance which was less than one month after signing the waiver form; and (5) defendant carried his burden of proving a change in his desire for the assistance of counsel, and his request was for good cause.

Judge CALABRIA dissenting.

Appeal by Defendant from judgment entered 16 October 2006 by Judge Alma L. Hinton in Halifax County Superior Court. Heard in the Court of Appeals 10 October 2007.

Attorney General Roy Cooper, by Assistant Attorney General James C. Holloway, for the State.

Anne Bleyman for Defendant.

STEPHENS, Judge.

On or about 3 January 2005, Travis Lee Scott ("Defendant") pled guilty to one count of felony possession of cocaine in violation of N.C. Gen. Stat. § 90-95(d)(2). The trial court sentenced Defendant to six to eight months in prison, suspended the sentence, and placed Defendant on supervised probation. On 5 September 2006, Defendant's probation officer filed a violation report alleging four violations of the terms of Defendant's probation. At his first appearance on 18 September 2006, Defendant signed a waiver of counsel form and stated that he would hire his own attorney to represent him in the probation violation proceedings.

At his next appearance on 16 October 2006, Defendant asked the trial court to appoint him an attorney.

THE COURT: Why is that, sir?

THE DEFENDANT: Because I don't have no money to afford to pay no lawyer.

THE COURT: Before you waived your right to counsel, had you made any inquiry as to how much it was going to cost to hire an attorney?

THE DEFENDANT: No, ma'am.

THE COURT: So you just came in here and waived thinking that you would be able to do it?

THE DEFENDANT: I didn't know it would be that much.

THE COURT: Have you ever had to hire an attorney before for anything?

THE DEFENDANT: Yes.

. . . .

THE COURT: Your request is denied.

THE DEFENDANT: I was asking could I get a continuance.

THE COURT: No, sir.

After hearing from Defendant and his probation officer, the trial court revoked Defendant's probation and activated his suspended sentence. On appeal, Defendant argues the trial court erred in (1) denying his request to withdraw his waiver of court appointed counsel, (2) denying his request for a continuance, and (3) failing to ensure that Defendant's waiver of counsel was made knowingly, intelligently, and voluntarily.

A defendant at a probation revocation hearing has a statutory right to counsel akin to the right enjoyed in a criminal trial. *See* N.C. Gen. Stat. § 15A-1345(e) (2005) ("The probationer is entitled to be represented by counsel at the [probation revocation] hearing and, if indigent, to have counsel appointed."); *State v. Warren*, 82 N.C. App. 84, 85, 345 S.E.2d 437, 439 (1986) ("There is a statutorily recognized right to counsel at a probation revocation hearing in North Carolina that goes beyond the federal constitutional right enunciated in *Gagnon v. Scarpelli*, 411 U.S. 778, 36 L. Ed. 2d 656, 93 S.Ct. 1756 (1973).") (citations omitted).

> A criminal defendant may waive his [constitutional] right to be represented by counsel so long as he voluntarily and understandingly does so. Once given, however, a waiver of counsel is good and sufficient until the proceedings are terminated or until the defendant makes known to the court that he desires to withdraw the waiver and have counsel assigned to him. The burden of establishing a change of desire for the assistance of counsel rests upon the defendant.

State v. Sexton, 141 N.C. App. 344, 346-47, 539 S.E.2d 675, 676-77 (2000) (alteration in original) (quotation marks and citations omitted).

In *Sexton*, the defendant waived his right to appointed counsel at his first appearance. Two months later, when the matter was called for hearing, the defendant specifically asked the trial court to appoint him counsel. The defendant made his request because he "lost [his] job[,]" *id.* at 347, 539 S.E.2d at 677, but the trial court denied the request based on the prior waiver. On appeal, this Court held that the defendant had "carried his burden of showing a change in his desire for assigned counsel, and the record reflects his request was for good cause." *Id.* Therefore, this Court determined, "the trial court's denial

of the request for assistance violated defendant's constitutional right to an attorney." *Id.*

Like the defendant in *Sexton*, Defendant in this case withdrew his prior waiver by explicitly asking the trial court to appoint counsel to represent him. Defendant indicated that he had sought to hire an attorney, but that he "didn't know it would be that much." The State's contention to the contrary, that Defendant "made no inquiry" into the cost of retaining counsel, is simply not supported by the transcript. Moreover, we disagree with the State's suggestion that Defendant's request for appointed counsel was a tactic "to delay and frustrate the orderly processes of the trial court[,]" and that, thus, Defendant forfeited his right to an attorney. *See State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 69 (2000) (stating that a defendant may forfeit his right to counsel when he uses that right " 'for the purpose of obstructing and delaying his trial.' ") (quoting *State v. McFadden*, 292 N.C. 609, 616, 234 S.E.2d 742, 747 (1977)). In *Montgomery*, this Court held that the trial court did not err in requiring the defendant to proceed *pro se* where the defendant "was afforded ample opportunity over the course of fifteen months[] to obtain counsel[,]" the "defendant was disruptive in the courtroom on two occasions," and the defendant "refused to cooperate with [his attorney] and assaulted him[.]" *Id.* at 525, 530 S.E.2d at 69. Defendant's "tactic" in this case, by contrast, amounted to an attempt to withdraw his waiver at his second appearance, less than one month after signing the waiver form. In sum, Defendant carried his burden of proving a change in his desire for the assistance of counsel, and his request was for good cause.

The trial court erred in denying Defendant's request, and this error violated Defendant's right to an attorney. Accordingly, we reverse and remand the matter to the trial court for a new probation revocation hearing. In light of this result, we need not address Defendant's remaining arguments.

REVERSED and REMANDED.

Judge McCULLOUGH concurs.

Judge CALABRIA dissents in a separate opinion.

CALABRIA, Judge, dissenting.

I respectfully dissent from the majority opinion that defendant's constitutional right to an attorney was violated. Defendant's request

for assigned counsel following a waiver was not for good cause; therefore the trial court's denial of the request was not in error.

"A waiver of counsel or decision to proceed *pro se* is good and sufficient until the trial [is] finally terminated, unless the defendant himself makes known to the court that he desires to withdraw the waiver and makes a showing that the change of mind to proceed (with or without an attorney) was for *some good cause*." *State v. Hoover*, 174 N.C. App. 596, 598, 621 S.E.2d 303, 304 (2005) (citations and internal quotation marks omitted) (emphasis added). The purpose behind the requirement of showing good cause to withdraw a waiver of counsel is that, in the absence of good cause, a defendant would be "permitted to control the course of litigation and sidetrack the trial." *State v. Smith*, 27 N.C. App. 379, 381, 219 S.E.2d 277, 279 (1975).

As *Hoover* indicates, to withdraw the waiver of counsel the defendant must do two things: make known to the court the desire to withdraw the waiver, and make a showing that the change of mind was for good cause. *Hoover*, 174 N.C. App. at 598, 621 S.E.2d at 304. It is on this second requirement that defendant has failed to meet the requirements set out in *State v. Hoover*.

The majority's reliance on *State v. Sexton*, 141 N.C. App. 344, 539 S.E.2d 675 (2000) is misplaced. In *Sexton* the defendant made his request for appointment of counsel because he "lost [his] job[,]" *Id.*, 141 N.C. App. at 347, 539 S.E.2d at 677. This Court, in a unanimous opinion, held that his request was for good cause. *Id.*, 141 N.C. App. at 344, 539 S.E.2d at 675. The defendant in *Sexton* faced a dramatic change in circumstances that modified his ability to afford an attorney.

Unlike the defendant in *Sexton*, the defendant in the case before us has not faced a change in circumstances that was not, or should not, have been anticipated. He has not shown that his circumstances had changed from the time he waived his right to appointed counsel and the time he attempted to withdraw that waiver.

We need not make an inquiry into the motives of the defendant to decide if he intended to "delay and frustrate the orderly processes of the trial court." We need only determine if defendant met his burden of showing his request for a withdraw of waiver of counsel was for good cause. Defendant failed to meet that burden, therefore the trial court's decision should be affirmed.

KAREN MATTHEWS, EMPLOYEE, PLAINTIFF-APPELLEE v. WAKE FOREST UNIVERSITY, EMPLOYER, SELF-INSURED, DEFENDANT-APPELLANT

No. COA06-1549

(Filed 18 December 2007)

1. Workers' Compensation— aggravation of existing psychological condition—disability

The Industrial Commission did not err by finding that plaintiff was disabled as a result of her compensable injury where the Commission found that chronic pain and physical restrictions resulting from plaintiff's compensable injury aggravated her existing non-disabling psychological condition.

2. Workers' Compensation— credibility of expert witnesses—Commission as sole arbiter

The Industrial Commission did not err in a workers' compensation proceeding by not determining the competency of plaintiff's expert witnesses. The Commission is the sole arbiter of credibility, and the Commission here was under no obligation to consider the deputy commissioner's finding regarding the credibility of plaintiff's medical experts.

3. Workers' Compensation— physician's report—not considered—not treating physician

The Industrial Commission did not err in a workers' compensation proceeding by not addressing and considering a psychiatric report. The physician in this case generated his report in the course of determinating eligibility for benefits rather than as a treating physician. No opinion was given on whether plaintiff's compensable injury aggravated her psychiatric condition, the overriding issue in this case.

Appeal by defendant from opinion and award entered 29 June 2006 by the Full Commission. Heard in the Court of Appeals 30 August 2007.

The Geraghty Law Firm, by Maureen Geraghty, for plaintiff.

Womble Carlyle Sandridge & Rice, PLLC, by Phillip J. Mohr, for defendant.

ELMORE, Judge.

Karen Matthews (plaintiff) worked as a buyer's assistant for Wake Forest University (defendant). Plaintiff suffered from depression, starting in the 1980s. She had particular difficulty following her parents' deaths in the 1980s and a burglary of her home in 1998. On 30 June 1999, plaintiff suffered a compensable injury when she tripped over a planter and injured her right knee, left wrist, and right foot. She received treatment and did not miss any work as a result of the injury. On 10 January 2000, plaintiff again tripped over a planter, sustaining injuries to her right knee and right shoulder.

Following the second injury, "[p]laintiff had increasing difficulty managing her physical limitations, chronic pain and medical treatment . . . ." Plaintiff began suffering increased psychological problems, due in part to her son's impending nuptials. Plaintiff began crying frequently and having trouble maintaining her work load. In addition, plaintiff experienced difficulty adapting to defendant's shift to a new computer program. Plaintiff met with supervisors several times, who counseled her on her lack of productivity, told her not to bring work home with her, and "that it was her decision to come to work when she was in pain."

Eventually, plaintiff received an opinion that although she was physically able to return to work, she "was incapable of employment . . . due to depression, anxiety, post-traumatic stress and regional pain syndrome in the upper right extremity." In June, 2002, plaintiff's doctor concluded that she was "at maximum medical improvement physically," but stated that "he 'would not release her to return to work without an agreement from her psychiatrist because of the potential difficulty that she may encounter secondary to her psychiatric history.' "

On 29 October 2004, Deputy Commissioner Lorrie L. Dollar filed an opinion and award in favor of defendant, concluding that plaintiff "failed to offer competent evidence that her psychiatric condition was materially aggravated by her compensable injuries to an extent that she was incapable of earning wages." The deputy commissioner rejected "the medical and psychiatric opinion testimony" plaintiff offered, concluding that it rested "on the inaccurate history related by plaintiff, as well as impermissible tampering with medical witnesses during the course of the treatment as well as prior to the depositions." The deputy commissioner emphasized that plaintiff's psychiatric condition was not the result of her compensable injuries, nor was it sub-

stantially aggravated by them. Rather, her worsened psychiatric condition was the result of her difficulties in learning a new computer program at work and her son's wedding. The deputy commissioner stressed that "[a]ny testimony to the contrary is simply not credible, particularly when read with [her attorney] Ms. Geraghty's instruction to her client to make sure [her treating psychiatrist] Dr. [Wayne H.] Denton and [therapist] Mr. [Johnny Marvin] Mullen noted chronic pain as a source of her depression." The deputy commissioner therefore denied plaintiff benefits based on her psychological problems.[1]

Plaintiff appealed the decision to the Full Commission, which wholly disregarded the deputy commissioner's findings and her Opinion and Award. Instead, the Full Commission found as fact that plaintiff's psychological problems were aggravated by the compensable injuries, and concluded that her psychological problems were therefore also compensable. The Full Commission did not address plaintiff's alleged tampering of witnesses. Defendant now appeals.

[1] Defendant's first argument on appeal is that the Full Commission erred in finding that plaintiff was disabled from work as a result of her compensable injury.

> Our review of the Commission's opinion and award is limited to determining whether competent evidence of record supports the findings of fact and whether the findings of fact, in turn, support the conclusions of law. If there is any competent evidence supporting the Commission's findings of fact, those findings will not be disturbed on appeal despite evidence to the contrary. However, the Commission's conclusions of law are reviewed *de novo*.

Oxendine v. TWL, Inc., 184 N.C. App. 162, 164, 645 S.E.2d 864, 865 (2007) (citation and quotations omitted). In this case, the Full Commission found that "[a]s a result of her chronic pain and physical restrictions resulting from her compensable January 10, 2000 injury and the aggravation and acceleration of her pre-existing non-disabling psychological condition due to her compensable injury. . . , Plaintiff has been incapable of working in any employment since June 28, 2000." This finding is supported by the testimony of Dr. Denton and Mr. Mullen. As such, we may not substitute our own judgment for that of the Full Commission. *See, e.g.*, *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000)

1. Plaintiff did receive other benefits, not pertinent to this appeal, in the deputy commissioner's 29 October 2004 Opinion and Award.

(holding that "on appeal, an appellate 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.") (citation, quotations, and alterations omitted).

We note defendant's contention that although the Full Commission's Conclusion of Law no. 2 states that plaintiff was "physically and mentally" unable to work, her doctors had, in fact, cleared her physically for some work. However, it is well established that one of the ways in which a plaintiff may prove disability is through "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." *Britt v. Gator Wood, Inc.*, 185 N.C. App. 677, 681, 648 S.E.2d 917, 920 (2007) (quotations and citation omitted, emphasis added). Either physical or mental incapacity is sufficient. Moreover, we stress that the Full Commission explicitly noted plaintiff's ability to perform "light-duty work."

[2] Defendant's next argument, that the Full Commission failed to determine the competency of plaintiff's expert witnesses, is likewise to no avail. We find defendant's allegations that plaintiff's counsel engaged in impermissible witness tampering troublesome, and we are not at all comforted by plaintiff's counsel's assertions that her alleged misconduct was simply zealous advocacy. Notwithstanding our discomfort, however, plaintiff is correct that this issue is not properly before this Court.

> Whether the full Commission conducts a hearing or reviews a cold record, N.C.G.S. § 97-85 places the ultimate fact-finding function with the Commission—not the hearing officer. It is the Commission that ultimately determines credibility, whether from a cold record or from live testimony. Consequently, in reversing the deputy commissioner's credibility findings, the full Commission is not required to demonstrate that sufficient consideration was paid to the fact that credibility may be best judged by a first-hand observer of the witness when that observation was the only one.

Deese, 352 N.C. at 115, 530 S.E.2d at 552 (quotations, citation, and alteration omitted). The Full Commission was under no obligation to consider the deputy commissioner's finding regarding the credibility of plaintiff's medical experts. Under the law as our Supreme Court has articulated it, defendant's argument is without merit. Because the

Full Commission is the sole arbiter of credibility, defendant's arguments regarding alleged conflicts between defendant's doctors' notes and deposition testimony are also futile.

[3] Finally, defendant contends that "[t]he Full Commission erred in failing to address and consider Dr. Richard Spencer's 2001 psychiatric report . . . ." Defendant argues that this Court's decision in *Gutierrez v. GDX Auto.*, 169 N.C. App. 173, 609 S.E.2d 445 (2005), requires the Full Commission "to enter findings regarding material evidence properly presented to the Commission." Although we agree with defendant's assertion generally, we find its argument unpersuasive in the present appeal.

As plaintiff notes, the *Gutierrez* case deals with medical evidence presented by a "treating physician." *Id.* at 176-77, 609 S.E.2d at 448. Dr. Spencer generated his report not as a treating physician, but in the course of an examination pursuant to a determination of plaintiff's eligibility for disability benefits. *Gutierrez* is therefore distinguishable.

Although defendant represents that Dr. Spencer "determined [plaintiff] had histrionic pain disorder" in its brief, the actual report states only that Dr. Spencer "[s]trongly suspect[ed] somatization disorder, ie [sic], histrionic pain disorder." Defendant suggests that because "[t]he report was generated during a time plaintiff claimed disability as a result of her work injuries," it "was therefore relevant to the exact point in controversy." However, in the report, Dr. Spencer gives no opinion on the overriding issue in this case: whether plaintiff's compensable injury aggravated her psychiatric condition. On these facts, we are unwilling to hold that the Full Commission erred in not addressing this evidence.

Having conducted a thorough review of the record and briefs, we can discern no error in the Full Commission's opinion and award. Accordingly, we must affirm.

Affirmed.

Judges STEELMAN and STROUD concur.

JOHN FLETCHER MEADOWS, ET. UX., KATHLEEN PAIGE MCILROY MEADOWS, PLAINTIFFS v. IREDELL COUNTY AND ROWAN COUNTY, DEFENDANTS

No. COA07-596

(Filed 18 December 2007)

1. Appeal and Error— failure to include transcript references—failure to state standard of review

Where plaintiffs' brief included only one reference to the transcript or record pages in over five pages, and did not state the appropriate standard of review, plaintiff's counsel was admonished pursuant to Appellate Rule 34 (b)(3) to be more diligent.

2. Counties— standing—change in county boundaries—property purchased after change

Plaintiffs suffered no injury and lacked standing where they alleged that a statute allowing counties to fix their own boundaries was unconstitutional, but the change occurred in 1992 and plaintiffs did not buy their property until 1999. The deed book indicated that the land was in two counties, and there was no change in the status of the property during plaintiffs' ownership. They could not pursue a class action for the same reason.

Appeal by plaintiffs from an order entered 21 February 2007 by Judge Nathaniel J. Poovey in Iredell County Superior Court. Heard in the Court of Appeals 15 November 2007.

David P. Parker, P.L.L.C., by David P. Parker, for plaintiffs-appellants.

Womble Carlyle Sandridge & Rice, P.L.L.C., by James R. Morgan, Jr. and Robert T. Numbers, II, for defendant-appellee Iredell County.

Templeton & Raynor, P.A., by Kenneth R. Raynor and Daniel DeCicco, for defendant-appellee Rowan County.

JACKSON, Judge.

John Fletcher Meadows and Kathleen Paige McIlroy Meadows ("plaintiffs") appeal the dismissal of their claims against Iredell and Rowan Counties ("defendants") on 21 February 2007. For the following reasons, we affirm.

Defendants' County Commissioners passed a resolution on 7 July 1992 to establish by consent the common boundary of the respective counties. Plaintiffs purchased land along the common county line on 15 February 1999. The Iredell deed book showed the land was situated in both Iredell and Rowan counties. In 2004, plaintiffs were notified that a portion of their property was located in Rowan County.

Plaintiffs filed their complaint in Iredell County on 23 October 2006 alleging the statute allowing counties to fix their own boundaries was unconstitutional on its face and as applied. They also alleged violations of their due process rights and sought class certification, a return of the county line to its 1789 position, and monetary compensation.

Defendant Iredell County filed a motion to dismiss pursuant to North Carolina General Statutes, section 1A-1, Rule 12(b)(6) on 28 December 2006. Defendant Rowan County filed a similar motion on 3 January 2007. The motions were heard on or about 19 February 2007 and granted by order filed 21 February 2007. Plaintiffs appealed.

[1] As a preliminary matter, we note that the North Carolina Rules of Appellate Procedure require the appellant's brief to include a nonargumentative statement of the facts, "supported by references to pages in the transcripts of proceedings, the record on appeal, or exhibits, as the case may be." N.C. R. App. P. 28(b)(5) (2007). Plaintiff's brief contains only one such reference in over five pages. In addition, the brief contains no statement of the appropriate standard of review.

> The argument shall contain a concise statement of the applicable standard(s) of review for each question presented, which shall appear either at the beginning of the discussion of each question presented or under a separate heading placed before the beginning of the discussion of all the questions presented.

N.C. R. App. P. 28(b)(6) (2007). It is well-established that the Appellate Rules are mandatory, and failure to comply with them subjects the appeal to dismissal. *State v. Hart*, 361 N.C. 309, 311, 644 S.E.2d 201, 202 (2007). However, as this Court was reminded in *Hart*, every violation of the rules does not require dismissal; sanctions pursuant to Rules 25(b) or 34 may be appropriate. *Id.* Pursuant to Rule 34(b)(3), we elect to admonish plaintiff's counsel to exercise more diligence in preparing briefs for this Court.

[2] When reviewing a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, we must decide

"whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory[.]" *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987) (citing *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979)). Rule 12(b)(6) " 'generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery.' " *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 166 (1970) (quoting *American Dairy Queen Corp. v. Augustyn*, 278 F. Supp. 717, 721 (N.D. Ill. 1967)). One such bar to recovery is a lack of standing, which may be challenged by a motion to dismiss for failure to state a claim upon which relief may be granted. *See, e.g.*, *Krauss v. Wayne County DSS*, 347 N.C. 371, 373, 493 S.E.2d 428, 430 (1997) ("The 12(b)(6) motion was made on the basis that plaintiff did not have standing . . . .").

Although North Carolina courts are not bound by the "case or controversy" requirement of the United States Constitution with respect to the jurisdiction of federal courts, similar "standing" requirements apply "to refer generally to a party's right to have a court decide the merits of a dispute." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002), *disc. rev. denied*, 356 N.C. 675, 577 S.E.2d 628 (2003). In *Neuse River*, this Court defined "[t]he 'irreducible constitutional minimum' of standing" as:

> (1) "injury in fact"—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 364 (1992)). Parties without standing to bring a claim, cannot invoke the subject matter jurisdiction of the North Carolina courts to hear their claims. *Estate of Apple v. Commercial Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16, *disc. rev. denied*, 359 N.C. 632, 613 S.E.2d 688 (2005). In most cases, the issue of standing depends on whether the party has suffered an "injury in fact." *Neuse River*, 155 N.C. App. at 114, 574 S.E.2d at 52. *See also*, *Dunn v. Pate*, 334 N.C. 115, 119-20, 431 S.E.2d 178, 180-81 (1993); *Strates Shows, Inc. v. Amusements of America, Inc.*, 184 N.C. App. 455, 460, 646 S.E.2d 418, 423 (2007); *Coker v. DaimlerChrysler Corp.*,

172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005), *aff'd*, 360 N.C. 398, 627 S.E.2d 461 (2006) (*per curiam*).

Paragraph twenty-five of plaintiffs' complaint alleges that the subject resolution was passed on or about 7 July 1992. Paragraph twenty-eight alleges that plaintiffs purchased the subject property on 15 February 1999, and that the deed book indicated the property was situated in both Iredell and Rowan counties. Notwithstanding plaintiffs' allegation that they were not informed of the change in the county line until 2004, the complaint alleges facts which would put plaintiffs on notice that the property was located in both Iredell and Rowan counties. During their ownership, there has been no change to the status of their property. Any change was made long before plaintiffs purchased the subject property. Therefore, plaintiffs suffered no injury in fact due to the resolution between defendants fixing the county line.

Having suffered no injury in fact, plaintiffs lack standing to invoke the subject matter jurisdiction of our State courts. Plaintiffs stated at oral argument that their complaint sought class certification and that their claims were dismissed prior to certification of the class. If permitted to proceed, they argued that there would be many plaintiffs who owned property when the resolution was passed and any standing issue would be cured. This argument presumes that the class in fact could be certified.

Rule 23 of the North Carolina Rules of Civil Procedure governs class actions. It states in pertinent part: "If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued. . . ." N.C. Gen. Stat. § 1A-1, Rule 23(a) (2005). "The purpose of this requirement is to assure the adequacy of the representation afforded the class. As is obvious from the wording of the statute, one who is not a member of the represented class may not bring a class action representing that class." *Carnahan v. Reed*, 53 N.C. App. 589, 591, 281 S.E.2d 408, 410 (1981).

In *Peverall v. County of Alamance*, 184 N.C. App. 88, 645 S.E.2d 416 (2007), a retired county employee sought class certification for all those employees who were, or would be, denied retirement benefits due to a retroactive change in the county's retirement policy. The trial court found that there were only seven former employees affected by the policy change. Further, the named plaintiff and the other six former employees were denied benefits under different circumstances.

The named plaintiff initially had been awarded benefits, but subsequently denied benefits because the change was made effective retroactively. The other six former employees had never been awarded benefits. This Court affirmed the trial court's denial of class certification and held that

> plaintiff's claim and the other six employees' claims are disparate in law and fact because their potential claims derive from potentially different insurance plans. The evidence supports the trial court's findings of fact, and the findings further support the court's conclusions that plaintiff failed . . . to establish that common issues of law and fact predominated over individual issues.

Id. at 93, 645 S.E.2d at 421.

In the case *sub judice*, plaintiffs did not own property along the Iredell-Rowan county line in 1992. Therefore, they cannot adequately represent the interests of potential class members who did own property along the county line in 1992 when the line was redrawn.

Because the face of plaintiffs' complaint alleged facts presenting an insurmountable bar to recovery, and plaintiffs were not suitable to represent the proposed class, the dismissal of their claims was proper.

Affirmed.

Judges TYSON and STROUD concur.

CAROLEEN MYERS HAMILTON, EXECUTOR OF THE ESTATE OF RONNIE C. HAMILTON, SR., DECEASED, PLAINTIFF v. THOMASVILLE MEDICAL ASSOCIATES, INC. AND OSCAR M. BLACKWELL, M.D., DEFENDANTS

No. COA07-583

(Filed 18 December 2007)

1. Evidence— motion in limine—subject to modification during trial

The trial court did not abuse its discretion in a medical malpractice case by revisiting and considering defendants' motion in limine on 12 February 2007 even though plaintiff contends defendants failed to file and serve upon plaintiff any purported

motion in limine to exclude plaintiff's expert witness testimony on the element of causation between 2 November 2006 and 12 February 2007, because: (1) the court's ruling on a motion in limine is not a final ruling on the admissibility of the evidence in question, but only interlocutory or preliminary in nature; and (2) the trial court's denial of defendants' motion in limine to exclude plaintiff's expert testimony on 3 November 2006 was subject to modification during the course of the trial.

2. Witnesses— qualifications—causation—better position to have opinion on subject than trier of fact

The trial court erred in a medical malpractice case by granting defendants' motion in limine to exclude plaintiff's expert testimony regarding causation based on its determination that the witnesses were not qualified as experts in the area of neurosurgery, and thus also erred by granting defendants' motion for summary judgment on the basis that plaintiff has no competent evidence with regard to causation, because: (1) it is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession as long as the expert witness, based on his expertise, is in a better position to have an opinion on the subject than is the trier of fact; and (2) plaintiff's tendered expert witnesses included an internist and a neurologist, and the witnesses were in a better position than the trier of fact to have an opinion on the subject of whether decedent would have suffered a stroke but for a doctor's failure to read the 29 November 1999 MRI.

Appeal by plaintiff from judgment entered 26 February 2007 by Judge W. Erwin Spainhour in Davidson County Superior Court. Heard in the Court of Appeals 15 November 2007.

Charles Peed and Associates, P.A., by Charles O. Peed, Jr., and J. William Snyder, Jr., for plaintiff-appellant.

Elizabeth Horton, for defendants-appellees.

TYSON, Judge.

Caroleen Myers Hamilton, Executor of the Estate of Ronnie C. Hamilton, Sr. ("executrix"), appeals from an order granting Thomasville Medical Associates, Inc.'s and Dr. Oscar M. Blackwell's ("Dr. Blackwell") (collectively, "defendants") motion for summary judgment. We reverse and remand.

I. Background

On 18 March 2003, Ronnie C. Hamilton, Sr. ("Mr. Hamilton") filed a complaint, which alleged claims of medical malpractice, against defendants and several other parties. Mr. Hamilton alleged he would not have suffered a stroke on 1 December 1999 if defendants and several other parties had taken earlier and different actions concerning his medical treatment. All other parties were dismissed from this action. Mr. Hamilton died 10 January 2006 from pancreatic cancer. Executrix was substituted as plaintiff by consent order filed 13 April 2006.

On 2 October 2006, the trial court heard arguments on defendants': (1) motion *in limine* to exclude plaintiff's experts' testimony and (2) motion for summary judgment on the grounds plaintiff had no competent evidence to support the causation element of the medical malpractice claim. In an order entered 3 November 2006, Judge Larry Ford denied defendants' motion *in limine* and motion for summary judgment. The case was continued until 12 February 2007.

On 1 February 2007, defendants filed a motion *in limine* to "exclude from evidence a DVD purporting to show [Mr. Hamilton] at various family occasions . . . ." On 6 February 2007, defendants filed a notice of hearing on motions *in limine* and an affidavit of Dr. Travis Jackson, a North Carolina neurologist. On 9 February 2007, defendants filed a motion *in limine* to prohibit the introduction or mention of certain evidence by plaintiff, her counsel, or any other witnesses.

In open court on 12 February 2007, plaintiff filed her "response to motion *in limine* of defendants . . . to exclude causation testimony of internist Dr. Michael Williams and neurologist Dr. David Roeltgen and for summary judgment." On 26 February 2007, the trial court filed its final order, which granted: (1) "defendants' motions *in limine* to exclude causation testimony by plaintiff's purported expert witnesses . . . ." and (2) "defendants' motion for summary judgment . . . on the basis that plaintiff has no competent evidence with regard to causation, an essential element of any medical malpractice claim . . . ." The trial court dismissed plaintiff's action. Plaintiff appeals.

II. Issues

Plaintiff argues the trial court erred by: (1) considering and granting defendants' motion *in limine* to exclude plaintiff's experts' testimony and (2) granting defendants' motion for summary judgment.

III. Motion *in Limine*

[1] Plaintiff argues the trial court erred by considering and granting defendants' motion *in limine* because "defendants failed to file and serve upon [] [p]laintiff any purported motion *in limine* to exclude [] [p]laintiff's expert witness testimony on the element of causation between November 2, 2006 and February 12, 2007." We review these issues separately.

A. Consideration of Motion *in Limine*

> A motion *in limine* seeks pretrial determination of the admissibility of evidence proposed to be introduced at trial, and is recognized in both civil and criminal trials. The trial court has wide discretion in making this advance ruling and will not be reversed absent an abuse of discretion. *Moreover, the court's ruling is not a final ruling on the admissibility of the evidence in question, but only interlocutory or preliminary in nature. Therefore, the court's ruling on a motion in limine is subject to modification during the course of the trial.*

Heatherly v. Industrial Health Council, 130 N.C. App. 616, 619, 504 S.E.2d 102, 105 (1998) (emphasis supplied) (internal citations and quotation omitted).

Judge Ford's denial of defendants' motion *in limine* to exclude plaintiff's experts' testimony on 3 November 2006 was "subject to modification during the course of the trial." *Id.* The trial court did not err by revisiting and considering defendants' motion *in limine* on 12 February 2007. This assignment of error is overruled.

B. Granting of Motion *in Limine*

[2] 1. Standard of Review

> It is well-established that trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony. When making such determinations, trial courts are not bound by the rules of evidence. In this capacity, *trial courts are afforded wide latitude of discretion* when making a determination about the admissibility of expert testimony. Given such latitude, it follows that *a trial court's ruling* on the qualifications of an expert or the admissibility of an expert's opinion *will not be reversed on appeal absent a showing of abuse of discretion.*

Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (emphasis supplied) (internal citations and quotation omitted). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985) (citation omitted).

2. Analysis

In *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995), our Supreme Court:

> set forth a three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?

Howerton, 358 N.C. at 458, 597 S.E.2d at 686 (internal citations omitted).

Here, the trial court found plaintiff's experts were not qualified as experts in the area of neurosurgery and ruled plaintiff could not forecast evidence of causation. We evaluate this ruling under the second factor of the *Goode* test. 341 N.C. at 529, 461 S.E.2d at 640.

As our Supreme Court explained in *Howerton*:

> [i]n the second step of analysis under *Goode*, the trial court must determine whether the witness is qualified as an expert in the subject area about which that individual intends to testify. 341 N.C. at 529, 461 S.E.2d at 640. Under the North Carolina Rules of Evidence, a witness may qualify as an expert by reason of "knowledge, skill, experience, training, or education," where such qualification serves as the basis for the expert's proffered opinion. N.C.G.S. § 8C-1, Rule 702(a). As summarized in *Goode*,
>
> "*It is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession.*" "It is enough that the expert witness 'because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.' "
>
> 341 N.C. at 529, 461 S.E.2d at 640 (citations omitted). "Whether a witness has the requisite skill to qualify as an expert in a given area is chiefly a question of fact, the determination of which is

ordinarily within the exclusive province of the trial court." *State v. Goodwin*, 320 N.C. 147, 150, 357 S.E.2d 639, 641 (1987).

358 N.C. at 461-62, 597 S.E.2d at 688 (emphasis supplied).

The record shows plaintiff's tendered expert witnesses included an internist and a neurologist. In an affidavit submitted by defendants, neurologist Dr. Travis Jackson stated:

> 4. As a neurologist, I order and interpret films and scans including MRI and other films and scans of the brain. I regularly order and interpret MRI's of the brain like the one ordered by Dr. Blackwell on November 29, 1999.
>
> 5. However, and even though I read and interpret these films, I am not a surgeon. If the films show what appears to be a stenotic vessel which may be amenable to surgery then I refer to a surgeon because only a surgeon can determine whether it is a stenotic vessel amenable to the surgical procedure known as carotid endarterectomy (assuming the patient is otherwise an appropriate candidate for surgery).

Plaintiff's expert witnesses are in a better position than the trier of fact to have an opinion on the subject of whether Mr. Hamilton would have suffered a stroke but for Dr. Blackwell's failure to read the 29 November 1999 MRI. *Goode*, 341 N.C. at 529, 461 S.E.2d at 640.

The trial court erred by granting defendants' motion *in limine* to exclude plaintiff's experts' testimony regarding causation. Because the trial court erred by granting defendants' motion *in limine*, the trial court also erred by granting defendants' motion for summary judgment on the basis that "plaintiff has no competent evidence with regard to causation, an essential element of any medical malpractice claim . . . ."

IV. Conclusion

The trial court did not err by revisiting defendants' motion *in limine*. The trial court erred by granting defendants' motion *in limine* to exclude plaintiff's experts. *Id.* The trial court also erred by granting defendants' motion for summary judgment. *Id.* The trial court's order granting defendants' motion *in limine* and motion for summary judgment is reversed. This case is remanded for further proceedings not inconsistent with this opinion.

Reversed and Remanded.

Judges JACKSON and STROUD concur.

STATE OF NORTH CAROLINA v. KEVIN McDOW ROBINSON, DEFENDANT

No. COA07-440

(Filed 18 December 2007)

Search and Seizure— motion to suppress evidence—videotape—private search

The trial court did not err in a multiple first-degree statutory sexual offense and multiple first-degree statutory rape case by denying defendant's motion to suppress evidence of a videotape, containing scenes of defendant engaging in sexual activities with at least two girls who appeared to be between ten and fourteen years old, that was given to police by the boyfriend of defendant's daughter who had removed the videotape from a lockbox in defendant's house, because: (1) the police do not exceed the scope of a prior private search when they examine the same materials that were examined by the private searchers, but they examine these materials more thoroughly than did the private parties; (2) the boyfriend's viewing of the videotape did not violate the Fourth Amendment since he was a private party not acting under the authority of the State, and his viewing of the videotape effectively frustrated defendant's expectation of privacy as to its contents; and (3) while the boyfriend stated that he had only viewed portions of the videotape, his viewing "opened the container" for the videotape and the subsequent viewing of the entire videotape was not outside the scope of the boyfriend's initial "search."

Appeal by defendant from an order and judgments dated 9 and 10 January 2007 by Judge Susan Taylor in Davidson County Superior Court. Heard in the Court of Appeals 1 November 2007.

Attorney General Roy Cooper, by Assistant Attorney General Q. Shanté Martin, for the State.

Greene & Wilson, P.A., by Thomas Reston Wilson, for defendant.

BRYANT, Judge.

Kevin McDow Robinson (defendant) appeals from an order dated 10 January 2007, denying his motion to suppress evidence, and subsequent judgments also dated 9 January 2007 and entered pursuant to defendant's plea of no contest to eight counts of first degree statutory sexual offense and three counts of first degree statutory rape. For the reasons stated herein, we affirm the order of the trial court.

Facts and Procedural History

In March of 2006, Michael Young was dating defendant's daughter and living in defendant's home. Defendant kept a lockbox in front of the refrigerator in the home. One evening, while defendant was showering, Mr. Young took defendant's keys, opened the lockbox, and removed a videotape from the lockbox. Mr. Young then took the videotape to his room and watched portions of the tape. The videotape contained scenes of defendant engaging in sexual activities with at least two girls who appeared to be between ten and fourteen years old. Mr. Young contacted Crimestoppers concerning the tape and was told someone from the Davidson County Sheriff's Department would call him back.

Detective Wanda Thompson of the Davidson County Sheriff's Department subsequently called Mr. Young and arranged to meet with him away from defendant's home to retrieve the videotape. Mr. Young informed Detective Thompson as to what he had observed on the videotape and gave the videotape to her when they met at "Pebble Beach." Detective Thompson viewed the entire videotape at the nearby Denton Police Department and confirmed Mr. Young's observations. Detective Thompson identified the two girls on the videotape and confirmed that at one point in time they had lived near defendant and been friends with his daughter. Detective Thompson then obtained and executed a search warrant for defendant's home for any additional child pornography or related materials.

On 8 May 2006, defendant was indicted on eight counts of first degree statutory sexual offense and three counts of first degree statutory rape. On 5 January 2006, defendant filed a motion to suppress evidence, arguing the videotape had been searched and seized by the State in violation of Articles IV and V of the Amendments of the United States Constitution, and Sections 19 and 23 of Article I of the North Carolina Constitution. Prior to trial, a suppression hearing was held on 9 January 2007. At the conclusion of the suppression hearing,

the trial court made findings of fact and conclusions of law in open court denying defendant's motion to suppress the videotape as evidence. Defendant objected to the trial court's findings of fact and conclusions of law, and took exception to the ruling. The trial court subsequently entered a written order denying defendant's motion to suppress dated 10 January 2007.

On 9 January 2007, at the conclusion of the suppression hearing, defendant entered a plea of "no contest" to all counts set forth in the indictments. In the Plea Transcript, defendant specifically preserved appellate review of the findings of fact and conclusions of law pertaining to the trial court's motion to suppress. The trial court then entered judgments sentencing defendant to eleven consecutive sentences of 384 to 470 months imprisonment with the North Carolina Department of Correction. Defendant appeals.

Defendant's sole issue on appeal is whether the trial court erred in denying his motion to suppress the videotape evidence. Defendant contends Detective Thompson's viewing of the entire videotape exceeded the scope of Mr. Young's viewing in violation of the Fourth Amendment. We disagree.

"The scope of review of the denial of a motion to suppress is 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.' " *State v. Bone*, 354 N.C. 1, 7, 550 S.E.2d 482, 486 (2001) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)), *cert. denied*, 535 U.S. 940, 152 L. Ed. 2d 231 (2002). Where a defendant has not assigned error to any of the trial court's findings of fact, those findings are conclusive and binding on appeal. *State v. Jacobs*, 162 N.C. App. 251, 254, 590 S.E.2d 437, 440 (2004). "The trial court's conclusions of law, however, are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

The Fourth Amendment provides, in pertinent part, that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. Const. amend. IV. Searches in violation of the Fourth Amendment "occur[] when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113, 80 L. Ed. 2d 85, 94 (1984). Further, the

Supreme Court of the United States has construed the protection guaranteed by the Fourth Amendment "as proscribing only governmental action; it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.' " *Id.* (quoting *Walter v. United States*, 447 U.S. 649, 662, 65 L. Ed. 2d 410, 421 (1980) (Blackmun, J., dissenting)). When the State conducts a search in response to information obtained by a search by a private party and communicated to the State, "the legality of the governmental search must be tested by the scope of the antecedent private search." *Id.* at 116, 80 L. Ed. 2d at 96.

> The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated. In such a case the authorities have not relied on what is in effect a private search, and therefore presumptively violate the Fourth Amendment if they act without a warrant.

Id. at 117-18, 80 L. Ed. 2d at 96-97.

While there appears to be no settled case law in North Carolina directly on point regarding the scope of a search involving the viewing of a videotape, we agree with the positions of the Fifth and Eleventh Circuits of the United States Court of Appeals, that "the police do not exceed the scope of a prior private search when they examine the same materials that were examined by the private searchers, but they examine these materials more thoroughly than did the private parties." *United States v. Runyan*, 275 F.3d 449, 464 (5th Cir. 2001) (finding no constitutional violation where the police viewed more images stored on a computer disc than did the private searcher); *United States v. Simpson*, 904 F.2d 607, 610 (11th Cir. 1990) (holding the search of a box and viewing of videotapes by federal law enforcement agents "did not exceed the scope of the prior private searches for Fourth Amendment purposes simply because they took more time and were more thorough than the Federal Express agents"). Here, Mr. Young's viewing of the videotape did not violate the Fourth Amendment because he was a private party not acting under the authority of the State. Mr. Young's viewing of the videotape effectively frustrated defendant's expectation of privacy as to the contents of the videotape, and thus the subsequent viewing of the videotape by Detective Thompson did not violate defendant's rights under the Fourth Amendment. While Mr. Young stated

that he had only viewed "portions" of the videotape, his viewing "opened the container" of the videotape and the subsequent viewing of the entire videotape was not outside the scope of Mr. Young's initial "search." *Runyan*, 275 F.3d at 465. Defendant's assignments of error are overruled.

Affirmed.

Judges McGEE and HUNTER concur.

CHAD TYLER EDMUNDSON, BY AND THROUGH HIS GUARDIAN AD LITEM, THOMAS J. FARRIS, DARRYL G. SMITH, AND BOBBY G. ABRAMS, PLAINTIFFS v. LEESA GREER LAWRENCE, M.D., AND EASTERN CAROLINA PEDIATRICS, P.A., DEFENDANTS

No. COA07-694

(Filed 18 December 2007)

Jury— selection—challenge for cause denied—no abuse of discretion

The trial court did not abuse its discretion by denying plaintiff's challenge for cause, as well as other related motions, to a potential juror in a medical malpractice action where the challenged juror had three minor children who were patients of defendant's practice.

Appeal by plaintiffs from judgment entered 7 February 2007 by Judge Thomas D. Haigwood in Wilson County Superior Court. Heard in the Court of Appeals 29 November 2007.

Keel O'Malley Tunstall, L.L.P., by Jimmie R. Keel and Susan M. O'Malley, for plaintiffs-appellants.

Jerry A. Allen, Jr., and O. Drew Grice, Jr., for defendants-appellees.

TYSON, Judge.

Chad Edmunson ("plaintiff"), through his Guardian *ad litem*, appeals the trial court's orders entered denying his: (1) challenge for cause; (2) motion for change of venue; (3) motion for a mistrial;

and (4) motion to set aside the verdict. We hold there is no error in these orders.

I. Background

On 12 December 2002, plaintiff commenced a medical malpractice suit against Dr. Leesa Lawrence ("defendant"). The only background facts needed to understand the issues on appeal occurred during the selection of the jury. The *voir dire* of the potential and empaneled jurors was not recorded. Plaintiff's counsel exhausted his peremptory challenges and subsequently made a challenge for cause to juror one, Mr. Martin. The trial court denied plaintiff's challenge for cause.

The only information contained in the record on appeal concerning Mr. Martin, is a portion of the recorded transcript narrating the exchange between the trial court and plaintiff's counsel:

> The Court: The Court inquired of [defendant's counsel] as to his position. He indicated to the Court that he objected to the plaintiff's challenge for cause. The Court having paid close attention to the answers of Mr. Martin during the course of his examination by [plaintiff's counsel] and by the Court respectfully denied the challenge for cause. [Plaintiff's counsel] is there anything you'd like to put on the record to your challenge for cause?
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> [Plaintiff's counsel]: Only this, it was my understanding at the bench, your honor, that [sic] that objection would be preserved as such, since I had used all of my peremptory challenges including those extra ones that had been given by the consent of the parties and agreement of the court. And that we were just unable to find a jury in this case, despite the court's assistance, that did not have children that were seen by Dr. Lawrence's practice.
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> . . . .
>
> The Court: All right. Thank you. I think the record should clearly reflect in response to the Court's questions and questions by [plaintiff's counsel] that the juror indicated that he had no—himself had no direct contact with the practice of the defendant, individual defendant. And that he further stated that even though his wife was the one who took the children to the practice that he had no direct knowledge of what happened when she took him. And that that [sic] would not play any part in how he decided the case. That is the treatment by the practice of his children and any

physicians who testified—who were members of the practice who testified he would be able to fairly, scrutinize their testimony just like he would anyone else, any other physician who had not—who was not a member of the practice and who had not treated his children.

Subsequently, plaintiff's counsel moved for a change of venue and a mistrial based on the denial of his challenge for cause to Mr. Martin being seated as a juror. The trial court denied both motions and the matter proceeded to trial. The jury returned a verdict finding plaintiff was not injured by defendant's negligence. On 7 February 2007, the trial court entered judgment in accordance with the verdict. Plaintiff appeals.

II. Issues

Plaintiff argues the trial court erred by denying his: (1) challenge for cause; (2) motion to change venue; (3) motion for a mistrial; and (4) motion to set aside the verdict.

III. Standard of Review

The standard of review for each of plaintiff's assignments of error is abuse of discretion. *See State v. Locklear*, 331 N.C. 239, 248, 415 S.E.2d 726, 732 (1992) (The standard of review for a denial of a challenge for cause is abuse of discretion); *Farmers Cooperative Exchange, Inc. v. Trull*, 255 N.C. 202, 204, 120 S.E.2d 438, 439 (1961) ("[Q]uestion[s] of venue . . . [rest] within the sound discretion of the trial judge, and [are] not subject to review except for manifest abuse of such discretion."); *State v. Hinton*, 155 N.C. App. 561, 564, 573 S.E.2d 609, 612 (2002) ("The trial court's ruling on a motion for mistrial generally lies within the sound discretion of the trial court and will be reversed only upon a showing of a manifest abuse of discretion."); *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (stating that an appellate court's review of a trial court's ruling granting or denying a motion to set aside the verdict is limited to an abuse of discretion standard). A trial court may be reversed for abuse of discretion only upon a showing that its actions are "manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980).

IV. Challenge for Cause

Our review of the trial court's ruling is limited to that portion of the transcript contained in the record on appeal. Plaintiff argues the

trial court abused its discretion by denying his challenge for cause when Mr. Martin had three minor children who were patients of defendant's practice. We disagree.

Our Supreme Court has held, "mere acquaintance with witnesses alone [is] not a sufficient basis for a challenge for cause." *State v. Hartman*, 344 N.C. 445, 460, 476 S.E.2d 328, 336 (1996) (citing *State v. Benson*, 323 N.C. 318, 324, 372 S.E.2d 517, 520 (1988)), *cert. denied*, 520 U.S. 1201, 137 L. Ed. 2d 708 (1997). The issue is whether the challenged juror could remain fair and impartial. *Hartman*, 344 N.C. at 461, 476 S.E.2d at 337.

Here, the trial court found: (1) Mr. Martin had no direct contact with defendant's practice; (2) Mr. Martin's wife took their children to defendant's practice; (3) Mr. Martin had no direct knowledge of what happened at defendant's practice; (4) this information would play no part in Mr. Martin's decision regarding this case; and (5) Mr. Martin would be able to fairly, scrutinize testimony from physicians, who were members of defendant's practice.

"If the record supports the trial court's decision that the juror could follow the law, then the trial court's ruling should be upheld on appeal." *State v. Cummings*, 361 N.C. 438, 449, 648 S.E.2d 788, 795 (2007). Based upon our review of the limited transcript presented to this Court, we hold that plaintiff failed to show the trial court abused its discretion in denying plaintiff's challenge for cause. This assignment of error is overruled.

V. Plaintiff's Other Motions

Plaintiff argues the trial court erred by denying plaintiff's motion for change of venue, motion for a mistrial, and motion to set aside verdict on the grounds that "plaintiff's counsel was unable to find twelve jurors that did not have children that were seen by [defendant's] practice." Based upon the analysis above and our holding, we conclude the trial court did not abuse its discretion in denying plaintiff's motions. These assignments of error are overruled.

VI. Conclusion

The trial court found that the juror challenged by plaintiff for cause could be fair and impartial in his decision regarding this case. Plaintiff has failed to show the trial court abused its discretion by denying defendant's challenge for cause.

Plaintiff's other assignments of error were based on the same theory: the denial of plaintiffs' challenge for cause to Mr. Martin being

seated as a juror. The trial court properly denied plaintiff's motion for change of venue, motion for a mistrial, and motion to set aside the verdict. We hold there is no error in the verdict or the judgment entered thereon.

No error.

Judges JACKSON and ARROWOOD concur.

IN RE: C.B., JUVENILE

No. COA06-1546

(Filed 18 December 2007)

1. Assault— victim struck from the side—juvenile as perpetrator—sufficiency of evidence

The trial court did not err by denying a juvenile's motion to dismiss for insufficient evidence a petition for misdemeanor assault inflicting serious injury. Although the juvenile argued that two other people were within striking distance of the victim and that the State did not offer testimony to conclusively establish that the juvenile struck the victim, the juvenile had attempted to engage the victim in "play fighting, " the victim rebuffed the juvenile and shoved him, the juvenile was close to the victim when the victim was struck, and the juvenile and not the others taunted the victim when he regained consciousness.

2. Juveniles— adjudication of delinquency—standard of proof not clear

An adjudication of delinquency was remanded where the trial court stated both the correct and the incorrect standard of proof in the order.

Appeal by juvenile from order entered 10 May 2006 by Judge Herbert L. Richardson in Robeson County District Court. Heard in the Court of Appeals 6 June 2007.

Brian Michael Aus, for juvenile-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Nancy R. Dunn, for the State.

CALABRIA, Judge.

C.B. ("the juvenile") appeals from an order of the trial court adjudicating him delinquent for misdemeanor assault inflicting serious injury ("AISI") and placing him on supervised probation. We remand.

On 2 December 2005, the juvenile's cousin, Brandon West, ("Brandon") visited the juvenile's home. When Brandon arrived at the juvenile's home, he went inside the house to visit with the juvenile's mother while his friends, who had accompanied him, remained outside in the vehicle. Brandon decided to invite his friends to join him. When he went outside to get his friends, the juvenile, the juvenile's brother, and another young man were also there. The juvenile started "play fighting" with Brandon. Although Brandon asked the juvenile to stop, the juvenile persisted. Brandon again asked him to stop and pushed the juvenile. Brandon then faced his friends and turned his back to the juvenile. Within seconds of turning away from the juvenile, Brandon received a blow to his face and was rendered unconscious. When Brandon regained consciousness, the juvenile was standing on the porch "talking trash." As a result of the incident, Brandon sought and received medical attention for a lost tooth and a fractured jaw which required the insertion of a metal plate.

On 10 May 2006, Robeson County District Court Judge Herbert L. Richardson ("Judge Richardson") adjudicated the juvenile delinquent for AISI and the offense of injury to personal property. The juvenile admitted responsibility for the injury to personal property but not the AISI. Judge Richardson placed the juvenile on supervised probation for twelve months. The juvenile only appeals the order adjudicating him delinquent for AISI.

[1] The juvenile argues the trial court erred by denying his motion to dismiss the petition for AISI on the grounds that there was insufficient evidence that he was the perpetrator of the offense. We disagree.

A motion to dismiss a juvenile petition "is recognized by North Carolina statutory and case law." *In re J.A.*, 103 N.C. App. 720, 723, 407 S.E.2d 873, 875 (1991). "[I]n order to withstand a motion to dismiss the charges contained in a juvenile petition, there must be substantial evidence of each of the material elements of the offense charged." *In re Bass*, 77 N.C. App. 110, 115, 334 S.E.2d 779, 782 (1985). "The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference of

fact which may be drawn from the evidence." *In re J.A.*, 103 N.C. App. at 724, 407 S.E.2d at 875.

The elements of assault inflicting serious injury pursuant to N.C. Gen. Stat. § 14-33(c)(1) (2005) "requires proof of two elements: (1) the commission of an assault on another, which (2) inflicts serious bodily injury." *State v. Hannah*, 149 N.C. App. 713, 717, 563 S.E.2d 1, 4 (2002). "Our courts have defined 'serious injury' as injury which is serious but falls short of causing death . . . ." *State v. Carpenter*, 155 N.C. App. 35, 42, 573 S.E.2d 668, 673 (2002) (internal quotation omitted).

Brandon testified that when the juvenile attempted to "play fight" with him, that he told the juvenile he did not want to participate. Brandon also testified that the juvenile persisted and Brandon responded by shoving the juvenile and reiterating that he did not want to fight. After Brandon shoved the juvenile, he turned towards his friends and, within seconds, he was struck from the side. The juvenile argues that because the State did not offer testimony that conclusively established that the juvenile struck Brandon, that the petition should have been dismissed. However, the evidence viewed in the light most favorable to the State allows the reasonable inference that the juvenile struck Brandon. Although two other individuals were within striking distance of Brandon, the juvenile had attempted to engage Brandon in "play fighting" and was quickly rebuffed by Brandon. Further, Brandon shoved the juvenile in an attempt to relay to the juvenile his feelings about "play fighting." When Brandon received the blow to his jaw, the juvenile was in close proximity and had just been shoved by Brandon. After Brandon regained consciousness, it was the juvenile, not the others, who stood on the front porch taunting Brandon. Viewing the evidence in the light most favorable to the State, there was substantial evidence that the juvenile was the perpetrator of the assault.

[2] The juvenile next argues the trial court erred by adjudicating the juvenile delinquent because the correct quantum of proof was not applied. We agree.

Pursuant to N.C. Gen. Stat. § 7B-2409 (2005), the allegations of a juvenile petition alleging the juvenile as delinquent must be proven beyond a reasonable doubt. The trial court is required to affirmatively state if it finds that the allegations in the petition have been proven beyond a reasonable doubt. N.C. Gen. Stat. § 7B-2411 (2005). "[F]ailure to state the standard of proof used in making the determinations

of delinquency constitutes reversible error[.]" *In re Walker*, 83 N.C. App. 46, 47, 348 S.E.2d 823, 824 (1986). We also note:

> [t]he 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.

In re A.C.F., 176 N.C. App. 520, 522-23, 626 S.E.2d 729, 732 (2006) (quoting *In re Banks*, 295 N.C. 236, 239-40, 244 S.E.2d 386, 388-89 (1978)).

At the close of the adjudication hearing, the trial court stated as follows: "I'm satisfied that your client is the one fellow who assaulted this fella." In its findings, the trial court stated the correct burden of proof from the standard printed language on the Juvenile Adjudication Order as follows: "The following facts have been proven beyond a reasonable doubt." However, in the portion of the order that referenced the AISI, the court stated a different burden of proof:

> That on or about December 2, 2005 the juvenile did unlawfully and willfully commit assault inflicting serious injury against Brandon West, being an offense in violation of G.S. 14-33(c)(1), and finds this by *clear, cogent and convincing evidence.*

Although the trial court's order indicated the correct burden of proof at the beginning of the written order, by including an incorrect quantum of proof at the end, the juvenile argues the correct quantum of proof was not applied. The State argues the trial court affirmatively stated that the allegations were proven beyond a reasonable doubt because the trial court checked the box adjacent to paragraph 3 which states "the following facts have been proven beyond a reasonable doubt."

This Court addressed a similar issue in *In re B.E.*, 186 N.C. App. 656, —— S.E.2d —— (2007). In the adjudication order, the trial court, in its finding of fact, stated "the juvenile . . . did unlawfully and willfully commit indecent liberties . . . being an offense in violation of G.S. 14-202.2, by *clear, cogent & convincing evidence.*" *Id.*, 186 N.C. App. at 659, —— S.E.2d at ——. In concluding "the adjudication order contains an ambiguity which this Court cannot resolve," the Court held, "[t]he trial court must unequivocally state the standard of proof

in its order pursuant to N.C. Gen. Stat. § 7B-2411 (2005)." *Id.*, 186 N.C. App. at 661, —— S.E.2d at ——.

In the case *sub judice*, the trial court did not unequivocally state the standard of proof in its order. Thus, "the adjudication order contains an ambiguity which this Court cannot resolve," and therefore we conclude the trial court erred. However, "[b]ecause the trial court has already made its determinations as to the credibility of the witnesses and has weighed the evidence, we do not require a new hearing. Rather, we remand to the trial court for clarification of the standard of proof used in the adjudication order." *In re B.E.*, 186 N.C. App. at 661-62 , —— S.E.2d at ——. Since we are remanding for clarification of the standard of proof, we need not reach the restitution issue.

Remanded.

Judges GEER and JACKSON concur.

IN RE: C.M.H., B.N.H., S.W.A.

No. COA07-851

(Filed 18 December 2007)

Termination of Parental Rights— failure to verify petition— lack of subject matter jurisdiction

The trial court lacked subject matter jurisdiction to terminate respondents' parental rights where the petition to terminate parental rights was unverified.

Appeal by respondent-father and respondent-mother from order entered 27 April 2007 by Judge Resson O. Faircloth in District Court, Harnett County. Heard in the Court of Appeals 15 November 2007.

E. Marshall Woodall and Duncan B. McCormick for Harnett County Department of Social Services.

Elizabeth Myrick Boone for guardian ad litem.

Lisa Skinner Lefler for respondent-appellant-father.

Sofie W. Hosford for respondent-appellant-mother.

STROUD, Judge.

Respondent-father and respondent-mother ("respondents") appeal the 27 April 2007 order of the trial court terminating their parental rights. Respondents raised several issues, one of which was the failure of the petitioner to attach a copy of the order granting custody of the three minor children to the Harnett County Department of Social Services ("DSS") to the motion to terminate parental rights, as required by North Carolina General Statute § 7B-1104(5). *See* N.C. Gen. Stat. § 7B-1104(5) (2005). In response, petitioner filed an amendment to the record with this Court. The amendment was an affidavit by the Deputy Clerk of Harnett County verifying that "a copy of the Adjudication Order was attached to the Motion to Terminate Parental Rights at the time of filing as shown by the court file." The amendment included a complete copy of the petition and attached order as filed with the trial court. Although this issue was not raised in either respondent's brief, we note that the 21 April 2005 motion to terminate parental rights was not verified.

A petition or motion to terminate parental rights is governed by North Carolina General Statute § 7B-1104 which provides that "[t]he petition, or motion pursuant to G.S. 7B-1102, *shall be verified* by the petitioner or movant . . . ." N.C. Gen. Stat. § 7B-1104 (2005) (emphasis added). "[A] violation of the verification requirement of N.C.G.S. § 7B-1104 has been held to be a jurisdictional defect *per se*." *In re T.M.H.*, No. COA07-609, 2007 WL 2989562, *2 (N.C. App. Oct. 16, 2007) (citing *In re Triscari Children*, 109 N.C. App. 285, 287-88, 426 S.E.2d 435, 436 (1993); *In re T.R.P.*, 360 N.C. 588, 593-94, 636 S.E.2d 787, 792 (2006)). "[A] question of jurisdiction . . . may be addressed by this Court at any time, *sua sponte*, regardless of whether [parties] properly preserved it for appellate review." *Guthrie v. Conroy*, 152 N.C. App. 15, 17, 567 S.E.2d 403, 406 (2002).

In *In Re Triscari Children*, the father appealed the trial court's orders which terminated his parental rights. 109 N.C. App. 285, 286, 426 S.E.2d 435, 436 (1993). This Court vacated the orders finding a lack of subject matter jurisdiction because the petitions to terminate parental rights were not verified. *Id.* at 286-89, 426 S.E.2d at 436-38. The Juvenile Code has been recodified since *In Re Triscari Children*, but the North Carolina Supreme Court has determined, subsequent to the recodification, that verification of petitions is a requirement to invoke subject matter jurisdiction. *In re T.R.P.*, 360 N.C. 588, 636 S.E.2d 787 (2006).

Petitioner's failure to verify the petition to terminate parental rights left the trial court without subject matter jurisdiction. N.C. Gen. Stat. § 7B-1104; *see also In re T.M.H.*, No. COA07-609, 2007 WL 2989562 (N.C. App. Oct. 16, 2007); *In Re Triscari Children* at 286-89, 426 S.E.2d at 436-38. "In the absence of subject matter jurisdiction, the trial court's order is void and should be vacated." *In re D.B.*, No. 06-1426-2, 2007 WL 3254398, *8 (N.C. App. Nov. 6, 2007). Therefore, we vacate the 27 April 2007 order terminating the parental rights of respondents.

VACATED.

Judges TYSON and JACKSON concur.

SANDY MUSH PROPERTIES, INC., AND FLORIDA ROCK INDUSTRIES, INC., PLAINTIFFS v. RUTHERFORD COUNTY, BY AND THROUGH THE RUTHERFORD COUNTY BOARD OF COMMISSIONERS, DEFENDANT

No. COA06-68-2

(Filed 18 December 2007)

Zoning— statutory right to use property—consideration in light of *Robbins*

A prior decision that plaintiffs did not obtain a vested statutory right in the use of the subject property was affirmed on remand for consideration of *Robbins v. Town of Hillsborough*, 361 N.C. 193. The issue of a statutorily vested right to use zoned property was not in issue before the Court in that case.

Appeal by Plaintiffs and by Defendant from order entered 7 December 2005 by Judge Forrest Donald Bridges in Superior Court, Rutherford County. Heard in the Court of Appeals 23 August 2006, and opinion filed 2 January 2007. Remanded to this Court by order of the North Carolina Supreme Court for reconsideration in light of *Robins v. Town of Hillsborough*, 361 N.C. 193, 639 S.E.2d 421 (2007).

Kennedy Covington Lobdell & Hickman, L.L.P., by Roy H. Michaux, Jr. and Ann M. Anderson, for Plaintiffs.

Sigmon, Clark, Mackie, Hutton, Hanvey, & Ferrell, P.A., by Warren A. Hutton, Forrest A. Ferrell and Stephen L. Palmer; and Nanney, Dalton & Miller, L.L.P., by Walter H. Dalton and Elizabeth Thomas Miller, for Defendant.

McGEE, Judge.

In *Sandy Mush Props., Inc. v. Rutherford Cty.*, 181 N.C. App. 224, 638 S.E.2d 557 (2007), our Court held, *inter alia*, that pursuant to N.C. Gen. Stat. § 153A-344(b) (2003), Plaintiffs did not obtain a statutory vested right to use the subject property as a quarry by virtue of the issuance of a building permit for an office building. *Sandy Mush*, 181 N.C. App. at 232-36, 638 S.E.2d at 562-64. Our Supreme Court allowed Plaintiffs' petition for discretionary review "for the limited purpose of remanding this case to the Court of Appeals for reconsideration of its decision in light of *Robins v. Town of Hillsborough*, 361 N.C. 193, 639 S.E.2d 421 (2007)." *Sandy Mush Props., Inc. v. Rutherford Cty.*, 361 N.C. 569, 651 S.E.2d 566 (2007). Upon remand, our Court ordered the parties to submit supplemental briefs and the matter is now before our Court for reconsideration as ordered by our Supreme Court.

In *Robins*, our Supreme Court held that "when the applicable rules and ordinances are not followed by a town board, the applicant is entitled to have his application reviewed under the ordinances and procedural rules in effect as of the time he filed his application." *Robins*, 361 N.C. at 199, 639 S.E.2d at 425.

In the present case, Plaintiffs argue that the rationale of *Robins* "supports a determination that Plaintiffs had a vested right to develop the property upon fulfilling all permitting requirements applicable under State law." We disagree.

The Supreme Court specifically limited its holding in *Robins*, as follows:

> Although the parties have presented arguments as to whether [the] plaintiff may assert a vested right, either by operation of statute or common law principles, these arguments are inapposite because our vested rights decisions have considered whether a plaintiff has a right to complete his project despite changes in the applicable zoning ordinances, *see, e.g.*, *Finch v.*

City of Durham, 325 N.C. 352, 373, 384 S.E.2d 8, 20 (1989), an issue distinct from the one before us today.

Robins, 361 N.C. at 197, 639 S.E.2d at 423. Because the Supreme Court in *Robins* determined that the issue of a statutory vested right was not an issue before the Court, *Robins* is thus not a statutory vested rights case, and we hold that the decision in *Robins* has no effect on the present case. Therefore, we affirm our prior decision in full.

Affirmed.

Judges BRYANT and ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 18 DECEMBER 2007

ANDERSON v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 07-463	Wake (06CVS4395)	Remanded
BLEVINS v. TOWN OF W. JEFFERSON No. 06-930-2	Ashe (05CVS515)	Affirmed
BRITT v. DURDEN HOME IMPROVEMENT PTR No. 06-1343	Ind. Comm. (I.C. 370481) (& PH-1028)	Affirmed
D.W. FLOWE & SON, INC. v. CDC, LLC No. 07-193	Cabarrus (06CVS2598)	Dismissed
EARLS v. STARR DAVIS CO. No. 07-223	Ind. Comm. (I.C. 014130)	Affirmed
HAWKS v. ARSTARK & CO. No. 07-678	Cabarrus (06CVS10)	Affirmed
IN RE A.W.T., L.O.L. No. 07-926	Catawba (05JT48-49)	Affirmed
IN RE B.M. No. 07-919	Lee (05J24)	Vacated
IN RE D.B., Jr. No. 07-928	Harnett (07J65)	Affirmed
IN RE I.D.S., III No. 07-901	Wilkes (03JA160)	Affirmed
IN RE I.S.E.G., T.I.D., A.R.D. No. 07-917	Dare (06J77)	Affirmed
IN RE J.C., K.B., S.B., L.B. No. 07-744	Wake (05JT555)	Affirmed
IN RE J.L., J.L., J.L. No. 07-701	Mecklenburg (06JA1270-72)	Affirmed
IN RE J.T.E. No. 07-827	Harnett (05J108)	Affirmed
IN RE M.K.M., C.R.M., S.S.M. No. 07-803	Caldwell (00JA27) (01JA17) (02JA1)	Affirmed

IN RE N.S.P., J.M.P. No. 07-891	Cumberland (03JT496-97)	Affirmed
IN RE R.D.Q. No. 07-883	Stanly (03JA61)	Reversed and remanded
IN RE S.D.H. & D.R.H. No. 06-1325	Cumberland (03JT754) (04JT23)	Affirmed
IN RE S.S.S. & S.L.S. No. 07-751	Cleveland (06JA76-77)	Affirmed
IN RE W.G. & E.G. No. 07-921	Alexander (06J28-30)	Affirmed
McDOWELL v. TATUM No. 06-1212	Avery (05CVS344)	Reversed
ROGERS v. LIFE PARTNERS, INC. No. 07-700	Scotland (06CVS651)	Affirmed
SHAREHEART DEV. CORP. v. PAMLICO CTY. No. 07-704	Pamlico (06CVS203)	Dismissed
STATE v. BUCK No. 07-169	Carteret (04CRS1099)	No error
STATE v. CANNADY No. 07-274	Johnston (06CRS55119) (06CRS8038)	No error
STATE v. HOUSTON No. 07-126	Catawba (04CRS15348)	No error
STATE v. KIDD No. 07-686	Randolph (04CRS53989-90)	No error
STATE v. LONG No. 03-1712-2	Ashe (02CRS50661)	No error
STATE v. McCORKLE No. 07-325	Lincoln (05CRS53601) (06CRS2404)	No error
STATE v. POTEAT No. 07-511	Rowan (00CRS13545-47) (00CRS13549)	No error
STATE v. REYES No. 07-693	Montgomery (05CRS51284)	Affirmed
STATE v. SMITH No. 07-458	Vance (05CRS51483) (05CRS51486-88)	No error

STATE v. THOMAS No. 07-709	Forsyth (06CRS53957) (06CRS43083) (06CRS53895)	No error
STATE v. TROGDON No. 07-509	Randolph (03CRS55321)	No error
WITHERS v. SONOCO PRODS. No. 07-150	Ind. Comm. (I.C. 343397)	Affirmed

APPENDIX

ORDER ADOPTING AMENDMENTS
TO THE NORTH CAROLINA RULES
OF APPELLATE PROCEDURE

Order Adopting Amendments to the North Carolina Rules of Appellate Procedure

Rule 3A of the North Carolina Rules of Appellate Procedure is hereby amended as described below:

Rule 3A. APPEAL IN QUALIFYING JUVENILE CASES—HOW AND WHEN TAKEN, SPECIAL RULES

(a) ***Filing the Notice of Appeal.*** Any party entitled by law to appeal from a trial court judgment or order rendered in a case involving termination of parental rights and issues of juvenile dependency or juvenile abuse and/or neglect, appealable pursuant to G.S. 7B-1001, may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in the time and manner set out in Chapter 7B of the general Statutes of North Carolina. Trial counsel or an appellant not represented by counsel shall be responsible for filing and serving the notice of appeal in the time and manner required. If the appellant is represented by counsel, both the trial counsel and appellant must sign the notice of appeal, and the appellant shall cooperate with counsel throughout the appeal. All such appeals shall comply with the special provisions set out in subsection (b) of this rule and, except as hereinafter provided by this rule, all other existing Rules of Appellate Procedure shall remain applicable.

(b) ***Special Provisions.*** For appeals filed pursuant to this Rule and for extraordinary writs filed in cases to which these provisions apply, the name of the juvenile who is the subject of the action, and of any siblings or other household members under the age of eighteen, shall be referenced only by the use of initials in all filings, documents, exhibits, or arguments submitted to the appellate court with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). In addition, the juvenile's address, social security number, and date of birth shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to subdivision (b)(l) below or Rule 9(c).

In addition, appeals filed pursuant to these provisions shall adhere strictly to the expedited procedures set forth below:

(1) *Transcripts.* Within one business day after the notice of appeal has been filed, the clerk of superior court shall notify the court reporting coordinator of the Administrative Office of the Courts of the date the notice of appeal was filed and the names

of the parties to the appeal and their respective addresses or addresses of their counsel. Within two business days of receipt of such notification, the court reporting coordinator shall assign a transcriptionist to the case. ~~Within thirty-five days from the date of the assignment, the transcriptionist shall prepare and deliver a transcript of the designated proceedings to the office of the Clerk of the Court of Appeals and provide copies to the respective parties to the appeal at the addresses provided. Motions for extensions of time to prepare and deliver transcripts are disfavored and will not be allowed by the Court of Appeals absent extraordinary circumstances.~~

Where there is an order establishing the indigency of the appellant, the transcriptionist shall prepare and deliver a transcript of the designated proceedings to the appellant and provide copies to the office of the Clerk of the Court of Appeals and to the respective parties to the appeal at the addresses provided within thirty-five days from the date of assignment.

Where there is no order establishing the indigency of the appellant, the appellant shall have 10 days from the date that the transcriptionist is assigned to make written arrangements with the assigned transcriptionist for the production and delivery of the transcript of the designated proceedings. If such written arrangement is made, the transcriptionist shall prepare and deliver a transcript of the designated proceedings to the appellant and provide copies to the office of the Clerk of the Court of Appeals and to the respective parties to the appeal at the addresses provided within forty-five days from the date of assignment. The non-indigent appellant shall bear the cost of the appellant's copy of the transcript.

Where there is no order establishing the indigency of the appellee, the appellee shall bear the cost of receiving a copy of the requested transcript.

Motions for extensions of time to prepare and deliver transcripts are disfavored and will not be allowed by the Court of Appeals absent extraordinary circumstances.

(2) *Record on Appeal*. Within ten days after receipt of the transcript, the appellant shall prepare and serve upon all other parties a proposed record on appeal constituted in accordance with Rule 9. Trial counsel for the appealing party shall have a duty to assist appellate counsel, if separate counsel is appointed or retained for the appeal, in preparing and serving a proposed record on appeal. Within ten days after service of the proposed

record on appeal upon an appellee, the appellee may serve upon all other parties: (1) a notice of approval of the proposed record; (2) specific objections or amendments to the proposed record on appeal; or (3) a proposed alternative record on appeal.

If the parties agree to a settled record on appeal within twenty days after receipt of the transcript, the appellant shall file three legible copies of the settled record on appeal in the office of the Clerk of the Court of Appeals within five business days from the date the record was settled. If all appellees fail within the times allowed them either to serve notices of approval or to serve objections, amendments, or proposed alternative records on appeal, the appellant's proposed record on appeal shall constitute the settled record on appeal, and the appellant shall file three legible copies thereof in the office of the Clerk of the Court of Appeals within five business days from the last date upon which any appellee could have served such objections, amendments, or proposed alternative record on appeal. If an appellee timely serves amendments, objections, or a proposed alternative record on appeal and the parties cannot agree to the settled record within thirty days after receipt of the transcript, each party shall file three legible copies of the following documents in the office of the Clerk of the Court of Appeals within five business days after the last day upon which the record can be settled by agreement: (1) the appellant shall file his or her proposed record on appeal, and (2) an appellee shall file his or her objections, amendments, or proposed alternative record on appeal.

No counsel who has appeared as trial counsel for any party in the proceeding shall be permitted to withdraw, nor shall such counsel be otherwise relieved of any responsibilities imposed pursuant to this Rule, until the record on appeal has been filed in the office of the Clerk of the Court of Appeals as provided herein.

(3) *Briefs*. Within thirty days after the record on appeal has been filed with the Court of Appeals, the appellant shall file his or her brief in the office of the Clerk of the Court of Appeals and serve copies upon all other parties of record. Within thirty days after the appellant's brief has been served on an appellee, the appellee shall file his or her brief in the office of the Clerk of the Court of Appeals and serve copies upon all other parties of record. Motions for extensions of time to file briefs will not be allowed absent extraordinary circumstances.

(c) ***Calendaring Priority.*** Appeals filed pursuant to this Rule will be given priority over other cases being considered by

the Court of Appeals and will be calendared in accordance with a schedule promulgated by the Chief Judge. Unless otherwise ordered by the Court of Appeals, cases subject to the expedited procedures set forth in this Rule shall be disposed of on the record and briefs and without oral argument.

These Amendments to the North Carolina Rules of Appellate Procedure shall be effective on the 1st day of December, 2008.

Adopted by the Court in Conference this 11th day of June, 2008. These Amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These Amendments shall also be published as quickly as practicable on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

Hudson, J.
For the Court

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TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

defendants' appeal in a medical malpractice case from the denial of their motion to dismiss is typically an appeal from an interlocutory order, the Court of Appeals elected in its discretion to grant defendants' petition for writ of certiorari and to address the merits of the appeal where defendants' notice of appeal was filed less than a week late and the administration of justice would best be served by granting defendants' petition. **Reid v. Cole, 299.**

Appealability—denial of summary judgment—failure to show substantial right—The trial court did not err by granting Rule 54(b) certification of both plaintiff's and defendants' appeals of the granting of partial summary judgment in the 16 May 2006 order, because the trial court properly determined that the claims that have been dismissed and those that remain are factually and legally intertwined such that proceeding to trial could result in verdicts inconsistent with the earlier dismissals. Additionally, the Court of Appeals determined the 30 June 2004 order dismissing several of defendants' claims likewise affects a substantial right and should be addressed on the merits. **Kinesis Adver., Inc. v. Hill, 1.**

Appealability—denial of summary judgment—qualified immunity—An appeal was dismissed as interlocutory where defendants' motion for summary judgment based on statutory immunity was denied. Defendants were not entitled to the qualified immunity offered by the statute, N.C.G.S. § 1222C-210.1, as a matter of law, and the denial of their motion for summary judgment did not deprive them of a substantial right. **Snyder v. Learning Servs. Corp., 480.**

Appealability—discovery order—privilege—substantial right—Although defendant doctor appeals from an interlocutory discovery order of the trial court denying in part his motion for a protective order and granting in part plaintiff executor's motion to compel, defendant has a right to an immediate appeal because: (1) appeals from discovery orders have been held to affect a substantial right when a privilege under N.C.G.S. § 90-21.22 has been asserted; and (2) defendant asserted that the matters to be disclosed were privileged under N.C.G.S. § 90-21.22. **Cunningham v. Cannon Mem'l Hosp., 732.**

Appealability—discovery order—statutory privilege affects substantial right—When a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right and is immediately appealable. **Spangler v. Olchowski, 684.**

Appealability—grant of partial summary judgment—dismissal of remaining claims without prejudice makes a final order—Defendant's motion seeking dismissal of plaintiffs' appeal in a case seeking damages for the contamination of plaintiffs' wells with certain toxic chemicals on the basis that it is from an interlocutory order is denied because plaintiffs voluntarily dismissed without prejudice their remaining claims for property damage against defendants under N.C.G.S. § 1A-1, Rule 41 after the entry of partial summary judgment, thus making the trial court's grant of partial summary judgment a final order. **Curl v. American Multimedia, Inc., 649.**

Appealability—interlocutory order—writ of certiorari—Assuming arguendo that plaintiff's appeal is from an interlocutory order, the Court of Appeals

APPEAL AND ERROR—Continued

record pages in over five pages, and did not state the appropriate standard of review, plaintiff's counsel was admonished pursuant to Appellate Rule 34 (b)(3) to be more diligent. **Meadows v. Iredell Cty., 785.**

Insufficient indictment—invited error not applicable—Due to another Court of Appeals decision on similar facts, a defendant was entitled to relief despite the invited error doctrine where he encouraged the court to submit sexual battery as a lesser included offense and appeals on the insufficiency of the indictment for first-degree rape to support a conviction for sexual battery. **State v. Kelso, 718.**

Mootness—current controversy still remaining—Defendants' motion to dismiss plaintiff's appeal as moot in a medical malpractice case is denied irrespective of whether plaintiff has agreed to produce all records through the date of 15 September 2005, because: (1) plaintiff did not appeal the 22 September 2005 order since plaintiff's reliance on an oral motion for the trial court to reconsider the 22 September 2005 order under N.C.G.S. § 1A-1, Rule 60(b) is misplaced, and plaintiff is bound by the 22 September 2005 order and must produce all medical records including the substance abuse treatment records up until 15 September 2005; and (2) a current controversy still remains concerning defendants' ability to depose decedent's substance abuse treatment providers and whether plaintiff must disclose records relating to substance abuse treatment between 15 September 2005 and 15 January 2006 since defendant Olchowski has not withdrawn his request to depose providers of substance abuse treatment and neither defendant Miranda nor defendant Atlantic Bariatric have withdrawn any discovery requests. **Spangler v. Olchowski, 684.**

Motion to amend record—motion to dismiss based on appellate rules violations—Defendants' first motion to amend the record in order to add the affidavit of a geologist who worked with defendants is granted, and defendants' second motion to dismiss plaintiffs' appeal for violation of the Rules of Appellate Procedure in a case seeking damages for the contamination of plaintiffs' wells with certain toxic chemicals is denied. **Curl v. American Multimedia, Inc., 649.**

Motion to strike portions of motion to dismiss—challenged information related to procedural context—Plaintiff's motion to strike portions of defendants' motion to dismiss in a medical malpractice case is summarily denied because the challenged information contained in defendants' motion to dismiss is related to the procedural context of the case. **Spangler v. Olchowski, 684.**

Notice of appeal—signed by guardian ad litem instead of parents—lack of jurisdiction—Respondent parents' appeal from the termination of their parental rights is dismissed based on an insufficient notice of appeal signed by trial counsel and the guardian ad litem (GAL) for each respondent rather than by the parents. **In re L.B., 326.**

Notice of appeal—timeliness—direct appeal from agency—Rule 18—The Court of Appeals had no jurisdiction over defendant's appeal in a workers' compensation case where the notice of appeal was not timely under Rule 18 of the Rules of Appellate Procedure. This is a direct appeal from an administrative agency rather than a civil case, so that it is governed by Rule 18 rather than Rule 3. **Strezinski v. City of Greensboro, 703.**

CONSTRUCTION CLAIMS—Continued

ment notwithstanding the verdict for defendants. Taking all of the evidence which supports the claim as true, and drawing all reasonable inferences in plaintiff's favor, plaintiff did not exceed the scope of its limited general contractor's license in the construction of defendants' house. **Hodgson Constr., Inc. v. Howard, 408.**

CONTEMPT

Civil—equitable distribution—failure to pay credit cards—The trial court did not err by holding defendant in contempt for failure to comply with the court order in an equitable distribution case as it related to credit cards even though defendant contends the consent order merely required her to assume financial responsibility for the credit card debts because her obligation was to transfer the accounts into her name individually instead of removing plaintiff's name from the accounts. **Watson v. Watson, 55.**

Civil—no entitlement to full protections of criminal contempt—The trial court did not err in a civil contempt case by failing to give defendant due notice of whether the contempt proceeding against her was civil or criminal in nature because: (1) defendant admitted she was adjudicated in civil contempt, and she was not entitled to the full procedural and evidentiary protections of a criminal contempt proceeding; and (2) the Court of Appeals has already rejected the argument that a defendant should have been granted the full protections of a criminal contempt proceeding when the notice of hearing did not state whether the proceeding was criminal or civil. **Watson v. Watson, 55.**

Civil—present ability to pay—The trial court did not err in a civil contempt case by finding that defendant had the present means and ability to satisfy the credit card obligations because the court found that defendant had in excess of $580,000 of equity in real estate in her name individually, and the court afforded defendant 90 days from the time of the contempt hearing on 5 June 2006 to comply with the order thus providing defendant an opportunity to sell the properties and acquire the funds to satisfy the order. **Watson v. Watson, 55.**

Civil—scope of hearing—due notice—The trial court did not err in a civil contempt case by holding that defendant had due notice that the scope of the hearing would encompass issues related to the Chase and MBNA credit cards. **Watson v. Watson, 55.**

Civil—willful failure to execute joint tax returns—The trial court did not err by holding defendant in civil contempt based on her failure to execute the parties' 2001 and 2002 joint tax returns, because: (1) defendant refused to sign 1040x forms for each tax year, and those forms were part of the process of filing the amended joint tax returns; and (2) defendant's refusal to execute the forms was knowing, deliberate, and part of a series of recalcitrant acts designed to frustrate the filing of amended joint tax returns required by the express terms of the consent order. **Watson v. Watson, 55.**

COSTS

Atorney fees—expert witness fees—civil contempt—Although the trial court's order in a civil contempt proceeding to enforce an equitable distribution consent order requiring defendant to pay attorney fees was proper, it was error

CRIMINAL LAW—Continued

CRIMINAL LAW—Continued

DAMAGES AND REMEDIES

DAMAGES AND REMEDIES—Continued

Unfair and deceptive trade practices damages—punitive damages—The trial court did not abuse its discretion by denying defendants' motion for a new trial under N.C.G.S. § 1A-1, Rule 59 on the issue of compensatory damages, but erred on the issues of unfair and deceptive trade practices damages and punitive damages, because: (1) although defendants contend the trial court erred by applying the law of contracts to the case since they allege they are a supplier only and not a general contractor, the issue of liability had been previously determined by the entry of default; (2) although defendants contend the compensatory damages award was excessive and unfounded, there was nothing to indicate the trial court abused its discretion, and the trial court was in a better position to determine whether the jury award was excessive since it actively participated in the proceedings; (3) in regard to damages for unfair and deceptive trade practices, plaintiffs failed to show damages arising from the claim of lien defendants filed on their real property, and there was no evidence introduced of damages incurred by plaintiffs as a result of the false representation by defendants giving rise to the unfair and deceptive trade practices claim separate and apart from the damages arising out of their breach of contract claim; and (4) it was error for the trial court to submit the question of punitive damages to a jury without affording defendant the opportunity to present evidence under N.C.G.S. § 1D-35. If upon retrial the trial court denies the motion to set aside entry of default and plaintiffs are awarded both punitive damages and unfair and deceptive trade practices damages in a new trial, plaintiffs must elect between these two remedies. **Decker v. Homes, Inc./Constr. Mgmt. & Fin. Grp., 658.**

DEEDS

Restrictive covenants—payment of recreational amenity fees—necessary parties—The trial court did not err by denying plaintiff's motion to dismiss defendants' counterclaims for failure to join all necessary parties including all property owners within Fairfield Harbor whose properties are subject to the Master Declaration, because: (1) the covenant at issue is one for the payment of amenity fees, not a residential use restriction; (2) only the owner of the recreational amenities has the power to levy a recreational amenity charge and to enforce this restrictive covenant; and (3) the extinguishment of the restrictive covenant would not deprive the other property owners of any property right. **Midsouth Golf, LLC v. Fairfield Harbourside Condo. Ass'n, 22.**

Restrictive covenants—recreational amenity fees—personal covenant not running with land—touch and concern requirement—A covenant to pay recreational amenity fees was a personal covenant that did not run with the land and was not enforceable against time share communities by plaintiff as a successor in interest to the original covenantor, notwithstanding the parties to the Master Declaration intended that the covenant to pay amenity fees would run with the land, because the covenant did not touch and concern defendants' properties where the recreational amenities are not appurtenant to defendants' properties; defendants do not have any easement rights in the recreational amenities financed by the recreational amenity charge but have easement rights only in the common areas, or parks, within the development; and defendants have only a revocable license to use the recreational amenities. **Midsouth Golf, LLC v. Fairfield Harbourside Condo. Ass'n, 22.**

MEDICAL MALPRACTICE—Continued

decedent's mental health and history of substance abuse at issue by bringing a claim for emotional distress; and (2) disclosure of the information under the trial court's order was also authorized by state and federal law under the exception codified in N.C.G.S. § 122C-54 and 42 C.F.R. § 2-63(a)(3); and (3) 42 C.F.R. § 2-63(a)(3) was satisfied since the records and communications related to decedent's substance abuse treatment are causally related and thus relevant to plaintiff's claim for damages, the information at issue could not be discovered other than by court order, and there was no potential injury to the patient or patient-physician relationship due to such disclosure when decedent had died. **Spangler v. Olchowski, 684.**

Erroneous denial of motion for directed verdict—ratification—The trial court erred in a medical malpractice case by denying defendant employer's motion for directed verdict on the issue of whether it ratified defendant doctor's conduct in having sexual contact with plaintiff patient. **Hughes v. Rivera-Ortiz, 214.**

Failure to comply with Rule 9(j) certification requirements—dismissal of complaint—The trial court did not err in a medical malpractice case by dismissing plaintiff's complaint based on plaintiff's failure to comply with N.C.G.S. § 1A-1, Rule 9(j) certification requirements, because: (1) plaintiff did not dispute that defendant doctors are both specialists, and the evidence revealed that both doctors were acting within their capacities as specialists under N.C.G.S. § 8C-1, Rule 702 in treating deceased as a trauma patient; (2) plaintiff's witness could not reasonably be expected to qualify as an expert witness as required by Rule 9(j) and did not qualify as an expert under Rule 702(b) or (c) since the witness was not certified as either an emergency room physician like one defendant or a trauma surgeon like the second defendant, nor did the witness practice in either of these areas; and (3) the record did not show any extraordinary circumstances to support certification under Rule 702(e), nor did plaintiff argue such circumstances existed. **Knox v. University Health Sys. of E. Carolina, Inc., 279.**

Motion to compel—doctor's substance abuse and limitations on ability to practice medicine—The trial court did not abuse its discretion in a medical negligence case by granting in part plaintiff executor's motion to compel discovery regarding defendant doctor's substance abuse and limitations on his ability to practice medicine because the Court of Appeals determined that both items sought by plaintiff were not privileged, and the information contained in a Georgia order and the application for hospital privileges provided information related to defendant's history of drug and alcohol abuse. **Cunningham v. Cannon Mem'l Hosp., 732.**

Motion for protective order—application for hospital privileges—limitations on ability to practice medicine—The trial court did not abuse its discretion in a medical negligence case by denying in part defendant doctor's motion for a protective order with respect to his application for hospital privileges showing defendant's limitations on his ability to practice medicine, because: (1) the privilege referenced in N.C.G.S. § 131E-95 does not extend to information available from original sources other than the medical review committee merely based on it being presented during medical review committee proceedings, and the statute's purpose is not violated by allowing materials otherwise available to be discovered and used in evidence even though they were considered by a medical review committee; and (2) the information sought by plaintiff was generated

SENTENCING—Continued

WORKERS' COMPENSATION—Continued

Back injury—pool therapy—frequency—Industrial Commission findings in a workers' compensation case that plaintiff needs pool therapy five days a week for a back injury were not supported by the evidence. **Winders v. Edgecombe Cty. Home Health Care, 668.**

Credibility of expert witnesses—Commission as sole arbiter—The Industrial Commission did not err in a workers' compensation proceeding by not determining the competency of plaintiff's expert witnesses. The Commission is the sole arbiter of credibility, and the Commission here was under no obligation to consider the deputy commissioner's finding regarding the credibility of plaintiff's medical experts. **Matthews v. Wake Forest Univ., 780.**

Deputy commissioner's findings—consideration by full Commission—The Industrial Commission did not err in a workers' compensation case in its consideration of the deputy commissioner's findings of fact. The full Commission may weigh the same evidence that was presented to the deputy commissioner and decide for itself the weight and credibility of the evidence. It may even strike the deputy commissioner's findings entirely. **Strezinski v. City of Greensboro, 703.**

Failure to comply with Rules—no statement of grounds for appeal—pro se litigant—waiver in interest of justice—abuse of discretion—The authority vested in the Industrial Commission under Rule 801 to waive violations of its Rules in the interest of justice is discretionary rather than obligatory, but must involve a sense of overall justice encompassing the interests of all parties and the goals of the Workers' Compensation Act. Here, the Industrial Commission abused its discretion by waiving a pro se plaintiff's non-compliance with the requirement of a statement of the grounds for the appeal in such a way that defendant first learned of the grounds for appeal when it received the Opinion and Award. **Wade v. Carolina Brush Mfg. Co., 245.**

Hearing loss—causal link to occupation—not established—The Industrial Commission's conclusion in a workers' compensation case that a 911 dispatcher had not suffered an occupational hearing loss within the meaning of the statue was proper. Plaintiff did not establish a causal link between her hearing loss and her alleged workplace exposure. **Strezinski v. City of Greensboro, 703.**

Hearing loss—findings—supported by evidence—The findings of the Industrial Commission in a workers' compensation case involving hearing loss by a 911 dispatcher were supported by the evidence. **Strezinski v. City of Greensboro, 703.**

Injury by accident arising out of employment—motor vehicle accident—increased risk analysis—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's 2 June 2003 motor vehicle accident arose out of his employment with defendant employer when plaintiff had a blackout while he was returning to his employer's place of business after making a delivery in the employer's pickup truck. **Billings v. General Parts, Inc., 580.**

Medical disability—arising out of and in course of employment—The Industrial Commission did not err in a workers' compensation case by determining that plaintiff's second stroke and resulting medical disability were the result of the 2 June 2003 motor vehicle accident, because (1) a doctor testified and the

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